

10-31-2019

Self-Determination And Territorial Integrity Revisited: Reflecting Chagos Advisory Opinion And Its Comparison With West Papua

Irfan Fadilah

Universitas Indonesia, Indonesia, irfanfadilah73@yahoo.com

Parusa Seno Adirespati

Universitas Indonesia, Indonesia

Follow this and additional works at: <https://scholarhub.ui.ac.id/ijil>

Recommended Citation

Fadilah, Irfan and Adirespati, Parusa Seno (2019) "Self-Determination And Territorial Integrity Revisited: Reflecting Chagos Advisory Opinion And Its Comparison With West Papua," *Indonesian Journal of International Law*: Vol. 17 : No. 1 , Article 4.

DOI: 10.17304/ijil.vol17.1.778

Available at: <https://scholarhub.ui.ac.id/ijil/vol17/iss1/4>

This Article is brought to you for free and open access by UI Scholars Hub. It has been accepted for inclusion in Indonesian Journal of International Law by an authorized editor of UI Scholars Hub.

SELF-DETERMINATION AND TERRITORIAL INTEGRITY REVISITED: REFLECTING CHAGOS ADVISORY OPINION AND ITS COMPARISON WITH WEST PAPUA

Irfan Fadilah and Parusa Seno Adirespati

Faculty of Law, Universitas Indonesia, Indonesia
Correspondence: irfanfadilah73@yahoo.com

Abstract

The right to self-determination and territorial integrity are amongst the cardinal principles of international law mostly utilised in determining the territory of a state. Both principles are equally protected and guaranteed under international law, and any attempt for total or partial disruption of a territory violates the right to self-determination of peoples. The relation between the two principles is evident in Chagos Advisory Opinion issued by ICJ which states that a former colonial territory detached by a colonial power violates the right to self-determination unless such detachment is based on freely expressed will of the people of the concerned territory. The Chagos Archipelago was originally detached from Mauritius by the UK prior to its independence in 1968. A similar situation was also apparent in Western Papua, in which the Dutch administration attempted to detach it from Indonesia prior to the transfer of sovereignty in 1949 under the name of Dutch Western New Guinea. This attempted detachment became one of the biggest arguments used in supporting Papuan independence since it was narrated that the territories were under a different administration. This article argues that such detachment is considered a disruption of territorial unity, which ultimately violates the right to self-determination of people. Furthermore, it also argues on how Indonesia has sovereignty over Western Papua. Those issues will also be discussed through the lens of international politics, especially in terms of the existence of state interests, both related to the former colonial countries and the international community in addressing the two cases.

Keywords : *uti possidetis juris, decolonization, detachment of colonial territories, Chagos Advisory Opinion, the right to self-determination, territorial integrity, West Papua*

Submitted : 1 August 2019 | Revised : 28 October 2019 | Accepted : 31 October 2019

I. INTRODUCTION

The end of World War II has significantly transformed global order, and more importantly, the face of international law as we know. The period was famously marked by the dawn of the emancipation of colonial territories. Devastated by the Second World War, which brought untold sorrow to humankind, it was within the interest of the international community to prevent such unimaginable suffering from happening ever again by creating the United Nations in 1945. The organization, which aims to maintain international peace and friendly relations among its members, coined the term “self-determina-

tion” as one of its purposes.¹

The inception of the UN marked the dawn of the decolonization movement that was widespread throughout the end of the Second World War. Combined with the weakening economic and political condition of the colonial powers, the urgency to end their respective colonial territories became ever-increasing at that time.² This was illustrated with the fact that the number of newly independent countries increased almost twofold within the span of 30 years, increasing from only 64 countries back in 1940 to 155 countries in 1975.³

However, the policy of decolonization was not without problems. Even when the policies of decolonization were done under the backdrop of the right of self-determination of people, its implementation was rather conducted without taking into account the freely expressed will of the people⁴ in the concerned territories, something that is rather in contravention to the meaning of the right itself. It was evident that some cases of decolonization were accompanied by political and economic motives from the colonial powers. As a result, there are still problems surrounding former colonial territories until the present day.⁵

The case of detachment of Chagos Archipelago demonstrates how the policy of decolonization under the backdrop of the right to self-determination is to some extent, flawed. The Islands, detached in 1965 from Mauritius before its independence, was initially administered as a dependency of Mauritius since 1903 after the territory’s administration was separated from Seychelles.⁶ The Islands were separated under a different administration of the British Indian Ocean Territory (BIOT) for the purpose of defence and military infrastructure of the United Kingdom⁷ and to accommodate the United States’ interest in establishing a military base in the region.

¹ Charter of the United Nations, opened for signature 26 June 1945, (entered into force 24 October 1945), Art. 1(2).

² Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge University Press, 2018) 9.

³ Vernon Bogdanor, “Ethnic Nationalism in Western Europe,” *Journal of Political Studies* 30, no. 2 (1984): 20.

⁴ International Court of Justice, *Western Sahara*, Advisory Opinion, [1975], ICJ Reports 1975, para. 162. See also: General Assembly resolution 1514, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514(XV) (14 December 1960), available from [https://undocs.org/en/A/RES/1514\(XV\)](https://undocs.org/en/A/RES/1514(XV)) (accessed 13 August 2019), para. 6.

⁵ Historical facts suggest that the decision to give independence in most of colonial territories does not merely based on moral obligations of colonial territories. Political factors such as the geopolitical context of the Cold War, or economic factors such as recovering the colonial power’s economy after the second world war period. See: Dietmar Rothermund, *Routledge Companions to Decolonization* (Routledge, 2009), 42.

⁶ Geoffrey Robertson, “Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean,” *University of Western Australia Law Review* 36, no. 1 (2012): 3.

⁷ United Kingdom, *British Indian Ocean Territory Order 1965*, Statutory Instrument No. 1920 of 1965.

The legality of the UK's action was brought into question by the international community when the UN General Assembly decided to deliver a request for an advisory opinion from the ICJ. While the proceeding at the ICJ was not the first time such action was challenged,⁸ the advisory proceeding was one of the most significant legal actions brought as an effort by Mauritian administration to end British occupation of the Archipelago. After a lengthy discussion and deliberation in terms of answering questions given by the General Assembly,⁹ on 25 February 2019, the Court rendered its opinion, which declared that the process of decolonization of Mauritius was not lawfully completed due to the detachment of Chagos Islands by the UK, and declared that the process of decolonization by detaching the Islands from the rest of Mauritius is inconsistent with the right of self-determination.¹⁰

In Indonesia, a reference to a similar situation exists on the island of Papua. Having been part of the Dutch East Indies, the Dutch administration attempted to detach Western Papua from the rest of Indonesia before the transfer of sovereignty in 1949 under the name of Dutch Western New Guinea. Even though Western Papua has been part of Indonesia since 1969, the attempted detachment of Western Papua in the 1940s is still employed as one of the biggest arguments supporting Papuan independence from Indonesia, since it is narrated that the territory of Western Papua was under separate administration from the rest of Indonesia and that it has never been a part of Indonesia before 1969.¹¹ The West Papua independence movement still exists to this day¹²

⁸ The Detachment was challenged a number of times before different proceedings, namely PCA (Permanent Court of Arbitration) and UK House of Lords. For further reference on the legal actions, see: *An Arbitration before an arbitral tribunal constituted under Annex VII of the United Nations Convention on Law of the Sea (Mauritius v. UK)*, [2015], ICGJ 486 (PCA 2015); *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No. 2)*, [2008], UKHL 61.

⁹ General Assembly resolution 71/292, *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, A/RES/71/292 (22 June 2017), available from <https://undocs.org/en/A/RES/71/292> (accessed 13 August 2019). The following questions requested for an opinion are: "(a) "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?"; (b) "What are the consequences under international law, including obligations reflected in the above -mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

¹⁰ International Court of Justice, *Legal Consequences of The Separation of The Chagos Archipelago from Mauritius in 1965* ("Chagos Advisory Opinion"), Advisory Opinion, [2019], ICJ Reports 2019, 42, para. 177 – 178.

¹¹ Evie Breese, "West Papua - Whose history?" accessed 16 August, 2019, <https://southeastasiaglobe.com/fifty-years-on-pasts-collide-in-indonesia-and-papua/>.

¹² Helen Davidson, "West Papuan independence group says it is 'ready to take over country'" accessed 13 August 2019, <https://www.theguardian.com/world/2019/jul/03/west-papuan-independence-group-say->

and poses challenges to the Indonesian Government,¹³ despite the special autonomy status given to the region since 2001 through Law No. 21 of 2001 on Special Autonomy for Papua Province.

This article aims to analyse two main questions. First, whether the detachment of a colonial territory from another colony constitutes a denial of the self-determination principle. Secondly, whether the detachment of Western Papua (Western New Guinea) qualifies as a violation of self-determination and an impairment towards Indonesia's territorial integrity. This article argues, by examining the prevailing norms of international law at that time, that the situations surrounding the similar cases of the detachment of the Chagos Archipelago and West Papua amount to the violation of the right of self-determination of colonial territories, and at the same time impair the territorial integrity of the respective states which are defined under the legal maxim of *uti possidetis juris*.

The article is structured as follows. First, an overview concerning the principle of self-determination in relation to decolonization, including its relationship with the principle of territorial integrity, will be presented. Secondly, the paper will provide a brief historical context of the Chagos Archipelago and its detachment, leading up to the UN General Assembly's request for an advisory opinion (resolution 71/292) in 2019, followed by a brief description of the reasoning used by the ICJ within the Advisory Opinion. Thirdly, the historical context of Western Papua detachment will be provided, as well as analysis and reflection of the Chagos Advisory Opinion on West Papua detachment. Finally, conclusions and recommendations related to the discussion will be given.

II. THE TERRITORIAL NATURE OF SELF-DETERMINATION IN THE CONTEXT OF DECOLONIZATION

The problem of territorial acquisition under the context of decolonization stems from the problem of how the principle of *uti possidetis* and self-determination are not clearly defined, and how the two principles relate to one another. This part will explain both the meaning and scope of both principles under the context of decolonization and argue on how both principles relate to one another, with *uti possidetis* taking precedence over the right to self-determination in terms of defining former colonial territory.

[they-are-ready-to-take-over-country.](#)

¹³ Karina M. Tehusjarana, "Papua mass killing: What happened", The Jakarta Post, 12 July 2018, accessed 13 August 2019. <https://www.thejakartapost.com/news/2018/12/07/papua-mass-killing-what-happened.html>.

Decolonization that occurred after the conclusion of the Second World War was inevitably a product of the right to self-determination that was transformed from only a matter of political jargon into an established international law principle. The principle, dating back from the period of European colonization in Latin America, was popularized after the conclusion of the First World War back in the early 1920s. Initially seen as merely a political watchword that bears no legal significance,¹⁴ the right was gradually transformed into a legal concept at the same time as the inception of the United Nations. While the Charter did not explicitly mention the exact phrase of “right to self-determination”, it said self-determination as the purpose of establishment of the organization and the commitments of its members to create conditions of stability and well-being necessary for peaceful and friendly relations among nations.¹⁵ This paved the way for a codification of the right as a part of fundamental human rights in further development, which started after the UN was formed. It was in 1948 and 1966 which saw the rapid development of human rights, where the non-binding Universal Declaration of Human Rights (UDHR) and the legally binding International Covenant on Civil and Political Rights (ICCPR) were introduced as a universal codification of Human Rights. However, it was ICCPR (and ICESCR) that includes self-determination as a part of fundamental human rights, elevating the status, from simply a “watchword” in international politics to an international legal principle that already acquired its status as part of customary international law¹⁶ and *erga omnes*¹⁷ status.

However, even when the right has already been considered as a part of universal human right, there are still lingering problems concerning the extent of this right. This stems from the fact that unlike any other rights, the right to self-determination possesses a relatively unique characteristic, which is the collective nature, in comparison to individualistic nature, as often associated with other rights.¹⁸ Unlike other individualistic rights that do not require its subject to be defined (since it is already clear that all “men” are granted such rights), the same thing cannot be applied to the right to self-determination. Self-determination, as often said, is something that occurs at the level of the group, not just among several separate individuals, in which the collective nature will ultimately disappear if we decide to reduce the right merely as a

¹⁴ Commission of Rapporteur, *The Aland Island Question*, League of Nations Doc. B7. 21/68/106 (16th April 1921, 27 – 28).

¹⁵ Charter of the United Nations, see note 1, Art. 55.

¹⁶ Chagos Advisory Opinion, see note 10, paras. 154 – 155.

¹⁷ International Court of Justice, *East Timor* (Australia v. Portugal), Judgement, [1995], ICJ Reports 1995, para. 90.

¹⁸ M. Yakub Ayyub Kadir, “Application of The Law of Self-Determination in The Post-Colonial Context: A Guideline,” *Journal of East Asia and International Law* 9, no. 1 (2016): 14.

collection of individual choices.¹⁹

Consequently, since ICCPR (and other international instruments) state that “all peoples have the right of self-determination,”²⁰ questions regarding what constitutes “peoples” need to be answered first to debunk the applicability of this right clearly. However, the effort has never been easy, and it remains unclear to this day on what constitutes people in international law, something that often sparks controversy when disputes arise from differing interpretations of this right, which is caused by the state’s reluctance to define “people” properly.²¹ As Ivor Jennings pointed out, things would be ridiculous when the people are granted the right to decide, but they cannot decide until somebody decides who the “people” are.²²

Even when brought into the context of decolonization, the problem of how the definition should operate is still apparent. The widespread decolonization, which is often cited as the success story of the exercise of self-determination was also affected on how to operationalise the right. If the right to self-determination used as the basis to conduct decolonization should be defined under substantive criteria—that is by looking at the socio-cultural definition as proposed by Cristescu²³ or UNESCO²⁴—the decolonization might not have been finished until now, due to the unusually complex concept and highly charged political interest among the international community. Therefore, as Fisch argued, there should be two standards in defining the holders of the right in the light of decolonization, namely substantial and procedural criteria to reconcile overcome the paucity of such a definition.

From the outset, the procedural definition of self-determination lies under the assumption that the definition of people is constrained under certain geographic-topologic elements or by administrative boundaries even before the people of the territory were ever spoken of.²⁵ The definition, expressed under the legal maxim *uti possidetis juris* is the most successful example of a defini-

¹⁹ Bas van der Vossen, “Self-Determination and Moral Variation” in *The Theory of Self-Determination*, Fernando Teson, ed. (Cambridge University Press, 2016), 16. See also: Christopher Heath Wellman, *A Theory of Secession* (Cambridge University Press, 2005), 43.

²⁰ International Covenant on Civil and Political Rights (“ICCPR”), opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976), Art. 1(1).

²¹ Christian Tomuschat, “Yugoslavia’s Damaged Sovereignty over the Province of Kosovo,” in *State, Sovereignty, and International Governance*, Gerrard Kreijen, et al. (Oxford University Press, 2002), 344.

²² Ivor Jennings, *The Approach to Self-Government* (Cambridge Publishing, 1956), 55.

²³ Aureliu Cristescu, *The Right to Self-Determination: Historic and Current Development on the Basis of United Nations Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev.1, 23, para. 54.

²⁴ United Nations Educational, Scientific, and Cultural Organisation (UNESCO), *International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples*, SHS89/CONF.602/7 (22 February 1990), para. 22.

²⁵ Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (Cambridge University Press, 2015), 35.

tion of the right taken under the context of decolonization after the conclusion of the Second World War. Compared to the substantial criteria of people at that time, the preceding criteria was preferable by the international community.²⁶ While the ICJ has confirmed that the right applies to non-self-governing territory, that is defined as territory yet to achieve a full measure of self-government²⁷ (which, ultimately confirms the territorial nature of self-determination under colonial context), was still prone to abuse by the colonial powers that weaponised the right to recover territories unlawfully under the pretext of self-determination due to the unclear formulation of the rights. Thus, a clear line needs to be drawn to determine the relationship between self-determination, territorial integrity, and *uti possidetis* in the light of decolonization to help determine how the process should be carried out.

The relationship between self-determination and *uti possidetis* at the time can be a unique one. The right to self-determination champions the idea of having people the right to freely express their will to determine political, economic, and cultural status.²⁸ At the same time, *uti possidetis* maintains the idea of the sanctity of borders inherited from remnants of colonial power. The two values in hindsight, seemed to look conflicting where the international community (whether the colonial power or the newly independent state) are faced with a mutually exclusive option that they must choose. To answer this concern, two positions need to be mentioned regarding the relationship between the two principles, which will be explained below. However, when it comes to the problem of detachment, regardless of how the relationship between both principles should be drawn, the issue of a detachment of a colonial territory should be considered unlawful under international law.

The first dimension is to say that both rights are conflicting—thus a mutually exclusive one. In essence, *uti possidetis* stems from the idea of having the needs to achieve the stability of border, that is to prevent the problem of border disputes that might occur due to newly independent countries defining their border, or even preventing the possibility to claim certain territory based

²⁶ There were numerous concerns given by countries, including by newly independent countries, that if the scope of this right was not contained within the boundaries of colonial administration as formulated under *uti possidetis* principle, will lead to a breakup of states with diverse linguistic, religious, or ethnicity. This position was also endorsed by U Thant, the UN Secretary General in 1970 that the UN will not accept secession as a logical consequence if self-determination was given to “all people” without any certain limitations. See: Jörg Fisch, see note 25, p. 199. See also: *Secretary-General’s Press Conferences*, UN MONTHLY CHRON., Feb. 1970, at 34, 36 (“as an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of (a) member state”).

²⁷ International Court of Justice, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971], ICJ Reports 1971, 31, para. 52.

²⁸ ICCPR, see note 20, Art. 1.

on *terra nullius*.²⁹ The idea of stability, as Jennings emphasized, is the heart of the whole problem of the legal ordering of international society. Thus a proper and stable ordering of territorial boundaries must be instituted.³⁰ However, it was due to the idea of making stability as the utmost priority by having the arrangements, the interest of a certain people inhabiting an area might be disrupted due to colonial boundaries. This was demonstrated in the case of African decolonization, where a massive wave of colonization that occurred throughout the 19th century³¹ consequently led to an arbitrarily drawn border across the continent, without taking into consideration the socio-political profile of the people living in the areas.³² In comparison to the right to self-determination, the division of former colonial territories based on *uti possidetis* is somewhat Machiavellian.

However, it was due to the concern of the international community that in the event of conflicting interest between *uti possidetis* and self-determination, the former should prevail. This seemingly pragmatic arrangement is relatively preferred by the international community, since a full-blown implementation of self-determination—that is by extensively interpreting “people” as a group of people with same social-geographical traits—may lead to the problem of ongoing irredentist movement by the newly independent countries by turning claims to unite a certain territory with a possibility of using force.³³ Secondly, the international community is also concerned that secession would be encouraged if the implementation of the right were to be fully implemented, something that the international community would not give an option to.³⁴ Thus, as Shaw stated, in the event that both principles seem to be in contravention, *uti possidetis* shall have precedence, and that for reasons relating to the stability of a newly independent country.³⁵

²⁹ International Court of Justice, *Land, Island, and Maritime Frontier Dispute* (Salvador v. Honduras), Judgement, [1992], ICJ Reports 1992, 387, para. 47.

³⁰ Robert Yewdall Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963), 70.

³¹ Elizabeth Rodriguez-Santiago, “The Evolution of Self-Determination of Peoples in International Law,” in *The Theory of Self-Determination*, Fernando Teson, ed. (Cambridge University Press, 2016), 211.

³² It was acknowledged that the colonizing countries drew the line with “only slight knowledge of or regard for local inhabitants or geography,” that the Europeans only based the division merely to reduce armed conflict among themselves. See: Steven B. Ratner, “Drawing a Better Line: *Uti Possidetis* and the Borders of New States,” *American Journal of International Law* 90, no. 4 (1996): 595.

³³ The irredentist movement was demonstrated in several cases, namely in the case of Indonesia at the time prior to its independence. There were notions of uniting the territory of Malayan Peninsula under Greater Indonesia (*Indonesia Raya*), whose territory also consists of present-day Malaysia, Singapore, Brunei, and Timor. The concept, proposed by Sukarno, was rejected, and the concept of present-day territory of Indonesia under *Uti Possidetis* concept was more preferred by the founding fathers. See: RM. A. B. Kusuma, *Lahirnya Undang-undang Dasar 1945*, Badan Penerbit Fakultas Hukum Universitas Indonesia, 2016, pp. 253 – 262.

³⁴ Ratner, “Drawing a Better Line,” 595.

³⁵ Malcolm N. Shaw, “The Heritage of States: The Principle of *Uti Possidetis* Today,” *British Yearbook of*

The second dimension, however, provides a more comparative approach between the two principles, enabling both principles to go hand in hand. Under this approach, both principles stand not as equals, but one principle subsided to another. This is achieved by having the implementation of self-determination put under the borders set by inheritance from colonial powers. This approach was set to balance the interest of achieving stability of borders of a newly independent country while maintaining the ideals of every persons's right to express their future as a single territorial unit freely.³⁶ This approach of having the primacy of territorial integrity of territories acquired under *uti possidetis* was upheld in UNGA resolution 1514 (XV), which is considered as the legal basis of rapid decolonization in the second half of the 21st century. Furthermore, this was upheld in *Chagos Advisory*, which will be discussed below.

III. UTI POSSIDETIS AND TERRITORIAL INTEGRITY: THE LEGAL PRINCIPLES BEHIND THE OBLIGATION NOT TO DETACH A NON-SELF-GOVERNING TERRITORY

Before looking at what the judges said in the advisory opinion concerning the legal questions imposed, one needs to identify the extent of *uti possidetis* and what entails the obligation of respecting the sanctity of colonial borders. The notion was based on the needs of having to evade a potential border dispute. Thus a stable and final border where either states can establish its legal border was pertinent. As a logical consequence, the border established under the principle was eventually unalterable except by the consent of the concerned parties.³⁷ The application also saw the effect of the territorial title existing at the time of independence, or as often mentioned, the “photograph of the territory at the critical date.”³⁸ There are several instances where a newly independent state was created under the principle. The boundaries might originate from former international boundaries or a former internal/administrative boundary.

In the first instance, an international border of a former colony can turn into a border of a newly independent state. The approach is relatively brief and straightforward in terms of marking the established border of a newly independent state based on the limit of the territory when it was under the control of colonial administration.

International Law (1997): 124.

³⁶ S. K. N. Blay, “Self-Determination versus Territorial Integrity in Decolonization,” *New York University Journal of International Law and Politics* (1986): 447.

³⁷ Malcolm N. Shaw, *International Law* (Cambridge University Press, 2008), 290.

³⁸ International Court of Justice, *Frontier Dispute* (Burkina Faso v. Mali), Judgement, [1986], ICJ Reports 1986, para. 30.

The second instance is when administrative boundaries are transformed into an international border. This model enables a part of a former colonial territory with a separate administrative division to have its own independent country. In comparison to the former instance, the model is relatively difficult to draw, since there is no consensus on what constitutes “separate administrative division” or when such a division can be justified as a basis of drawing a border for a newly independent country. International law in the case of *El Salvador – Honduras* only specifies on what kind of administrative border that can be used in establishing the border, which is the one established by the colonial powers, not by any pre-existing division such as administrative divisions brought by the indigenous people.³⁹

However, this seemingly complicated and rigid method does not mean that the line is unchangeable. The *uti possidetis* line might be modified under several strictly defined conditions, namely:⁴⁰

- (1) consent between the parties involved;
- (2) modification by international recognition;
- (3) modification by acquiescence;
- (4) modification in the interests of peace and security.

This seemingly complicated discussion about *uti possidetis* is vital in defining the extent of the territory of a newly independent state. The ability of a state (the former colony, in this instance) to utilize the principle in claiming territory will much likely contribute to a relatively established and stable border. The clarity of defining a territory will also contribute to defining the extent of territorial sovereignty safeguarded under the principle of territorial integrity.

For much of its development, the intersection between the term *uti possidetis* and territorial integrity remains a confusion amongst scholars or lawyers who liken both principles.⁴¹ While both principles are inextricably linked, they are rather different in nature. While *uti possidetis* concerns with the mode of acquisition of territories from inheritance during colonial times to preserve the stability of borders or territories, territorial integrity is more intimately linked to the perennial protection within its territory that is limited by international borders as recognized under international law.⁴² The principle is related to each other by seeing that while states have the right to protect their existence, their right to preserve their integrity is limited within the clearly

³⁹ Land, Island, and Maritime Frontier Dispute, see note 29, 393, para. 50.

⁴⁰ Shaw, “The Heritage of States,” 141 – 150.

⁴¹ *Ibid.*, 76 and 124.

⁴² Abdelhamid El Ouali, *Territorial Integrity in a Globalizing World: International Law and Quests for States’ Survival* (Springfield Verlag Heidelberg, 2012), 7.

defined boundaries under international law. Such border needs to be defined first, something which *uti possidetis* can be considered as one of the methods to determine the boundary.

From this, a question might pop up to our minds in terms of the obligation not to divide a colonial territory, particularly in relation to the two principles mentioned above. The question concerns where does such obligation originate. While in practice mentioned above, there were instances when a detachment of colonial territories was allowed, or to some extent preferred,⁴³ international law generally prohibits an administering power to detach colonial territories. There are two principles that relate to the prohibition of a detachment of colonial territories, namely self-determination and territorial integrity.

Firstly, an obligation not to detach a colonial territory can be considered to be originating from the right to self-determination. Self-determination in the context of decolonization can be considered as domesticated,⁴⁴ which means that the application was considered to include people of a whole part of the single territory, not people as what in the idealistic sense, as what resolution 2625 or ICCPR/ICESCR stipulates. This means that this right is defined territorially, and such arrangements were made to prevent encroachments by the administering power from taking back control the territories under the pretext of the right to carve up the territories under their administration,⁴⁵ and as Raic emphasized, “to prevent the fear of territorial fragmentation and destabilisation in view of the often-complex ethnic structure of the territories in question”.⁴⁶

Secondly, international law also prohibits detachment of colonial territory since this violates the territorial integrity of a state. While it is often depicted that territorial integrity as having inter-state applicability,⁴⁷ the concept still is interpreted broader since this is relevant whenever the effective control of states over territory may subject to challenge, either internally or externally.⁴⁸ Furthermore, in the context of decolonization, Resolution 1514— which acted as the legal basis of decolonization—affirmed the view that territorial integrity applied not only to states but also to colonial territories that is yet to achieve

⁴³ *Ibid.*, 10 – 11.

⁴⁴ Martti Koskenniemi, “National Self-Determination Today: Problems of Legal Theory and Practice,” *International Comparative Law Quarterly* 43, no. 2 (1994): 242.

⁴⁵ See Statement of Guatemalan Delegation in 15 UN GAOR (947th Plenary Meeting), UN Doc. A/P.V.947 (1960), 1276.

⁴⁶ David Raic, *Statehood and the Law of Self-Determination* (Kluwer Law International, 2002), 209.

⁴⁷ Oliver Corten, “Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law,” *Leiden Journal of International Law* 24 (2011): 87.

⁴⁸ Raic, *Statehood*, 294.

independence where statehood has not been achieved.⁴⁹ This was when *uti possidetis* played a part in describing the detachment of colonial territories as a violation of a state's territorial integrity. It is realized that a colony was not a state prior to achieving its independence. However, where it was already realized that self-determination in the context of decolonization took place under the whole territory of a colony, international law explains that in the event of a change of sovereignty, the international boundaries of the territory concerned still operate under the principle of continuity of international boundaries, where this arrangement is based on the notion of preserving territorial stability.⁵⁰ Thus, even when the territory has not achieved statehood, the existence of boundary is both protected and its finality and permanence is assumed,⁵¹ regardless of any changes of sovereignty.⁵² In this instance, one can conclude that territorial integrity applies even before a colony/Non-Self-Governing Territory achieved independence. Thus, since under *uti possidetis* international law safeguards the stability and permanence of borders regardless of change of sovereignty, any attempt to impair or to detach a colonial territory is not accepted, and in fact, constitutes a breach of territorial integrity.

IV. PURPORTED DETACHMENT IN CHAGOS ARCHIPELAGO: A LOOK INSIDE THE ADVISORY OPINION

ICJ's Advisory Opinion of Chagos Archipelago demonstrates how international law put an obligation for an administering power not to detach their administered territories in any circumstances, unless a consent was involved, going as hard as stating that the process of decolonization of Mauritius "was not lawfully completed" due to the action done by the UK back in 1965. However, to understand more entirely of what the Advisory Opinion really says, certain historical facts concerning the Islands, along with its inhabitants, are worth analysing first.

The Archipelago itself is a group of small islands and atolls in the Indian Ocean,⁵³ situated south of the Maldives and roughly 2,200 km to the north-east of Mauritius.⁵⁴ It is currently a part of British Indian Ocean Territory.⁵⁵

⁴⁹ General Assembly resolution 1514(XV), see note 4, para. 6.

⁵⁰ Raic, *Statehood*, 296.

⁵¹ International Court of Justice, *Temple of Preah Vihear* (Cambodia v. Thailand), Judgement, [1962], ICJ Reports 1962, 6, para. 34.

⁵² International Court of Justice, *Continental Shelf* (Tunisia v. Libyan Arab Jamahirriya), Judgement, [1982], ICJ Reports 1982, 18, para. 66.

⁵³ James Summers, "Decolonisation revisited and the obligation not to divide a Non-Self-Governing Territory," *QIL*, *Zoom-out* 55 (2018): 147.

⁵⁴ Chagos Advisory Opinion, 12, para. 25.

⁵⁵ Trinidad, *Self-Determination*, 84.

Between 1814 and 1965, the Chagos Archipelago was under the UK's administration as a dependency of Mauritius.⁵⁶ According to section 90(1) of the Mauritius Constitution Order of 26 February 1964, the colony of Mauritius is defined as, "the island of Mauritius and the Dependencies of Mauritius."⁵⁷ The inhabitants of the Archipelago maintained their attachment to Mauritius until 1965 when the Archipelago was eventually detached by the UK from Mauritius.⁵⁸ Such attachment was maintained despite the fact that the Islands is more than 2,200 km apart.⁵⁹

The existence of the Archipelago as part of Mauritius remained until 1964 when the US expressed an interest in establishing military facilities on the island of Diego Garcia, the largest island in the Chagos Archipelago. At the height of the Cold War, it was within the interest of the US to possess a strategic military base. The period saw the US persuaded one of its biggest allies to use the islands (especially Diego Garcia) as a military base.⁶⁰ This was followed by a series of discussions between the US and the UK which began in February 1964.⁶¹ Another series of discussions also commenced in June 1964 between the UK and the Premier of the colony of Mauritius regarding the detachment of the Chagos Islands from Mauritius. This led to the conclusion on 23 September 1965 of an agreement, commonly known as the "Lancaster House Agreement".⁶²

The agreement saw several island groups, including the Chagos Archipelago, to be detached from Mauritius and the Seychelles to form a new and separate colony named BIOT, which was set aside for 'defence purposes'.⁶³ The US and the UK reached an agreement in 1966 concerning the "Availability for Defence Purposes of British Indian Ocean Territory".

It should be noted that the status of the colony of Mauritius was rather uncertain. Their future on whether they should remain an overseas territory of the UK or gain independence was undecided prior to the agreement. At that time, it was noted that the UK administration expressed concerns concerning the granting of independence, even when at the same time the UK was granting independence to several of its overseas territories.⁶⁴ The matter of whether

⁵⁶ Chagos Advisory Opinion, 13, para. 28.

⁵⁷ *Ibid.*

⁵⁸ International Court of Justice, *Legal Consequences of The Separation of The Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius, [2019], ICJ Reports 2019, p. 42.

⁵⁹ *Ibid.*, 24.

⁶⁰ Stephen Allen and Chris Monaghan, *Fifty Years of the British Indian Ocean Territory* (Springer International, 2018), 119.

⁶¹ Chagos Advisory Opinion, 12 – 13, para. 26 and 31.

⁶² *Ibid.*, 13, para. 32.

⁶³ Trinidad, *Self-Determination*, 84.

⁶⁴ Written Statement of Mauritius, 80, para. A. 3.40.

Mauritius should be granted independence thus lay entirely in the hands of the UK. However, their stance dramatically changed after they decided to proceed with the US over the arrangement of the Archipelago. It turned out that the UK administration was trying to obtain acquiescence from Mauritius to detach the island, in order to prevent backlash from the international community in response to the detachment.⁶⁵ This was achieved by proposing independence for Mauritius, in exchange for their consent to detach the archipelago amongst other points agreed, such as monetary compensation, and other economic and defence-related commitments between the UK and Mauritius. Initially rejected the purported detachment, the Mauritian premier at that time, Sir Seewoosagur Ramgoolam eventually agreed to the proposal, after his preference of leasing the Archipelago rather than detaching them was rejected by the UK government.

Mauritius itself became an independent state in 1968, following a general election in 1967 in which pro-independent political parties won.⁶⁶ Several legal and diplomatic attempts have been made since 1965 regarding the issue of the detachment or separation of the Chagos Archipelago.⁶⁷ The proceeding at the ICJ which started in 2017 marks one of the most recent challenges against the UK to end its administration in the Archipelago. There are two take outs that are worth analysing in this article, namely (1) How the court interpret the customary nature of the right to self-determination under the backdrop of decolonization and its position with another principle, namely territorial integrity and (2) as the consequence of the second question, the obligation of the UK and international community regarding the problem of the purported detachment.

The first takeaway in the opinion concerns how the Court interprets the legality of detachment in correspondence to the right to self-determination brought under the backdrop of decolonization and how does the right operate with territorial integrity. In viewing the discussion, the Court considered that the detachment was unlawful. In answering the question, the court initially structured its reason by seeing the applicable law between 1965–1968, but remains open from considering the law of self-determination since the adoption of Resolution 1514 in relation to the application in the context of decolonization. The Court observed that the right to self-determination had already been considered as a part of international law before Resolution 1514 was adopted, even dating back from the legal regime of NSGT set out in Chapter

⁶⁵ UK Foreign and Commonwealth Office, *United Kingdom, Mauritius and Diego Garcia: The Question of Consent- Note from 28 August 1965*, FCO 31/3437.

⁶⁶ Chagos Advisory Opinion, 15, para. 40 and 42.

⁶⁷ *Ibid.*, 4, para. 34 – 53.

XI of the UN Charter, which was based on the progressive development of the institution.⁶⁸ Resolution 1514 in this instance was considered to represent a consolidation of state practice on decolonization, something which constitute one of the elements of customary international law formation.⁶⁹ In relation to this, the Court also pointed out that the UNGA had affirmed the existence of the right to self-determination regarding the process of decolonization in various resolutions that it had adopted.⁷⁰ Thus, the Court believes that in this case, the right to self-determination had already existed as a part of customary international law.

After examining the existence of the right during the case of detachment, the Court then turns its analysis in determining the position of territorial integrity in relation to self-determination in the context of decolonization. In this case, the Court view that in the context of an NSGT, the right to self-determination is defined by an entirety of the territory, thus making the territorial integrity as a corollary right to self-determination. The Court views that the administering power must respect the territorial integrity of their territory as a whole, and if there was an act of detachment by the administering power, it must be done by freely expressed and genuine will of the people of the territory concerned.⁷¹ The Court then pointed out the fact that the unlawfulness of the detachment in this case also lies in how the process was carried. The Court views that when the act happened, an issue of consent by Mauritius “should be given heightened scrutiny”. By this, the Court realized that there was an unequal footing in terms of the process that was carried out during the Lancaster House agreement, since the Mauritian delegation at that time “possess no real legislative or executive powers, and that authority is nearly all concentrated in the hands of the UK government and its representatives”.⁷² Thus, the Court deems that it is not possible to hold real talk of an international agreement when one of the parties was under the authority of the latter.⁷³

Secondly, it should be analysed on the consequence of the continued administration of the UK in the archipelago in relation to the first question in the opinion. While the Court had answered the first question in negative, this leads to the second question concerning the legal consequences of continued administration arising from such unlawful detachment in 1965. While the UK stressed the point that it is under no international obligation to relinquish their

⁶⁸ *Ibid.*, 35, para. 147.

⁶⁹ International Court of Justice, *North Sea Continental Shelf* (UK v. Norway), Judgement, [1969], ICJ Reports 1969, 44, para. 77.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, 38, para. 160.

⁷² *Ibid.*, 40 – 41, para. 172.

⁷³ *Ibid.*

control over the Archipelago and to recognize Mauritius' interest in the condition in which the Archipelago will be returned.⁷⁴ The Court, having found that the decolonization was not lawfully completed then decided that the UK's continued administration in the Chagos Archipelago a wrongful act entailing the international responsibility of that state, thus the UK was under an obligation to bring an end to its administration in the archipelago, and to complete decolonization of Mauritius in a manner consistent with the right to self-determination.⁷⁵ In addition to the UK, the Court also obliges all States concerning *erga omnes* obligation to cooperate with the UN to bring modalities necessary for ensuring the completion of the decolonization of Mauritius.⁷⁶

V. PURPORTED DETACHMENT OF WEST PAPUA: A HISTORICAL AND LEGAL ANALYSIS

West Papua refers to the entire western half of the island of Papua, also commonly known as New Guinea, which is owned by Indonesia. It is currently divided into two provinces, Papua (*Provinsi Papua*) and West Papua (Province)⁷⁷ (*Provinsi Papua Barat*). Discussion about West Papua and its historical background is important in order to establish a connection between West Papua and the rest of Indonesia.

Although many consider West Papua to be inhabited by tribes of semi-nomadic foresters who have no connections and links to other peoples and islands in the Indonesian archipelago,⁷⁸ there were coastal peoples who interacted with other peoples from around Indonesia.⁷⁹ West Papua is where the archipelago's trading networks ended. Starting from the sixteenth century, there were interactions between locals and the sultans of Tidore and Bacan from the nearby Maluku Islands. The two sultanates had stationed agents in local villages and designated local village headmen as their vassals.⁸⁰

The Dutch East Indies was already well-established in the Indonesian archipelago in the nineteenth century. Its presence in the Indonesian archipelago can be traced back to the seventeenth century.⁸¹ In the late 1800s, sul-

⁷⁴ International Court of Justice, *Legal Consequences of The Separation of The Chagos Archipelago from Mauritius in 1965*, Written Statement of UK, [2019], ICJ Reports 2019, 153, para. 9.20.

⁷⁵ Chagos Advisory Opinion, 42, para. 177.

⁷⁶ *Ibid.*, paras. 178 – 179.

⁷⁷ In this paper, the term “West Papua” refers to the whole region of the western half of New Guinea owned by Indonesia, unless stated otherwise.

⁷⁸ Jean Gelman Taylor, *Indonesia: Peoples and Histories* (Yale University Press, 2003), 350.

⁷⁹ *Ibid.*, 350.

⁸⁰ *Ibid.*, 351.

⁸¹ Susan Blackburn, *Jakarta: Sejarah 400 Tahun [Jakarta: A History]*, translated by Gatot Triwira, (Komunitas Bambu, 2011), 5 – 15.

tans from the Maluku Islands signed contracts with the Dutch which transfer suzerainty over all their territories to the Dutch East Indies. Therefore, the Dutch inherited claims to West Papua's coasts.⁸² Throughout the early twentieth century, the Dutch began to expand authority into West Papua's interior. There, it even established exile sites intended for campaigners who supported and campaigned for Indonesian independence, as well as those who wanted to overthrow Dutch rule.⁸³ Before the Second World War, West Papua was administered under the *Groote Oost* administrative region of the Dutch East Indies, starting from 1938, alongside the islands of Sulawesi, Maluku Islands, and the Lesser Sunda Islands.⁸⁴

During the Second World War, the Archipelago came under Japanese occupation. However, when Japan capitulated in 1945, it created a power vacuum. This power vacuum was exploited by Indonesian nationalists who proclaimed an independent, unitary Republic of Indonesia on 17 August 1945⁸⁵, which encompassed the whole of the Dutch East Indies territory under Japanese administration during the Second World War.⁸⁶

Conflicts and hostilities broke out between republican (Indonesian) forces and Allied forces. These conflicts occurred between 1945–1949 and were also filled with diplomatic efforts and negotiations regarding Indonesian independence.⁸⁷ The United Nations had become involved in the dispute as early as 1947. A United Nations Commission for Indonesia (UNCI) was then established to mediate the dispute.⁸⁸ Besides the United Nations, international pressures on the Dutch to resolve the dispute also came from Britain, Australia, and the US, who raised the issue as early as January 1946.⁸⁹ The US, in particular, played a serious role in persuading the Netherlands to abandon their determination to reconquer Indonesia. They insisted that the Netherlands would lose the post-war reconstruction funds offered under the Marshall Plan if the Netherlands failed to come to terms with Indonesia.⁹⁰ The US was worried that the ongoing guerrilla war would strengthen support for communism.⁹¹

⁸² Taylor, *Indonesia*, 351.

⁸³ *Ibid.*, 308 and 351.

⁸⁴ Robert Cribb, "Digital Atlas of Indonesian History: Chapter 4: The Netherlands Indies, 1800 – 1942," accessed 1 September 2019, available at: <https://web.archive.org/web/20180206204720/http://www.indonesianhistory.info/pages/chapter-4.html>.

⁸⁵ Trinidad, *Self-Determination*, 26 – 27.

⁸⁶ Steven Drakeley, *The History of Indonesia* (Greenwood Press, 2005), 76.

⁸⁷ *Ibid.*, 77 – 80.

⁸⁸ Thomas M. Franck, *Nation Against Nation: What Happened to the U.N. Dream and What the U.S. Can Do About It* (Oxford University Press, 1985), 76 – 77.

⁸⁹ Drakeley, *The History of Indonesia*, 79.

⁹⁰ *Ibid.*, 80.

⁹¹ Samodra Wibawa, *Negara-negara di Nusantara: Dari Negara-Kota hingga Negara-Bangsa, dari Modernisasi hingga Reformasi Administrasi [States in Nusantara: From the City-states to Nation-states from*

The Indonesian struggle to defend its independence was formally ended on 27 December 1949, the date of the transfer of sovereignty between the Kingdom of the Netherlands and the Republic of the United States of Indonesia.⁹² The transfer of sovereignty was agreed following the 1949 Round Table Conference which was held at The Hague from 23 August 1949 to 2 November 1949.⁹³ However, not all parts of the former Dutch East Indies territory were transferred into republican authority.

A deadlock existed between the Netherlands and Indonesia on the status of West Papua, which was one of the most critical issues during the conference.⁹⁴ However, this issue could not be settled in time to permit the conference to conclude successfully within the agreed time limit, because of the limited research that had been completed and various factors which should have been taken into account in settling the issue.⁹⁵ Both parties broke this final deadlock by accepting UNCI's proposal that

“the *status quo* of the Residency of New Guinea should be maintained, continuing under the Government of the Netherlands; with the stipulation, however, that within a year from the date of transfer of sovereignty, the political status of New Guinea should be determined, and the dispute on this matter terminated, through negotiations between the Republic of the United States of Indonesia and the Netherlands.”⁹⁶

The UNCI's proposal on the status of West Papua was formulated under Article 2 of the Charter of the Transfer of Sovereignty.⁹⁷ However, the negotiations broke down, and the issue failed to be resolved within the time limit set in Article 2 of the Charter.⁹⁸ The unitary Republic of Indonesia was restored, abolishing the federal structure of the Republic of the United States of Indonesia, which was imposed through previous agreements.⁹⁹

The deadlock on the issue of West Papua continued into the 1950s. In 1954, the Indonesian Government took the dispute to the General Assembly.¹⁰⁰ As a region that had been part of the Dutch East Indies, Indonesia claimed

Modernisation to Administrative Reform] (Gadjah Mada University Press, 2001), 120.

⁹² Trinidad, *Self-Determination*, 27.

⁹³ United Nations Commission for Indonesia, “Special Report to the Security Council on the Round Table Conference,” 10 November 1949, S/1417.

⁹⁴ *Ibid.*, para. 28, 16 – 17.

⁹⁵ *Ibid.*, para. 42, 24.

⁹⁶ *Ibid.*

⁹⁷ Charter of the Transfer of Sovereignty between the Kingdom of the Netherlands and the Republic of the United States of Indonesia, 1949, Article 2.

⁹⁸ Franck, *Nation against Nation*, 77.

⁹⁹ Wibawa, *Negara-negara di Nusantara*, 120 – 123.

¹⁰⁰ The Question of West Irian (West New Guinea), United Nations Doc., A/2694, 18 Aug. 1954, p. 1.

that West Papua should be under Indonesian authority. Indonesia based its boundaries on a territorial basis—based on the former Dutch East Indies’ territory—rather than a racial one.¹⁰¹ This claim was based on the idea of a common experience of colonialism,¹⁰² as well as common suffering endured by locals throughout the Indonesian Archipelago during the Dutch colonial occupation.¹⁰³ However, the Netherlands kept their arguments that the 700,000 Papuans living on the island were, “neither racially nor culturally related to the Indonesians” and that the Netherlands had, “a duty to help them develop to the point at which they could make an informed decision on their future.”¹⁰⁴

The dispute over West Papua ended in 1969 through an election process commonly known as the ‘act of free choice’¹⁰⁵ or *Penentuan Pendapat Rakyat/PEPERA*. Since then, West Papua has been affirmed as a territory of the Republic of Indonesia. West Papua also has enjoyed some degree of special autonomy, which was given by the Indonesian Government since 2001 through Law No. 21 of 2001 on Special Autonomy for Papua Province. The events that occurred after West Papua’s detachment in 1949 and the related negotiations in the 1950s will not be looked at in detail.

Several arguments brought forward by the judges within Chagos Advisory Opinion can be reflected on and possibly applied to the problem of the detachment of West Papua in 1949. The arguments that can be applied are mostly related to the principles discussed above—the right to self-determination, territorial integrity, and *uti possidetis juris*. The use of resolution 1514 as one of the legal bases within the Advisory Opinion can be reflected on West Papua’s detachment case, especially in relation to paragraph 6, which provides 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.”

It can be said that the deadlock that existed between Indonesia and the Netherlands regarding the status of West Papua during the 1949 Round Table Conference and the following negotiations in the 1950s and early 1960s

¹⁰¹ *Ibid.*, 4 – 5.

¹⁰² Taylor, *Indonesia*, 350.

¹⁰³ Trinidad, *Self-Determination*, 27; and United Nations Commission for Indonesia, see note (...), para. 107, p. 56. During the conclusion of the Round Table Conference, Chairman of the Republican Delegation, Vice-President, and Prime Minister of the Republic of Indonesia Dr. Mohammad Hatta also stated, “The Netherlands was transferring complete and unconditional sovereignty to the Republic of the United States of Indonesia; however joy in Indonesia would be somewhat restrained by the fact that New Guinea remained a matter of dispute.”

¹⁰⁴ Franck, *Nation against Nation*,

¹⁰⁵ Trinidad, *Self-Determination*, 29.

showed how the Netherlands attempted to disrupt the national unity and the territorial integrity of Indonesia. However, before a conclusion is made regarding whether the Netherlands acted contrary to the essence of said paragraph, several considerations are needed to be made. Firstly, the different time periods between the detachment of West Papua in 1949 and the detachment of the Chagos Archipelago in 1965. Secondly, the extent of Indonesian territory during the relevant time period, in order to apply the principle of territorial integrity.

The detachment of West Papua happened in 1949, long before resolution 1514 was adopted in 1960. In the Advisory Opinion, the judges took into consideration the relevant time period in order to identify the rules of international law that are applicable to the process of detachment.¹⁰⁶ One of the legal instruments used for consideration is UNGA resolution 1514, especially paragraph 6, regarding the principle of territorial integrity.¹⁰⁷

Even though the detachment of West Papua happened before the resolution existed, paragraph 6 of resolution 1514 can possibly be applied in West Papua's case. Just like what happened to the Chagos Islands from 1965 until the present time with the UK—being under UK control as BIOT, West Papua was under Dutch control since its detachment in 1949, until 1963 when it was agreed that the Dutch were to transfer the administration of the territory to Indonesia.¹⁰⁸ It can be argued that resolution 1514 can be applied to West Papua's detachment, because between the birth of said resolution until the Netherlands ceased its administration over the territory, Indonesia's territorial integrity was disrupted and its decolonization process was not completed.

Furthermore, paragraph 6 states that the attempt aimed at disrupting the national unity and the territorial integrity of a country is *incompatible with the purposes and principles of the Charter of the United Nations*. It is known that the UN Charter was adopted back in 1945. This means that the Dutch's attempt at disrupting the territorial integrity of Indonesia, by excluding West Papua from recognized Indonesian territory, was incompatible with the purposes and principles of the UN Charter.

It is also essential to define the extent of Indonesian territory during the relevant time period in order to apply the principle of territorial integrity. The method used to define the extent of Indonesian territory is *uti possidetis juris*. Before Japan occupied the Dutch East Indies in the Second World War, the territory of the Dutch East Indies spanned from Sumatra to West Papua. West

¹⁰⁶ Chagos Advisory Opinion, see note 10, 34, para. 140.

¹⁰⁷ *Ibid.*, 36 – 37, para. 153.

¹⁰⁸ Trinidad, *Self-Determination*, 28 – 29.

Papua was under the administration of the Dutch East Indies government, within the *Groote Oost* administrative region starting from 1938, alongside the islands of Sulawesi, Maluku Islands, and the Lesser Sunda Islands.¹⁰⁹ West Papua was not a separate colony under the Netherlands' administration prior to the Second World War. This can be seen from resolution 66 (I), in which the Netherlands declared their intention of transmitting information regarding NSGTs of several territories, namely, "the Netherlands Indies, Surinam and Curacao;" but there was no mention of West Papua or West New Guinea.¹¹⁰ When the nationalists declared independence in 1945, they declared the independence of Indonesia with the territory of the former Dutch East Indies as its territory.¹¹¹

As have been discussed in previous chapters, the obligation not to divide colonial territory originated from and related to at least two principles, namely the right to self-determination and the principle of territorial integrity. Both principles are needed to be put under the context of decolonization. In relation to the right to self-determination, the right can be considered as domesticated, which means that the application of the right needs to consider the inclusion of the people of a whole part of a single territory.¹¹² When this right is reflected in West Papua's detachment case, the right to self-determination should be considered *territorially*. This means that the right to self-determination was applied to the whole territory of Indonesia, and not just parts of it. The right to self-determination of West Papua was already applied since the Indonesian declaration of independence on 17 August 1945.

In relation to the principle of territorial integrity, under the context of decolonization, the principle can be applied in a broader sense. Resolution 1514 provides the view that the principle of territorial integrity can also be applied to colonial territories that is yet to achieve independence where statehood has not yet been reached.¹¹³ Therefore, the question of whether Indonesia had achieved independence or not prior to the 1949 transfer of sovereignty is irrelevant, because the principle of territorial integrity can be applied to both states and colonial territories. By using *uti possidetis juris* as a method to define the extent of Indonesia's territory, the detachment of West Papua in 1949 could be considered as a disruption to Indonesia's territorial integrity, because Indonesia inherited the former Dutch East Indies' territory which included

¹⁰⁹ Cribb, "Digital Atlas of Indonesian History"

¹¹⁰ General Assembly resolution 66(I), *Transmission of Information under Article 73e of the Charter*, A/RES/66(I) (14 December 1946), available from: [https://undocs.org/en/A/RES/66\(I\)](https://undocs.org/en/A/RES/66(I)) (accessed 11 May 2020).

¹¹¹ Drakeley, *The History of Indonesia*, 76.

¹¹² Koskenniemi, "National Self-Determination," 242.

¹¹³ General Assembly resolution 1514(XV), para. 6.

West Papua.

This article tries to reflect Chagos Advisory Opinion on the detachment of West Papua, as well as comparing the detachment of the Chagos Islands from Mauritius with the detachment of West Papua from Indonesia. While both cases concern the issue of detachment, several differences can be found and must be considered.

Firstly, the purported detachment happened under the 1965 Lancaster House Agreement between the representatives of Mauritius (then British colony) and the representatives of the UK,¹¹⁴ while the detachment of West Papua happened through failed talks and negotiations, which was initially formalized through Article 2 of the 1949 Charter of the Transfer of Sovereignty.¹¹⁵

Secondly, the Lancaster House Agreement was done before Mauritius gained independence, while the 1949 Charter of the Transfer of Sovereignty was done after Indonesia declared independence in 1945. These two differences are essential to be taken note of, because Mauritius and Indonesia arguably had different “position” or “standing” compared to the UK and the Netherlands, respectively, which could have affected the nature of the two detachment processes and the talks related to each of them.

The third and final difference between the two cases had already been mentioned previously, which was how the Chagos Islands detachment initially happened after the adoption of resolution 1514 while West Papua detachment initially happened long before the resolution existed. This was also a point of contention in the proceeding, especially regarding the exact date of crystallization of self-determination as part of customary international law. However, in both cases, the obligation not to detach colonial territory does not solely rely on resolution 1514 that acted as a crystallization of the customary nature of self-determination. Resolution 1514, in this case, acted as the reflection of a customary nature of self-determination, but before the resolution had been adopted, there were already widespread decolonization from other administering powers, and other UNGA resolutions concerning the granting of independence of NSGTs. Thus, in both cases the right to self-determination, along with the obligation not to divide a territory remains intact even before resolution 1514 was adopted.

VI.CONCLUSION

¹¹⁴ Chagos Advisory Opinion, see note (10), pp. 27 – 28, paras. 108 – 112.

¹¹⁵ Franck, *Nation against Nation*, 77.

The right to self-determination and its associated principle of territorial integrity played a pivotal part in conducting widespread decolonization during the period of the 1960s. However, it must be considered that how the right operates in the context of decolonization is of domesticated nature, which means that the application of the right needs to consider the inclusion of the people of a whole part of a single territory. In this instance, it is also worth noting that in relation to self-determination, territorial integrity is considered corollary instead of conflicting. The proceeding in the ICJ concerning the Chagos Archipelago demonstrates how the relationship between the two principles leads to an obligation not to detach colonial territories without the consent of people concerned and respect to the principle of territorial integrity. Even with several controversies surrounding the rendering of the opinion, it still serves as one of the most important cases concerning the application of the right to self-determination in the context of decolonization.

The detachment of Western Papua qualifies as a violation of self-determination and an impairment towards Indonesia's territorial integrity. The right to self-determination in the context of decolonization should be considered *territorially*, which means that the right was applied to the whole territory of Indonesia, including West Papua, when Indonesia proclaimed its independence. The detachment of West Papua did not only violate the right to self-determination, but it also impaired Indonesia's territorial integrity, which included West Papua when *uti possidetis* is used as a basis for defining the extent of Indonesian territory.

REFERENCES

Articles in journals and periodicals

- Blay, S.K.N. "Self-Determination versus Territorial Integrity in Decolonization." *New York University Journal of International Law and Politics* (1986): 863-880.
- Bogdanor, Vernon. "Ethnic Nationalism in Western Europe." *Journal of Political Studies* 30, no. 2 (1982): 284-291.
- Corten, Oliver. "Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law." *Leiden Journal of International Law* 24 (2011): 87-94.
- Kadir, M. Yakub Ayyub. "Application of The Law of Self-Determination in The Post-Colonial Context: A Guideline". *Journal of East Asia and International Law* 9, no. 1 (2016).
- Koskenniemi, Martti. "National Self-Determination Today: Problems of Legal Theory and Practice." *International Comparative Law Quarterly* 43, no. 2. (1994): 241-269.
- Ratner, Steven B. "Drawing a Better Line: *Uti Possidetis* and the Borders of New States." *American Journal of International Law* 90, no. 4 (1996): 590-624
- Robertson, Geoffrey. "Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean." *University of Western Australia Law Review* 3, no. 1 (2012).
- Shaw, Malcolm N. "The Heritage of States: The Principle of *Uti Possidetis* Today." *British Yearbook of International Law* (1997): 75-154.
- Summers, James. "Decolonisation revisited and the obligation not to divide a Non-Self-Governing Territory." *QIL, Zoom-out* 55 (2018): 147-176.

Books and book chapters

- Allen, Stephen, and Chris Monaghan. *Fifty Years of the British Indian Ocean Territory*. Springer International, 2018.
- Blackburn, Susan. *Jakarta: Sejarah 400 Tahun [Jakarta: A History]*. Translated by Gatot Triwira. Komunitas Bambu, 2011.
- Drakeley, Steven. *The History of Indonesia*. Greenwood Press, 2005.
- El Ouali, Abdelhamid. *Territorial Integrity in a Globalizing World: International Law and Quests for States' Survival*. Springfield Verlag Heidelberg, 2012.
- Fisch, Jörg. *The Right of Self-Determination of Peoples: The Domestication of an Illusion*. Cambridge University Press, 2015.
- Franck, Thomas M. *Nation Against Nation: What Happened to the UN Dream and What the US Can Do About It*. Oxford University Press, 1985.
- Jennings, Ivor. *The Approach to Self-Government*. Cambridge Publishing, 1956.
- Jennings, Robert Yewdall. *The Acquisition of Territory in International Law*. Manchester University Press, 1963.
- Kusuma, RM. A. B. *Lahirnya Undang-undang Dasar 1945 [The Birth of 1945 Indonesian Constitution]*. Badan Penerbit Fakultas Hukum Universitas Indonesia, 2016.
- Raic, David. *Statehood and the Law of Self-Determination*. Kluwer Law International, 2002.

- Rodriguez-Santiago, Elizabeth. "The Evolution of Self-Determination of Peoples in International Law". In *The Theory of Self-Determination* edited by Teson, Fernando R. Cambridge University Press, 2016.
- Rothermund, Dietmar. *Routledge Companions to Decolonization*. Routledge, 2009.
- Shaw, Malcolm N. *International Law*. Cambridge University Press, 2008.
- Taylor, Jean Gelman. *Indonesia: Peoples and Histories*. Yale University Press, 2003.
- Trinidad, Jamie. *Self-Determination in Disputed Colonial Territories*. Cambridge University Press. 2018.
- van der Vossen, Bas. "Self-Determination and Moral Variation." In *The Theory of Self-Determination* edited by Teson, Fernando R. Cambridge University Press. 2016.
- Wellman, Christopher Heath. *A Theory of Secession*. Cambridge University Press, 2005.
- Wibawa, Samodra. *Negara-negara di Nusantara: Dari Negara-Kota hingga Negara-Bangsa, dari Modernisasi hingga Reformasi Administrasi [States in Nusantara: From the City-states to Nation-states from Modernisation to Administrative Reform]*. Gadjah Mada University Press, 2001.
- Tomuschat, Christian. "Yugoslavia's Damaged Sovereignty over the Province of Kosovo". In Kreijen, Gerrard, *et al. State, Sovereignty, and International Governance*. Oxford University Press. 2002.

Legal documents

- United Kingdom. *British Indian Ocean Territory Order 1965*. Statutory Instrument No. 1920 of 1965.
- _____. Foreign and Commonwealth Office. *United Kingdom, Mauritius and Diego Garcia: The Question of Consent- Note from 28 August 1965*. FCO 31/3437.
- An Arbitration before an arbitral tribunal constituted under Annex VII of the United Nations Convention on Law of the Sea (Mauritius v. UK)*. [2015]. ICGJ 486 (PCA 2015).
- Charter of the Transfer of Sovereignty between the Kingdom of the Netherlands and the Republic of the United States of Indonesia, 1949.
- Charter of the United Nations. (opened for signature 26 June 1945, entered into force 24 October 1945).
- Commission of Rapporteur. *The Aland Island Question*. League of Nations Doc. B7. 21/68/106. 16 April 1921.
- Cristescu, Aureliu. *The Right to Self-Determination: Historic and Current Development on the Basis of United Nations Instruments*. UN Doc. E/CN.4/Sub.2/404/Rev.1.
- General Assembly resolution 66(I). *Transmission of Information under Article 73e of the Charter*. A/RES/66(I) (14 December 1946). Available from: [https://undocs.org/en/A/RES/66\(I\)](https://undocs.org/en/A/RES/66(I)) (accessed 11 May 2020).
- General Assembly resolution 1514. *Declaration on the Granting of Independence to Colonial Countries and Peoples*. A/RES/1514(XV) (14 December 1960). Available from [https://undocs.org/en/A/RES/1514\(XV\)](https://undocs.org/en/A/RES/1514(XV)) (accessed 13 August 2019).
- General Assembly resolution 71/292. *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos*

- Archipelago from Mauritius in 1965*. A/RES/71/292 (22 June 2017). Available from <https://undocs.org/en/A/RES/71/292> (accessed 13 August 2019).
- International Court of Justice. *Temple of Preah Vihear* (Cambodia v. Thailand). Judgement. [1962]. ICJ Reports 1962.
- _____. *North Sea Continental Shelf* (UK v. Norway). Judgement. [1969]. ICJ Reports 1969.
- _____. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*. Advisory Opinion. [1971]. ICJ Reports 1971.
- _____. *Western Sahara*. Advisory Opinion. [1975]. ICJ Reports 1975.
- _____. *Continental Shelf* (Tunisia v. Libyan Arab Jamahirriya). Judgement. [1982]. ICJ Reports 1982.
- _____. *Frontier Dispute* (Burkina Faso v. Mali). Judgement. [1986]. ICJ Reports 1986.
- _____. *Land, Island, and Maritime Frontier Dispute* (Salvador v. Honduras). Judgement. [1992]. ICJ Reports 1992.
- _____. *East Timor* (Australia v. Portugal). Judgement. [1995]. ICJ Reports 1995.
- _____. *Legal Consequences of The Separation of The Chagos Archipelago from Mauritius in 1965*. Advisory Opinion. [2019]. ICJ Reports 2019.
- International Covenant on Civil and Political Rights. 999 UNTS 171, 1057 UNTS 407 (opened for signature 16 December 1966, entered into force 23 March 1976).
- R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult* (No. 2), [2008], UKHL 61.
- The Question of West Irian (West New Guinea)*. United Nations Doc. A/2694. 18 August 1954.
- United Nations Commission for Indonesia. “Special Report to the Security Council on the Round Table Conference.” 10 November 1949, S/1417.
- United Nations Educational, Scientific, and Cultural Organisation (UNESCO). *International Meeting of Experts for the Elucidation of the Concepts of Rights of Peoples*. SHS89/CONF.602/7. 22 February 1990.
- United Nations General Assembly. 15th Session. 947th Plenary Meeting. A/P.V.947.
- _____. 15th Session. 936th Plenary Meeting. A/PV.936.

Web sources

- Breese, Evie. “West Papua - Whose history?”. Accessed on 16 August 2019. <https://southeastasiaglobe.com/fifty-years-on-pasts-collide-in-indonesia-and-papua/>.
- Cribb, Robert. “Digital Atlas of Indonesian History: Chapter 4: The Netherlands Indies, 1800 – 1942”. Accessed on 1 September 2019. <https://web.archive.org/web/20180206204720/http://www.indonesianhistory.info/pages/chapter-4.html>.
- Davidson, Helen. “West Papuan independence group says it is ‘ready to take over country’”. Accessed on 1 September 2019. <https://www.theguardian.com/world/2019/jul/03/west-papuan-independence-group-say-they-are-ready-to-take-over-country>.
- Tehusjarana, Karina M. “Papua mass killing: What happened”. Accessed on 13 August 2019. <https://www.thejakartapost.com/news/2018/12/07/papua-mass-killing-what-happened.html>.