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Self-Determination and the Limits of Justice: West Papua and East Timor

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On 4 June 2008, Australian Prime Minister, Kevin Rudd, announced his vision for the establishment of an Asia-Pacific Community. Subsequently, the Human Rights Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade has undertaken an inquiry into international and regional human rights mechanisms and possible models for the Asia–Pacific region. Simultaneously there have been significant developments within the Association of Southeast Asian Nations (ASEAN). On 16 December 2009, the Working Group for an ASEAN Human Rights Mechanism agreed to develop a responsive and credible human rights system in the region.

Will an Asia–Pacific regional institution include a function to monitor and protect human rights across the region? If so, what are the potential practical benefits of establishing such a mechanism? Could it succeed in effecting policy change in the face of the traditionally strong assertion of state sovereignty and non-intervention in internal affairs that has characterised human rights discourse in the region? What might be its limits in delivering justice?

This chapter provides an insight into human rights issues in the Asia Pacific, focusing on a little-known place right on Australia's doorstep: West Papua, a contested territory within

Indonesia seeking its independence. Touted as 'the next East Timor', inevitable comparisons are made between the newly independent East Timor and the Indonesian province of West Papua. Both are or were once provinces of Indonesia, both are rich in natural resources, and both territories are made up of distinct religious and ethnic minorities that have suffered gross human rights abuse under Indonesian rule and both have experienced United Nations involvement. But West Papua is a province of Indonesia and East Timor is an independent state. The different colonial history of West Papua and East Timor, as Dutch and Portuguese colonies, is frequently cited as the reason for their different status today. But emphasising this difference ignores West Papua's right to self-determination under international law. This chapter will provide an insight into both East Timor and West Papua, self-determination and the injustices suffered under Indonesian rule.

The second part of the chapter analyses the international and domestic legal mechanisms available to West Papuans to redress two outstanding demands for justice: their right to self-determination and accountability for past and ongoing human rights abuse under Indonesian rule. Since West Papuans have no recourse to international courts or human rights mechanisms to remedy the injustices they suffer, a regional human rights mechanism may offer their best hope at achieving some measure of justice in the short term. By providing an insight into human rights issues in West Papua, this chapter illustrates in clear, practical terms, the potential benefits — and limits — of a human rights mechanism in the Asia-Pacific for the indigenous peoples of the region.

East Timor and West Papua: Different Histories

In 2009, as East Timor celebrated a decade since the United Nations (UN) administered vote which gave the Timorese their independence from Indonesia, West Papuans remember and mourn the UN supervised vote in 1969 that denied them theirs. 2009 marked 40 years since the Act of Free Choice (AOFC), the UN supervised vote in which West Papuans were given the

choice between the same two options put before the Timorese in 1999: integration with Indonesia or full independence.

The UN Transitional Administration for East Timor (UNTAET) and the conduct of the vote for self-determination in East Timor has unanimously been hailed a success. Under threat of violence — but with the world watching — the Timorese voted in a democratic referendum and 78.5% voted for independence. For the Timorese, the Australian-led humanitarian intervention force and the subsequent UN-backed vote ended a bloody 24-year occupation by Indonesian forces.

Few people are aware that 30 years before East Timor, West Papua was the first ever UN-administered territory and the first territory granted a UN-supervised vote. But for the Papuans, the process and outcome could not have been more different. The vote, conducted by Indonesia with UN supervision, was a sham, as is further discussed below. Despite overwhelming popular support for independence, the Papuans were coerced into voting for integration with Indonesia in an atmosphere of fear and violence. Unsurprisingly, the AOFC is more popularly known to Papuans as the 'Act of "NO" Choice'. For West Papua, the UN-supervised vote both legitimised the bloody invasion by Indonesia in 1962 and began the bloody Indonesian annexation that continues today.

As a matter of law, both the East Timorese and the West Papuans had the right to self-determination and both wanted independence. Both had UN votes: East Timor got independence; West Papua became part of Indonesia. What happened? How can the first and most recent UN-administered territories end up with such different outcomes?

West Papua

West Papua is the western half of the island of New Guinea in the Pacific Ocean, just 300 km north of Australia. The other, better-known half of the island is the independent state of Papua New Guinea (PNG). The Melanesian peoples of West Papua and PNG share similar ethnicities, cultures and religions. It is merely their different colonial past that sets them apart.

PNG had been colonised by the British and the Germans, but was unified to become Papua New Guinea after World War II, ceded to Australian administration and subsequently gained its independence in 1972. West Papua was colonised by the Dutch and formed part of the Dutch East Indies, modern day Indonesia. When Indonesia was granted independence after WWII, the Dutch retained the territory of West Papua (then West New Guinea), arguing West Papua should have its own independence separate from Indonesia. West Papua had only been administered as a part of the former colony, the Dutch East Indies, because the small Dutch presence had not warranted a separate colonial administration. Furthermore, West Papuans are distinct from Indonesians in ethnicity, culture, history and religion. Accordingly, the Dutch began preparing the West Papuan leadership for independence. West New Guinea was added to the UN list of non-self governing territories, the list of colonies that were to become independent states, with the supervision and assistance of the UN, in accordance with the UN Charter. On 1 December 1961, West Papua claimed independence from the Dutch.

However, Indonesia claimed that West Papua belonged to Indonesia since it had been part of the former colony, the Dutch East Indies. Between 1949 and 1961 the Indonesian government made representations to the UN to 'recover' West Papua. In 1961 Indonesia's President Sukarno threatened to invade and annex West Papua by force, with political support and arms from the Soviet Union. Consistent Indonesian attacks prompted the Netherlands and their ally in the region, Australia to prepare for war. The US, fearing the spread of communism to Indonesia, sponsored negotiations between Indonesia and the Netherlands regarding the status of the territory. Facing American pressure and continued Indonesian military incursions into West Papua, the Dutch agreed to a UN- and US-brokered settlement: the New York Agreement.

West Papuans, unanimous in their demand for independence, were not consulted.

Under the terms of the 1962 New York Agreement, administration of West Papua was transferred by the Netherlands to a UN Temporary Executive Authority (UNTEA), the first in UN history. Between 1962 and 1963 UNTEA had full authority to administer the territory, to maintain law and order and to protect the rights of West Papuans. The territory was transferred to Indonesian administration in 1963 and was unceremoniously removed from the list of non-self governing territories in that same year. The UN continued in a supervisory role until the AOFC: the vote for self-determination in 1969.

In the period between 1963 and 1969, the Indonesian military embarked on a sustained campaign of violence, conditioning and intimidating the Papuans into voting to join Indonesia. Indeed, it was in 1967 — two years before the referendum — that Indonesia signed a lucrative mining concession deal with US mining giant, Freeport, for the development of a gold and copper mine in West Papua. It was clear that Indonesia and the US, under the policy guidance of the Secretary of State, Kissinger (who later became a board member of Freeport), had considered the vote a foregone conclusion. In 1969, and under UN supervision, a handpicked group of 1,022 West Papuans (of an estimated population of 800,000) voted unanimously for integration with Indonesia, amid allegations of coercion, military violence and intimidation. Eyewitnesses reported that voting in some places involved Indonesian soldiers drawing a line in the sand and West Papuans risked death if they stepped over the line to vote for independence.

Unlike the vote in East Timor in 1999, the UN failed to discharge its mandate in West Papua. It sent only 16 officials to monitor a territory the size of France and this lack of supervision was telling in the result. West Papuans did not enjoy basic rights during the period of Indonesian administration. The UN took no action in the face of widespread human rights abuse. An Australian journalist, Hugh Lunn, reported that Papuans carrying signs 'one man, one vote' — in protest against the voting procedures being adopted — were arrested by the

Indonesian military. Some were killed. While under UN supervision, the Indonesian military is estimated to have been responsible for the deaths of 30,000 West Papuans. Frank Galbraith, US Ambassador to Indonesia at the time, warned that Indonesian military operations 'had stimulated fears … of intended genocide among the [Papuans]'. UN officials were aware of the abuses, but said nothing.

The vote was not conducted in accordance with international practice, which required universal suffrage. The UN stood by and watched as Indonesia conducted an illegal vote, in violation of international law. The UN sanctioned the vote even though there is much evidence that it did not reflect the genuine will of the Papuans. British diplomatic correspondence noted that the UN wanted quick resolution of the matter, but '[privately] … we recognise that the people of West [Papua] have no desire to be ruled by the Indonesians … and that that process of consultation did not allow a genuinely free choice to be made'. UN officials admitted in private that 95% of Papuans supported independence. But the UN Representative in West Papua, Sanz, approved the vote outcome and reported it to the UN General Assembly, noting only that 'Indonesian', and not 'international' voting practice was adopted. Sanz told Australian journalist Hugh Lunn, 'West [Papua] is like a cancerous growth on the side of the UN and my job is to surgically remove it'. Remove it he did. In November 1969, the UN took note of — and thus legitimised — the outcome of the vote and West Papua formally became a province of Indonesia.

East Timor

East Timor — or Timor-Leste as it is now known — is the eastern half of the island of Timor. Like New Guinea, the island of Timor is split between the western half, which is the Indonesian province of West Timor and the east, which is now Timor-Leste. East Timor had been a Portuguese colony for centuries, but West Timor formally became territory of the Dutch East Indies in 1859. The populations of West Timor and East Timor are similar, but like West Papua and PNG, colonial

happenstance meant that West Timor became a province of Indonesia upon independence from the Dutch in 1949. On the other hand, East Timor remained a Portuguese colony until 1975. Investment in infrastructure, health, and education was minimal and Portuguese rule tended to be brutal and exploitative. Following the Carnation Revolution in Portugal and the political instability that followed, Portugal effectively abandoned East Timor. The Timorese unilaterally declared itself independent on 28 November 1975.

Internal conflict in East Timor led to a brief civil war in 1975. Indonesia alleged that the East Timorese FRETILIN party, which received support from China, was communist. Like the West Papuans, East Timor's right to self-determination was sacrificed to Cold War politics. Fearing the spread of communism through Southeast Asia in the wake of the Vietnam War, the US and Australia supported Indonesia's invasion of East Timor. As illustrated in the recent Australian film, Balibo, Indonesia launched a violent invasion of East Timor on 7 December 1975. The Security Council deplored Indonesia's invasion, stating its regret that Portugal had not complied with its duties as the administering power and calling upon all states to respect East Timor's right to self-determination. But the US blocked any further UN action to redress the situation. East Timor was declared a province of Indonesia in July 1976, even though its nominal status in the UN remained that of a 'non-self-governing territory under Portuguese administration'.

Indonesian rule in East Timor was marked by extreme violence. The Commission for Reception, Truth and Reconciliation in East Timor cited a minimum estimate of 102,800 conflict-related deaths between 1974 and 1999. Successive Australian governments — from Whitlam to Howard — allegedly co-operated with the Indonesian military to obscure details about conditions in East Timor and to preserve Indonesian control of the region.

After years of international campaigning for self-determination, the UN-supervised popular referendum was held on 30 August 1999. The Timorese voted for independence. Following the announcement of the result, widespread violence broke out at the instigation of the Indonesian military and Indonesia-backed militias. A peacekeeping force, led by Australia and mandated by the UN, maintained peace until the UN force arrived. UNTAET assisted to rebuild and improve capacity and the new nation state of Timor-Leste joined the UN on 27 September 2002.

East Timor and West Papua Compared

Given the UN's prior experience in West Papua over 30 years before — it is remarkable that no reference was made, whether in academia or politics, to the potential lessons for East Timor from West Papua in 1969 and, in particular, the threat of violence from Indonesian forces. Indeed, Indonesia's conduct of the vote exhibited many parallels with the 1969 vote in West Papua: the military commenced a campaign of militia-backed terror to coerce the Timorese to vote for integration and the Indonesian authorities restricted the number of official ballot monitors. But despite these restrictions there would be an unprecedented level of international scrutiny in East Timor, with nearly 2300 activists acting as informal election monitors, 1700 Indonesian and Timorese non-governmental monitors, as well as over 600 journalists. It was impossible for Indonesia to repeat the sham that was the 1969 vote in West Papua. Australian journalist Hugh Lunn reports that Reuter's agency repeatedly told its correspondents not to attend West Papua during the vote. As one of the only journalists who travelled to West Papua at the time, Lunn wrote about the atmosphere of violence and the killings that occurred around the vote — and how the UN observers did nothing to prevent it or report it to the world. But his reports fell on deaf ears. For East Timor, a reluctant Australia led the international peacekeeping mission. For West Papua, there was no such peacekeeping force.

Former UN Under-Secretary General Chakravarthy Narasimhan, who handled the Indonesian takeover of West Papua, has admitted that the process was a 'whitewash'. But the international community has not taken action to redress this injustice. Had the vote been properly conducted, West Papuans would be celebrating their independence like East Timor. Rather than celebrating 40 years of independence, Papuans are suffering after more than 46 years of oppression, violence and human rights abuse.

Human Rights Abuse in West Papua — Integration with Indonesia to Today

Since annexation, indigenous Papuans have suffered all forms of human rights abuse, including forced disappearances and summary executions, cultural discrimination and unjust acquisition of customary lands. Pressing human rights concerns have been raised, in particular, around the development of the controversial Freeport gold and copper mine. Military operations in response to the low-level guerilla resistance movement (OPM) have resulted in killings, torture and indiscriminate reprisals against indigenous Papuans. It is estimated that 100,000 Papuans have been killed by Indonesian security forces. Both Yale University and Indonesia's own Human Rights Commission (Komnas HAM) have reported that the Indonesian government has committed crimes against humanity against indigenous Papuans. Further, some commentators report strong indications the situation is approaching genocide. The long history of abuse, beginning with the denial of self-determination, has given rise to a collective memory of suffering, 'memoria passionis', which asserts that peace cannot be achieved without re-examining history, acknowledging past crimes and pursuing justice. While the Indonesian government has apologised for suffering in Papua under Suharto, ongoing impunity and repression remains a major source of resentment within Papuan society and continues to fuel demands for independence.

After the fall of Suharto and the UN vote in East Timor in 1999, demonstrations and flag raisings occurred across Papua, with Papuans demanding their own referendum on independence. In 1999 and 2000 Jakarta held dialogue with Papuan leaders to negotiate Papua's future. But when Megawati became President of Indonesia in 2001 policy on Papua changed. A compromised version of special autonomy within Indonesia was the only politically viable option. There would be no referendum on independence. The freedom to express aspirations for independence quickly evaporated. Papuan leaders were assassinated and arrested. Across Papua to this day, peaceful protests and flag raisings are met with violence, arrest and torture in detention. Protestors have been sentenced to between fifteen and twenty years prison for simply raising the Papuan flag.

The Special Autonomy Law of 2001 was supposed to give Papua fiscal and administrative autonomy, provide greater Papuan control over natural resources revenue and mechanisms for dealing with past human rights abuse. Yet, as has since been noted by many observers, West Papua's 'special autonomy' status has been methodically undermined until it has become next to meaningless. Not one Indonesian official has been brought to justice. Papuans seek recognition of the injustice of their integration with Indonesia and the history of human rights abuse. Indonesia insists on the referendum's validity and that Papua is unquestionably part of Indonesia. As President Yudhoyono has asserted, '[t]here exist no manipulations of history that must be revised'.

International and Domestic Options for Justice

In this context: what legal mechanisms — domestic, regional or international — are available to West Papuans to achieve some measure of justice in respect of their claim for self-determination, whether external or internal, and for past and ongoing human rights abuse?

The Right to Self-Determination

The right to self-determination refers to the creation of independent States in the context of decolonisation ('external self-determination'). International law is the law applicable to disputes involving self-determination and decolonisation and the International Court of Justice provides the forum for dispute resolution.

In the post-colonial context self-determination refers to the recognition of minority rights and the right all peoples to determine their own economic, social and cultural development within the confines of the state ('internal self-determination'). In more recent years, this internal right to self-determination has been used, for example, to ensure indigenous peoples have right of approval of development planned on or near traditionally owned lands. An aspect of self-determination is to be free from violence and human rights abuse.

External Self-Determination: The Claim to Independent Statehood

The people of West Papua claim the external right to self-determination — and their independence — on the basis of applicable rules of customary international law regarding decolonisation, which states that 'the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights' and the UN Charter. This law is reinforced by State practice, pursuant to which countries around the world have gained independence from their former colonial powers.

Indonesia argues that, at its independence in 1945, the territory of the Dutch East Indies included West New Guinea. West Papua is therefore part of Indonesia because post-colonial states are generally formed from the former colony. This is where Indonesia distinguishes West Papua and East Timor: East Timor was a former colony of Portugal and not part of the Dutch East Indies, like West Timor and West Papua. However, this distinction is simplistic and simply serves to obfuscate the

debate. The real issue is the identification of the pertinent unit of self-determination: was it the entire colony of the Dutch East Indies, including West New Guinea? The short answer is no: subsequent events and the practice of the international community with respect to West New Guinea recognised the independent right of West Papuans to independence, separate from Indonesia. Successive General Assembly resolutions note the creation of the independent state of Indonesia and its admission to the UN, but specifically note that the new territory of Indonesia excluded West New Guinea, which would continue under Dutch control and ultimately gain independence. The UN and the Netherlands recognised that West New Guinea was a 'non-self-governing territory', which meant the territory had the right to independence and the international community had an obligation to assist them achieve it.

Therefore, in 1963 West Papua was a colony over which Indonesia had administrative power, responsibilities inherited from the UN transitional authority (UNTEA), which in turn had taken over administration from the Netherlands, the original colonial power. The AOFC in 1969 is cited by Indonesia as justifying Indonesia's integration of West Papua.

Indonesia was required by its obligations under UN Charter, the New York Agreement and general international law to hold an act of self-determination in West Papua in accordance with international practice. International law required that West Papua's integration with Indonesia 'should be the result of the freely expressed wishes of the [Papuan] 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'. These conditions were clearly not met in the 1969 vote. Legal commentators have dismissed the Indonesian administered AOFC as a 'spurious exercise', which amounts to a substantive betrayal of the principle of self-determination.

The Remedy: A Claim Before the International Court of Justice?

The nature of legal proceedings before the ICJ means that a number of obstacles stand in the way of any claim before the ICJ regarding West Papua's status in international law.

1. ICJ Rules on Standing

ICJ procedures are only open to UN member states or authorised international organisations. West Papua is a province of Indonesia and not an independent state. It is not a UN member, nor can it become a party to the ICJ Statute. Therefore the people of West Papua cannot themselves bring their claim for self-determination before the ICJ. However, the problem of standing can be avoided if another state or group of states bring their legal claim before the ICJ, either in the form of a contentious dispute or by seeking an advisory opinion.

2. Contentious Claims and the Requirement of Consent

ICJ jurisdiction is based upon the consent of the disputing states. Indonesia has not consented to the compulsory jurisdiction of the ICJ to hear legal disputes in which it — or its legal rights — are involved.

In the case of East Timor, Portugal sought to avoid both the rules of standing and consent by bringing a claim on behalf of the East Timorese against Australia in Portugal v Australia in 1996 over the exploitation of the Timor Gap oil. Australia, unlike Indonesia, was made a defendant because it had accepted the jurisdiction of the ICJ. Portugal argued that Australia, by entering into the Timor Gap Treaty with Indonesia, had breached its obligation to Portugal as the administering power and the right of the people of East Timor to self-determination. The case was dismissed because Indonesia was a necessary third party to the dispute: the Court could not decide the subject matter of the dispute without determining the legality of Indonesia's annexation of East Timor and whether it had lawfully acquired the power to enter treaties on behalf of East Timor. Indonesia had

not provided its consent and therefore the Court had no jurisdiction to consider the question. For the same reason, if the Dutch were to bring a claim in respect of West Papua against another state that had accepted ICJ jurisdiction, the ICJ would refuse to hear the claim.

3. General Assembly Support for an Advisory Opinion

Therefore, the only available avenue to international justice is if another UN member state is willing to put a resolution to the General Assembly to request an advisory opinion. For example, in the case of the Palestinian Wall Advisory Opinion, an opinion was sought in respect of the legality of Israel's actions in building the wall in Palestine even though Palestine is not a UN member or a state. Kuwait supported a resolution before the General Assembly on behalf of the Arab States. The General Assembly or Security Council can seek advisory opinions from the ICJ on 'any legal question'. The General Assembly has requested advisory opinions in a number of territorial disputes, including Namibia and Western Sahara, and more recently, in the case of Kosovo. The benefit of the advisory opinion procedure is that the consent of Indonesia is not required: the lack of consent of an interested party is not an obstacle to the ICJ rendering an opinion. Any UN member state/s can seek an advisory opinion on the question of the status of West Papua, that is, provided that General Assembly support can be obtained. Vanuatu has indicated some willingness to do so. But the West Papuans cannot initiate this claim themselves.

International Human Rights Mechanisms

Indonesia is not a party to the international human rights treaties which allow for individuals to make complaints to treaty supervisory bodies, such as the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee Against Torture, which can rule on complaints in respect of human rights violations. Therefore West Papuans have no recourse to international human rights mechanisms to assert their claims within the state of Indonesia.

Similarly, Indonesia is not a party to the Rome Statute and therefore the International Criminal Court has no jurisdiction to prosecute Indonesian officials for atrocities in West Papua.

Domestic Mechanisms

Indonesian Human Rights Court

Following international pressure to create an international tribunal to deal with Indonesian violations in East Timor, Indonesia responded by creating its own domestic mechanism. The Indonesian Human Rights Court Act (HRCA) creates the framework for prosecution of perpetrators of gross violations of human rights (genocide, war crimes and crimes against humanity) before Human Rights Courts (HRC) and to provide justice and reparations to victims across Indonesia, including West Papua. Perpetrators face prison sentences of between five and twenty five years and the HRCs have the power to award compensation to victims.

Yet Indonesia has demonstrated that it lacks the political will — or the capacity — to effectively prosecute military and police officials and to provide justice for the people of West Papua. The East Timor trials are unanimously considered an abject failure: not one defendant has been found guilty. Despite numerous investigations into gross human rights violations in Papua both before and after the enactment of the HRCA, only the Abepura Case has proceeded to trial yet all of the accused were acquitted. In this history of systematic human rights abuse in Papua not one official has been held to account.

The Abepura Case was a prosecution brought against the police commanders alleged to have supervised the attack, arrest and detention of over 100 students. As is common in West Papua, this case involved indiscriminate, violent reprisal action against the civilian community after an alleged attack by OPM guerillas. Students were arrested, beaten, tortured and mistreated, with several being killed upon arrest or later as the result of the beatings in prison. The Indonesian Human Rights Commission concluded that crimes against humanity had been committed and named 25 suspects, including the police commanders and

lower ranking officers. Yet only two commanding policemen were ultimately charged and both were acquitted. No judgment has ever been made available (which is common in Indonesia), so close legal analysis of the grounds for the decision and the legal reasoning adopted is impossible. However, according to a Swiss journalist who had witnessed the abuse, there was no doubt of the involvement of the policemen and his account suggests the policemen would not have been acquitted if held to international standards of command responsibility. Local non-governmental organisations have reported that the prosecution failed because the prosecutor presented a very weak case, amidst allegations of political interference with prosecutors and judges. The victims' applications for reparation were also rejected.

This case is just one example of how the Indonesian judicial system has operated to legitimise state violence and deny Papuans' rights. While Indonesian officials are acquitted of gross human rights abuse (and most never face any investigation or prosecution), Papuans are persecuted for expressing their political opinions. Benny Wenda, a prominent Papuan leader, was forced to flee the country and seek asylum in England after he was arrested and prosecuted in a politically motivated trial because of his leadership of a pro-independence organisation. Filep Karma and Yusuf Pakage are two political prisoners of conscience, imprisoned for over fifteen years for merely raising the Papuan flag. Challenges to their convictions to the Indonesian appeal courts have failed, leading to international campaigns by Amnesty International, Human Rights Watch and members of the US Congress to seek their release.

Truth and Reconciliation Commission

The Truth and Reconciliation Commission Act created the national Komisi Kebenaran dan Rekonsiliasi (KKR) to provide accountability and compensation for past abuse in Indonesia before 2000. The KKR was supposed to replicate the South African Truth and Reconciliation Commission (TRC), which has been held up as a shining example of how commissions can heal the past. However, the KKR was never set up.

A separate truth and reconciliation commission was to be incorporated in the draft Special Autonomy Law, as well as a Papuan Human Rights Commission and a Human Rights Court. There was also to be a 'Commission for the Rectification of Papuan History' under the control of Papuan Parliament to 'thoroughly and comprehensively solve the differences of opinion on the history of integration with Indonesia'. The draft also included provision for a referendum regarding Papua's status should the Commission determine that the AOFC violated Papuans' right to self-determination. However, the final law provides simply that a KKR will be created by the central government 'to clarify the history of Papua in order to stabilise the unity and integrity' of the nation within Indonesia, including no reference to a vote for self-determination. Therefore, there are no mechanisms for Papuans within Indonesia to address the history of their integration with Indonesia or their right to self-determination. No human rights or truth commission has been created under the framework of special autonomy.

Domestic Courts of Other States

Convinced that there was no chance of obtaining justice within the Indonesian legal system, West Papuans affected by the mining operations of US company, Freeport, took their claims to the US courts in 1996. In separate state and federal tort claims, Tom Beanal and Mama Yosefa Alomang alleged that Freeport was complicit in human rights abuses committed against them and the Amungme people by security forces employed by Freeport and for the environmental destruction and 'cultural genocide' in destroying their habitat and religious symbols. Both claims failed due to the jurisdictional obstacles faced in bringing claims in foreign courts.

So it seems that for Papuans no legal mechanism on the international or domestic level can review and reconsider the history of injustice — whether past human rights abuse or the history of integration with Indonesia.

How Could an Asia–Pacific Regional Mechanism Assist?

An Asia-Pacific human rights mechanism, if modelled on other regional human rights bodies such as that in the Americas and Europe with proper powers of supervision and review of individual complaints, offers an opportunity for indigenous Papuans to obtain a measure of justice unavailable to them at present. Whether created under the auspices of ASEAN or a broader Asia-Pacific Community, Indonesia will be a member.

Indigenous communities are increasingly relying on international law and international fora for enforcing their human rights. When there are no domestic laws that recognise indigenous rights, or such laws exist but there is no political will to enforce them, indigenous peoples in the Americas are increasingly turning to the Inter-American human rights system. The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court on Human Rights (IACtHR), the two bodies set up by Organisation of American States (OAS) for the promotion and protection of human rights, have decided seminal indigenous ancestral land and political rights cases and provided a measure of justice for oppressed indigenous minorities.

The bodies have been dealing with cases involving precisely the same issues confronted in West Papua: the recognition of communally-owned indigenous property, matters related to investment or development projects affecting indigenous communities, the right to prior consultation on investment projects, the right to political participation, electoral participation by indigenous political parties/organisations, and violence affecting communities, such as cases of forced displacement in the context of armed internal conflicts, and death threats and killings of indigenous leaders. The Court has the power to grant provisional measures, which are protective measures to prevent irreparable harm and its decisions have led to changes to state government policies and the development of standards in indigenous consultation in investment projects,

as well as the payment of reparations to those subjected to state violence.

For example, Mayagna (Sumo) Community of Awas Tingni v. Nicaragua, was a landmark case decided by the Inter-American Court of Human Rights, and the first case in which an international tribunal with legally binding authority has found a government in violation of the collective land rights of an indigenous group in allowing an investment project without their approval. As a result of this decision, on 14 December 2008, the Government of Nicaragua handed the indigenous Awas Tingni community the title to its traditional territory. Similar cases have been decided to assist the Maya people of Belize, the Western Shoshone people of the US and the Sawhoyamaxa people of Paraguay to obtain title to their lands and fair compensation.

More recently, the Commission strongly condemned acts of violence in Peru by security forces against indigenous people who had blockaded a road in protest against government development in the Amazon, which affected their traditional land rights. Many people were killed and injured. The Commission reminded Peru of its obligation to conduct a judicial inquiry into these acts of violence and repair the consequences. The Commission has also called on state parties to adopt mechanisms to prevent excessive use of force by government officials against public protests and to remove criminalisation for legitimate social protest.

Given the experience in the Americas with the Inter-American Human Rights Commission and Court, there is clear potential for an Asia–Pacific human rights body — properly constructed — to provide for a measure of justice and reparation for human rights abuse in West Papua and to call upon Indonesia to adopt mechanisms to prevent excessive use of force and remove criminalisation of social protest. This would go some to way to creating the space for Papuans to express their political views without fear of violence or arrest.

Conclusion

Like East Timor but many years before it, West Papua was annexed by Indonesia in circumstances that violated international law. As this chapter has set out, West Papuans have a legal right to self-determination.

Like East Timor but in a situation that continues today, West Papua has suffered under the brutality of Indonesian rule. Like East Timor, successive Australian governments have ignored West Papuans claims to self-determination and cooperated with the Indonesian government to obscure details about conditions in West Papua and to preserve Indonesian control of the region. But unlike in East Timor, international events have not yet conspired to force Australia's hand to change its foreign policy on West Papua. Journalists cannot enter West Papua and so cannot show the world Indonesian atrocities. By failing to take action, Australia risks putting itself on the same political limb it found itself for 24 years with East Timor: supporting Indonesia's claims to West Papua, while trying to play down the endless stream of atrocities going on there.

In these circumstances, what legal mechanisms exist for West Papuans to assert their claim to self-determination and obtain justice for the human rights abuse they suffer under Indonesian rule? The short answer is none: without the support of other countries, there are no effective legal mechanisms at the international or domestic level that have both the jurisdiction to hear Papuan claims and the capacity to deliver justice.

Given the experience in the Inter-American system, an Asia–Pacific human rights body could however offer West Papuans hope at achieving some measure of justice in the short term. The difficulties faced in asserting their rights and obtaining justice for abuses suffered illustrates in clear, practical terms the potential benefits of such a mechanism for the indigenous peoples of the region. Of course, it will have its limits for Papuans: no human rights body can or will ever rule on West Papua's claim to self-determination and independence from Indonesia; but it may — through its decisions and the pressure

these place on domestic government policy — ensure that Papuans enjoy the freedom to express this claim to the international community and hope that, one day, it will respond.

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