“Western Sahara, East Timor and West Papua: Three Cases of Self-Determination and Their New Developments”

Pedro Pinto Leite, International Platform of Jurists for East Timor

In September 2006 I had the honor to speak at a UNPO conference in The Hague, “The Right to Self-Determination in International Law”. My paper was titled “International legality versus realpolitik: the cases of Western Sahara, East Timor and West Papua”. I was asked to treat the same subject here, therefore I cannot avoid repeating myself1. But having into account the developments that took place in these 19 months, this paper will try at least to bring an update to the first one.

The cases of Western Sahara, East Timor and West Papua have this in common: the right to self-determination of the peoples of these territories was blatantly denied. For many years Western Sahara and East Timor were side by side on the UN list of Non-Self-Governing Territories, waiting for the moment to exercise their right to self-determination. In August 1999 the East Timorese were finally allowed to choose their future status through a referendum. They chose independence and East Timor has since 2002 been a member of the United Nations. The Saharawis, who at an earlier stage had been promised a similar referendum by the international community, are still waiting. They hope that the similarities with the question of East Timor will inevitably lead to the same solution, but when looking at the way the problem of West Papua was handled by the United Nations they have also good reasons to be apprehensive.

The question of West Papua2

Following the capitulation of Japan in 1945, Indonesia declared her independence. The Dutch were able to regain control of most of the territory, but not for long. After a fierce struggle, they were obliged to acknowledge the sovereignty of Indonesia at the Round Table Conference of 1949. Because the West Papuans were Melanesian, thus ethnical and culturally different of the Indonesians, the Dutch at first resisted the pressure to surrender West Papua to Jakarta and started a self-determination process there. However the Indonesian leaders did not give up their claim to West Papua and under strong pressure from the United States – afraid of a communist take over in Indonesia – the Netherlands was obliged to sign the 1962 New York Agreement, by which the administration of West Papua would be taken over by the UN and later by Indonesia. The Papuans were not a party to the Agreement. They were not even consulted. The act of self-determination “according to international practice” envisaged by the Agreement never took place. Instead, in 1969 a so-called Act of Free Choice was orchestrated by Indonesia: only 1,025 selected Papuans (out of a population of 700,000) were allowed to vote. United Nations observers were turned away from the voting sites. No wonder that the Papuans dubbed the Act of Free Choice Act of NO Choice. In November 1969 the UN General Assembly considered

1 In the same way, this paper includes many parts of my presentation at the seminar “Western Saharan Natural Resources: Burden or Opportunity?”, organized by the Nordic Africa Institute (jointly with the Swedish Development Forum and the Global Publications Foundation) in Stockholm in November 2005, and published in Claes Olsson (ed.), The Western Sahara Conflict. The role of natural resources in decolonization, Current African Issues No. 33, Nordiska Afrikainstitutet, Uppsala, Sweden, 2006, pp. 11-16.

2 For a comprehensive analysis of the West Papua problem, see Viktor Kaisiepo, The case of West Papua’s Sovereignty: the Exclusion of West Papua’s Indigenous Peoples from the Process of Determining their Destination, in Arts, Karin and Pinto Leite, Pedro (eds.), International Law and the Question of Western Sahara, IPJET, Oporto, 2007, pp. 147-161.

3 Art 18 of the Agreement.
the Secretary General’s report on the matter. It did not endorse the report, but merely “took

cognizance” of it. Lamentably, the General Assembly also regarded the question settled and removed
West Papua from the UN agenda. In fact since 1962 it is only through military might that Indonesia
maintains control over West Papua. The Papuans are victims of gross human rights violations: the
Indonesian armed forces and their militias have killed an estimated 100,000 Papuans -15% of the

Seven years ago, Mr. Narasimhan, a former Undersecretary General and the most senior UN person
involved in the Act of Free Choice, characterized it in these terms: “It was just a whitewash. The mood
at the United Nations was to get rid of this problem as quickly as possible. Nobody gave a thought to
the fact that there were a million people there who had their fundamental rights trampled on”4. Many
NGOs, the Irish Parliament and MPs of several countries asked the UN Secretary General to review
the UN’s conduct in relation to the Act. Nobel laureates like Archbishop Desmond Tutu expressed
support for the review campaign. A member of the British government has acknowledged that the
Papuans were “largely coerced into declaring for inclusion in Indonesia”5. In June 2005 the U.S.

In the Netherlands, West Papua’s former colonial power, the review campaign is also getting
momentum. In 2000, after a visit to the territory by two MPs, the Lower House of the Dutch
Parliament asked the government for an independent inquiry on the historical facts surrounding
the Act of Free Choice. The then Foreign Minister, Josias van Aartsen, accepted the challenge and
appointed a scholar, Professor Drooglever, to carry out that inquiry. The Indonesian government tried
to no avail to stop it: Professor Drooglever was refused access to the archives of Indonesia and was
even not allowed to enter the country, let alone West Papua. But he was able to study the UN archives
and those of the Netherlands, United States and Australia and to interview Papuans and other
participants to the controversial Act. In October 2005 in The Hague Professor Drooglever officially
presented the book6 with his findings: "The Act of Free Choice ended up as a sham", he wrote in a
summary of the book. "A press-ganged electorate acting under a great deal of pressure appeared to
have unanimously declared itself in favor of Indonesia." Not surprisingly, the Foreign Minister at that
time, Bernard Bot, a Christian Democrat, did not attend the ceremony. In his own words, the
Drooglever report was “superfluous”7. Time and again he had assured the Indonesian government that
Holland fully respects the territorial integrity of Indonesia, an euphemism for accepting the Javanese
colonialism in the region. According to the Dutch Embassy in Jakarta, “it concerns a purely academic
study to which the Dutch government does not find itself politically bound. Subsequently, the Dutch
government will not take any action whatsoever with regard to the study”8. But the most shameless
apology of realpolitik came from a party more to the right in the political spectrum. The spokesman
for the Dutch Party for Freedom and Democracy (VVD) on foreign affairs, Hans van Baalen, went so
far as saying:

“Irian Jaya (Papua) is an integral part of Indonesia. The Netherlands therefore will not support
any separatist movements” and “the Drooglever study should not affect the good bilateral

5 Minister of State, Foreign and Commonwealth Office, Baroness Symons of Vernham Dean answering a
question put by the Bishop of Oxford whether the Government would support the call for the United Nations
Secretary-General to instigate a review of the United Nations’ conduct in relation to the Act of Free Choice in
6 P.J. Drooglever, Een Daad van Vrije Keuze. De Papoea’s van westelijk Nieuw-Guinea en de grenzen van het
zelfbeschikkingsrecht (Amsterdam, Uitgeverij Boom, 2005).
7 Newspaper Trouw, 15 November 2005.
8 The Royal Netherlands Embassy in Jakarta, News, The Dutch position concerning the study to the ‘Act of Free
relations between Indonesia and the Netherlands. Instead, the two countries should enhance their ties for mutual benefit”. And he could not be more clear when he stated: “The Netherlands as a founding member of the EU can be a gateway for Indonesian products to Europe and can lobby for the abolishing of EU import duties and quotas for Indonesian products. Indonesia as a co-founder of ASEAN can do the same for the Hague's interests in the region”.

The position of the current Dutch government is not very different. Good relations with Indonesia are still a priority. But my perception is that the review campaign is growing strong.

Six years after the Act of No Choice, history repeated itself in the questions of East Timor and Western Sahara. With an important difference: while West Papua was improperly removed by the UN from its list of Non-Self-Governing Territories, Western Sahara is still there and East Timor was also kept in the list until it acceded to independence in 2002.

**Western Sahara and East Timor: like two drops of water**

Both Western Sahara and East Timor are the former colonies of Western nations (Spain and Portugal respectively) and, in the mid-1970s following the withdrawal of the colonizing powers, they were occupied and annexed by neighboring countries: Indonesia in the case of East Timor and Morocco in respect of the former Spanish Sahara. Significantly, both aggressors are Third World countries and themselves former Western colonies that have received support (diplomatic, material, financial and military) from Western nations (particularly the USA) to maintain their illegal occupations. Both East Timor and Western Sahara have suffered various forms of human rights abuses, including torture, disappearances, detention without legal redress, and extrajudicial killings. Indonesia and Morocco have repeatedly been condemned by international human rights bodies and have acted in breach of UN Resolutions 1514 (XV) and 1541 (XV), which make freely expressed self-determination an inalienable right.

Portugal was the more proactive of the two former colonizing powers in supporting efforts toward self-determination in its former colony, as for example when it initiated proceedings against Australia before the ICJ concerning the 1989 Timor Gap Treaty. Algeria assumed the protective role that Spain should have played in Western Sahara. Those who deny the Saharawis’ right to self-determination accuse Algeria of pursuing its own particular interests when defending it. There is a lot of hypocrisy in this allegation. The fact is that Algeria was a pioneer in the struggle against colonialism and since its independence the foremost supporter of many liberation movements in the world. Algeria’s progressive internationalism was also fundamental for the success of the anti-apartheid movement in South Africa. It also extended support to the anti-fascist and anti-colonialist movement in Portugal: General Humberto Delgado, who ran as democratic candidate of the Portuguese presidency in the manipulated elections of 1958, spent much of his following exile in Algiers, as a guest of Ben Bella, the first Algerian president.

**The false argument of territorial integrity**

Located in Northern Africa, bordering the North Atlantic Ocean between Morocco and Mauritania, Western Sahara has an area of 266,000 square kilometers (the same area as New Zealand or three-

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9 Jakarta Post, October 21, 2005: *Papua's integration into RI final: Dutch lawmaker.*
10 Just a fortnight ago, a well-attended debate on ‘West Papua and the Right to Self-Determination’, organized by the Amsterdam Student Association of International Law, reached the consensus on the need for the Netherlands to change its policy on the matter.
fourths of the area of Germany) and has a long coast, of more than 1,000 kilometers. According to the Spanish census of 1974, there were about 74,000 inhabitants in Western Sahara. At the time most of them were nomads: tribes linked by the same language - Hassania, related to Arabic - and the same culture.

The Spanish colonial regime in the Western Sahara was established at the end of the 19th century. In the 1960s Spain came under strong international pressure to decolonize the territory. Like many anti-colonial movements in Africa, the Popular Front for the Liberation of Saguia el Hamra and Rio de Oro (Polisario) was established in 1973 as a guerrilla movement to liberate its region from the Spanish colonizing power. Four months after the Carnation Revolution in Lisbon in April 1974, which would heavily influence events in East Timor, Spain announced that it would hold a referendum on self-determination in Spanish Sahara, to be monitored by the UN. King Hassan II of Morocco, seizing the opportunity presented by Spanish internal political difficulties, prevailed on the UN to delay the referendum to consider Moroccan and Mauritanian territorial claims over Western Sahara. In December 1974, the UN General Assembly passed Resolution 3292 (XXIX) requesting the International Court of Justice in The Hague to give an advisory opinion on the case of Western Sahara. Morocco and Mauritania based their claims over the territory of Western Sahara on the principle of territorial integrity. The ICJ could not ignore some factual evidence indicating the existence of cultural, religious and political ties between Morocco or Mauritania and the nomadic tribes occupying Western Sahara in the period preceding Spanish colonizaton, but it concluded that

"(...) the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory."12

In the same way the Suharto regime started a campaign about the historical and cultural bonds between Indonesia and East Timor and used the same principle of territorial integrity to justify the annexation. The alleged bonds, however, were nothing but a fabrication of history. Timor had never been subservient to one of the empires, reigns and sultanates, which developed from some of the islands that nowadays form a part of Indonesia. And in the East Timor case (Portugal vs. Australia), twenty years later, the Court reminded that the UN General Assembly and the Security Council had reaffirmed the inalienable right of the people of East Timor to self-determination in accordance with General Assembly resolution 1514 (XV)13.

Invasion, occupation and annexation

In November 1975, a month after the ICJ published its advisory opinion, which upheld the Saharawis' right to self-determination, King Hassan mobilized 350,000 Moroccans across the border into Sahara in the so-called 'Green March'. Hassan intended this mass mobilization southward as a show of defiance against the ICJ's decision and evidence of Moroccan popular support for the annexation of Spanish Sahara. The UN Security Council, convened at the request of Spain, urged Morocco to withdraw from Sahara, but no effective action was sanctioned when its resolutions14 were ignored. As Spain was determining a new political course in 1975, following 36 years of fascism, it was in no position to challenge militarily the territorial ambitions of Morocco. The territory was ceded to both Morocco and Mauritania with the signing of a partition agreement in Madrid on 14 November 1975. Under the terms of the tripartite agreement, Spain withdrew from Sahara in 1976 in return for 35 per

12 International Court of Justice, Western Sahara Advisory Opinion, ICJ Reports, 1975, p.68, para. 162.
cent of phosphate mines and fishing rights in Saharan waters for ten years\textsuperscript{15}, thereby reneging on its pledge to oversee a referendum on self-determination in Sahara and ensure a peaceful transfer of power. Neither the UN nor the Organization of African Unity challenged the legality of the tripartite agreement.

The majority of Saharawis fled the Moroccan occupation forces and were rallied by the Polisario leadership in refugee camps in Tindouf, southwest Algeria, where they still remain. With a long tradition of supporting African liberation movements, the Algerian government was the strongest regional ally of the Saharawis. Polisario was provided with weaponry, communications and refuge facilities and, importantly, Moroccan forces, fearful of provoking the direct involvement of Algeria in the conflict, did not attack the Tindouf refugee camps. Between 1975 and 1991, the Moroccan occupation forces increased from 56,000 to 250,000 and its air force used napalm and phosphorus to displace any civilians who had not already fled to the camps in Tindouf\textsuperscript{16}. Although the Polisario guerrillas were heavily outnumbered, they sustained an unconventional desert warfare, which necessitated an increased commitment to the conflict of resources from Morocco and Mauritania. In 1978 Mauritania, on the verge of bankruptcy, withdrew its troops from the territory, signed a peace deal with Polisario and renounced all its claims. Morocco moved to occupy that part of the territory. The withdrawal of Mauritania and the Saharawi’s successful containment tactics prompted Morocco to construct a 2250-km-long defence wall of sand and stone, protected by minefields and advanced electronic equipment supplied by the USA and France.

The independence movement in East Timor evolved at a later stage than those organized in other Portuguese colonies. In the mid-1970s, however, a clandestine liberation movement opposed to colonial rule attracted widespread support within Timorese society and attempted to seize the opportunity for independence presented by the Carnation Revolution of April 1974. The collapse of the colonial regime in Lisbon transformed the political scene in Timor, and within a month of the revolution two main political groups had emerged. The Timorese Social Democratic Association (ASDT), which later evolved into the Revolutionary Front for the Independence of East Timor (Fretilin) supported self-determination for the Timorese, whilst the Timor Democratic Union (UDT) initially favored a continued association with Portugal. A third political group, the Popular Democratic Association of Timor (Apodeti), defended integration with Indonesia. A small party, Apodeti was largely a construction of the Indonesian government. The new Portuguese government promised independence for East Timor, but in the chaotic course of events, which followed the revolution, the small overseas province of Timor was not one of Lisbon's political priorities. When some of the UDT leaders organized a coup in August 1974, at the prompting of the Indonesian military, the Portuguese authorities left Dili, the capital, for the island of Atauro, and a resulting civil war claimed some 1500 lives. By November 1975, Fretilin had won the civil war and also secured the administration of the territory as the Portuguese refused to return to the main island. On 7 December Indonesia invaded East Timor and officially annexed it some months later.

The invasion, occupation and annexation of Western Sahara and East Timor not only formed an obvious violation of the Charter of the United Nations, but also an international crime against peace. Moreover, they formed an equally clear violation of the right of the Saharawis and East Timorese to self-determination and independence. As Hector Espejill rightly concludes in his study on self-determination:

\textit{"(...) foreign occupation of a territory - an act condemned by modern international law and incapable of producing valid legal effects or of affecting the right to self-determination of the...\textsuperscript{15}}


peoples whose territory has been occupied - constitutes an absolute violation of the right to self-determination”\textsuperscript{17}.

In addition, the Moroccan and Indonesian governments committed an act of disobedience against the United Nations by maintaining the occupation of the territory even after being repeatedly summoned by the Security Council to withdraw their troops.

**The alleged economic non-viability of Western Sahara and East Timor**

An argument raised by the occupying powers against the self-determination of Western Sahara and East Timor touches the question of natural resources. Both Morocco and Indonesia tried to depict the occupied territories as economically unviable: the population of the Western Sahara would be too tiny, the area of East Timor would be too small, both territories would have very few resources.

In line with its anti-colonial attitude the UN has never regarded the criterion of economical non-viability as a hindrance towards independence of any nation. This is evident both from the UN resolutions, which dealt with this criterion in theoretical terms, and from the actual application of them throughout the years. This is illustrated by paragraph 3 of resolution 1514 (XV):


tag{quote}

“Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”
tag{quote}

In any case, East Timor could not be regarded as unviable on the basis of its territorial size. Almost a sixth of existing states have an area smaller than East Timor: the Bahamas, Fiji, Gambia, Jamaica, Lebanon, Qatar, Singapore and Swaziland, to name a few. There are also several states with a population smaller than that of Western Sahara.

East Timor may in the statistics be one of the poorest countries in the world, but it is nevertheless a rich territory. It is worth mentioning that Australia is making $1.7 million a day from a temporary deal granting access to oilfields that belong to East Timor. The coffee of East Timor is known to be among the best in the world: similarly, thanks to trade monopoly in that coffee, a company controlled by Indonesian generals, called P.T. Denok, also earned many millions of dollars a year.

In 1974, the World Bank labeled Western Sahara as the richest territory in the Maghreb region because of its fishing resources and huge phosphate deposits. In addition, it contains potentially large oil reserves. Even supposing one could accept the (colonially colored) criterion of economic non-viability as an obstacle to the independence of a colonized territory, there are still not sufficient arguments against Western Sahara’s independence, since nothing indicates that Western Sahara can be considered as unviable. On the contrary, everything points in the direction that these sources of potential and actual wealth in Western Sahara are among the most important reasons that led to the occupation of the territory.

**States or non-self-governing territories?**

In February 1976 the Polisario Front proclaimed a government-in-exile of the Saharawi Arab Democratic Republic (SADR). In June 2005 Morocco’s foreign minister, reacting furiously to the decision of Kenya – following that of South Africa in the same year - to establish formal diplomatic ties with the SADR, named it “a virtual entity without any attribute of a sovereign state”.\textsuperscript{18} But the fact is that the majority of the Saharawi population lives in the camps of Tindouf under its own administration, that a part of Western Sahara is already a liberated zone and that the Saharawi Republic conducts international relations with more than 70 states. In other words, that it has all the attributes of a sovereign state, which fulfills the legal criteria for statehood provided by the


\textsuperscript{18} Statement reported by the Moroccan news agency MAP, 25 June 2005.
Montevideo Convention: a permanent population, a clearly defined territory, a government and the capacity to enter into relations with other states. True, the UN still consider the Western Sahara a non-self-governing territory and that is confusing for many people, particularly when they note that the intergovernmental, regional organization OAU (Organization of African Unity) admitted the SADR as a full member in 1984 and that at the launching of the African Union in July 2002 SADR was elected Vice-President of the new organization.

On 27 November 1975, ten days before the invasion, Fretilin established the Democratic Republic of East Timor (DRET). Although recognized as such by only fifteen countries, DRET could also be seen as an independent state at the moment the Indonesian forces invaded its territory, as nowadays recognition is considered as having a declaratory, not a constitutive effect. East Timor also met all the conditions that modern international law demands for the existence of a state. The government's control of all the territory, from September until the invasion, was recognized by many independent observers even if it only lasted three months. That was enough to create statehood and the illegal occupation that followed could not terminate it. Under international law the occupant does not displace the territorial sovereign though the incidents of statehood are affected. But the United Nations however preferred, just as Portugal had done, to continue to consider East Timor as a non-self-governing territory and the Timorese leaders, for strategic reasons, took a step back.

For East Timor this question has now a purely theoretical interest, since the East Timorese gained (or regained) independence in May 2002. In the case of Western Sahara, however, is obviously at the very centre of the problem.

A referendum held in East Timor, but not in Western Sahara

In both cases the occupying power tried to appease the subjugated peoples by offering them a certain degree of autonomy. King Hassan II had already proposed that in the eighties, President Habibie came up in 1998 with a similar proposal, included in a package deal: autonomy status for the territory and the liberation of Xanana Gusmão and other Timorese prisoners if Portugal and the United Nations did accept the Indonesian integration of East Timor. Finally, under growing international pressure Morocco and Indonesia irrevocably undertook to accept the holding of a referendum in the occupied territories. Morocco, by signing the UN-OAU Peace Plan for Western Sahara on June 1990, Indonesia, by signing the New York tripartite agreement with Portugal and the UN on 5 May 1999. The UN established the instruments for the implementation of both agreements: the United Nations Mission for the Referendum in Western Sahara (MINURSO) and the United Nations Mission in East Timor (UNAMET). In both cases a date was fixed for the popular consultations, and in both cases the date was postponed.

Here the similarities come to an end. In East Timor the referendum did take place, even if at a high cost. The New York agreement had left the Indonesian military in charge of maintaining security before, during and after the vote (in fact provisionally accepting Indonesia’s sovereignty over the territory), what led many observers to say that it was the equivalent of putting the fox in charge of the chicken coop. As predicted, instead of guaranteeing security, the Indonesian forces and their militias killed hundreds of people and destroyed much of the infrastructure of East Timor. The international community was obliged to rectify the mistakes of the New York agreements by sending military to the territory, the INTERFET forces. But in the end the Indonesian withdrew, a UN Administration (UNTAET) took their place, free and fair elections for a Constitutive Assembly were held and on the 20th of May of 2002 East Timor became the first new State of this Millennium.

In Western Sahara the referendum envisaged by the Peace Plan did not take place, due to the obstruction of Morocco: Rabat insisted that MINURSO should register many thousands of Moroccan migrants as voters and the Saharawis could not accept that. For some time the 1997 Houston Agreement seemed a breakthrough, but in reality Morocco’s obstruction persisted and the referendum scheduled for December

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1998 was postponed once more. In January 2000 a strengthened MINURSO was able to publish the results of the voters’ identification, accepting as Saharawis 86,381 candidates of a total of 198,469, but meanwhile the number of appeals presented by Morocco grew to 130,000. The result of this maneuver is well-known: pessimistic about the chances to bring the process to a good end, the UN-Secretary General endorsed the proposal of his envoy James Baker of a so-called “Framework Agreement” in which the Moroccan offer of autonomy was resuscitated. The Security Council accepted the proposal to open conversations on the base of the “Framework Agreement”, but did not abandon the Peace Plan, keeping the referendum as an option.

As said, President Habibie had already proposed autonomy as a way to solve the conflict of East Timor. The Timorese, Portugal and the UN rejected it, keeping firm on the application of the principle of self-determination. Therefore, the question put to the voters in the referendum was:

“Do you ACCEPT the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia?

OR

Do you REJECT the proposed special autonomy for East Timor, leading to East Timor’s separation from Indonesia?”

The proposed autonomy was there, but as a conclusion of a process of free choice by the East Timorese, together with the other option, the independence. Contrarily, in the “Framework Agreement” for Western Sahara, autonomy was determined from the beginning; it would thus be imposed on the Saharawi people, before they had the chance to freely choose their status. This clearly contravened Principle IX of Resolution 1541 (XV), which provides:

“The integration should be the result of the freely expressed wishes of the Territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes impartially conducted and based on universal adult suffrage”.

In 2003 James Baker presented a new proposal, the “Peace Plan for self-determination for the people of Western Sahara”, known as Baker Plan II. The plan called for a four to five-year period in which the Saharawis would be reunited in the territory. A provisional administration would be elected by the voters already listed by MINURSO and Western Sahara would be granted autonomy. At the end of that period, a referendum would allow to an extended electorate, including all the residents in the territory since 1999, to chose among independence, integration or autonomy within Morocco.

Surprisingly, Polisario Front accepted to cooperate with the UN on the plan (although stressing that it was “not a definitive solution to the conflict, but “a base for a new process”). Also surprisingly – after all, the plan would allow most of the Moroccan settlers to participate in the vote - Morocco rejected it. Frustrated with the continued impasse, Baker resigned from his position. In an interview given on 19 august 2004 to PBS, a public broadcasting television service with hundreds member TV stations in the US, he clearly blamed Morocco for the situation.

20 Speech of President Abdelaziz of 13 October 2003, quoted in www.arso.org/01-e03-4044.htm
21 http://www.pbs.org/wnet/wideangle/shows/sahara/transcript.html. Recalling the history of the process, Baker said: “Javier Perez de Cuellar, the U.N. Secretary General (…) put something on the table called the settlement plan to which both the Sahrawi's POLISARIO Front and Morocco agreed, which called for a vote based on [the] Spanish census (…). The closer we got to implementing the settlement plan - and we got quite close, in fact, we got a code of conduct for the election agreed to right here in Houston (…), we got the Houston accords agreed to. The closer we got, the more nervous I think the Moroccans got about whether they might not win that referendum.” And further; “[M]y plan, which is still on the table, called the Peace Plan for Self-Determination of the People of Western Sahara (…) changed the settlement plan, which Morocco had decided they were no longer going to try and implement in this way. It broadened the electorate so that everyone in Western Sahara would have the right to vote on this issue of self-determination on the referendum and not just the people who were identified in the Spanish census (…). And even under that arrangement, now that plan, by the way, was unanimously approved by the Security Council Resolution 1495, and the Moroccans concluded that they weren’t
The stalemate persisted. In 2005 Kofi Annan appointed Peter van Walsum, a Dutch diplomat, as his Personal Envoy for Western Sahara. Having a lower profile than Baker, van Walsum did not obtain any results either. And routinely, the UN Security Council has extended every six months the mandate of a MINURSO that, once the identification process finished, has not much to do than monitor the cease-fire22.

Meanwhile Rabat’s intransigency went even further. When Mohammed VI succeeded his father Hassan II in 1999, observers thought that the announced political reforms would favor a solution to the Sahara problem. Those expectations were not met. On the contrary: since 2002 the new king dismisses the idea of a referendum in Western Sahara, rejecting thus the two agreements that his father’s government had subscribed to (the 1990 Settlement Plan and the Houston Agreement of 1997). He considers as irrevocable Morocco’s “sovereignty” over “the Southern Provinces”. And in March 2006, during his colonial visit to the occupied territory, Mohammed VI declared: "Morocco will not cede a single inch, nor a grain of sand of its dear Sahara"23.

Using strong wording unusual for a diplomat, Francesco Bastagli, Special Representative of the UN Secretary-General for Western Sahara and head of MINURSO from August 2005 until August 2006, expressed his dismay with the situation in an article three months after he left office24:

“(…) Through the years, Morocco has strengthened its hold over Western Sahara. Moroccan settlers now constitute the majority of the population. Since November 2005, there has been an ebb and flow of unrest in the territory. Morocco's response has been harsh. Men, women and children have suffered beatings, arbitrary arrests and detentions. Polisario has so far refrained from challenging Morocco openly. It has also kept a distance from militant Islamist groups active in the region. However, discontent is growing. Disenfranchised and frustrated by the political stalemate, younger generations may turn to violence”.

In that article he also criticized the last proposal for solving the problem launched by Kofi Annan, some weeks before his term of office:

“Following the failure of past UN efforts, the UN secretary general is now proposing to hold direct negotiations between Morocco and Polisario without preconditions. This rather unimaginative approach will not break the deadlock without the engagement of international actors.”

Finally, Bastagli pointed out the dangers of the appeasement and advised the big powers to reverse their policy:

“The Maghreb is a region of strategic importance, not the least for its abundant natural resources. Western Sahara may soon become an oil producer. From Algeria to Mauritania, however, the political and security environment is extremely fragile. Observers agree that the region will not stabilize until the Western Sahara issue is resolved. France, which has the lead in the European Union on Western Sahara, is a stalwart champion of Morocco. It should use its privileged relationship to advocate a more courageous and

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23 Statement quoted in http://www.arso.org/01-e06-1314.htm

innovative stand. As permanent members of the Security Council, the United States and France should join forces to prompt the Council into robust action. Western Sahara has remained at the periphery of the international agenda for too long. Acting with the Council, the new secretary general could secure progress in the early stages of his mandate. Failure to do so may soon bring Western Sahara and its surrounding region to the front pages for all the wrong reasons”.

As alternative to the referendum, Mohammed VI reintroduced the idea of limited autonomy for Western Sahara, that, as already said, his father had proposed in the eighties. After years of waiting the king finally transmitted to the new UN Secretary-General Ban Ki-moon the autonomy proposal on 11 April 2007, under the pompous name of “Moroccan initiative for negotiating an autonomy statute for the Sahara region”, a proposal that, according to Mohammed VI, could “serve as a basis for dialogue, negotiation and compromise”.25 The American Ambassador Frank Ruddy, Former Deputy Chairman of MINURSO, calls it otherwise: “the latest in a long line of illusions that Morocco has created over the years to distract world attention from the real issue”. And he explains where the deception lies:

“The Moroccan limited autonomy plan for Western Sahara (…) might sound like a step forward, at least until one reads the not-so-fine print. Article 6 of the plan provides that Morocco will keep its powers in the royal domain, especially with regard to defense, external relations and the constitutional and religious prerogatives of his majesty the king. In other words, the Moroccans are offering autonomy, except in everything that counts. It gets even more disingenuous where the Moroccans say their plan will be submitted to a referendum, but fail to provide details. A referendum to be voted on by whom? By the Moroccan people? That would be absurd on the face of it. By the Saharawis themselves? If so, what happens if the Saharawis reject the plan? Would that mean Saharawi independence? The Moroccans are not likely to tolerate that result.”26

Bastagli’s criticism and warning fell on deaf ears. The United States, busy with their war against terrorism, are afraid of alienating Morocco, one of their oldest and closest allies in the region. France has a record of unconditionally backing Rabat and since Zapatero came to power, Spain aligned its position to that of France. Not surprisingly, the UN Security Council had an ambiguous answer to Morocco’s autonomy proposal: although continuing to call for a solution that respected “the self-determination of the people of Western Sahara”, the Council welcomed the Moroccan move as “serious and credible” and endorsed the abovementioned proposal of Kofi Annan, calling upon “the parties to enter into negotiations without preconditions”27.

And so started in Manhasset, New York, a series of talks between Morocco and Polisario, with Algeria and Mauritania participating as interested neighbor states. The fourth round took place last month. As one would expect the negotiations did not lead to any breakthrough. Backed by France, Morocco continues to rule out Polisario’s demand for a referendum of self-determination. Backed by international law, Polisario rejects the Moroccan imposition of autonomy as a lone final status option. In his statement of 17 March, Mahud Ali Beia, the head of Polisario’s delegation, put it very clearly:

“The Moroccan delegation came to Manhasset to reiterate that it is ready to negotiate only a solution that would recognise beforehand the "Moroccanity" of Western Sahara. This position preconditions and prejudgets the outcome of the negotiations. In no way can it be called negotiations; rather, it is imposition. It also confuses self-determination with forcible annexation. Moreover, Morocco argued for the impossibility of holding a referendum, but at the same time considers that its so-called proposal for solution provides for this referendum.”28

26 Arts, Karin and Pinto Leite, Pedro (eds.), op.cit., p.12.
28 groups.yahoo.com/group/Sahara-Update/message/2033.
A fifth round of talks was agreed by the parties. The UN Security Council is likely to adopt the ritual resolution at the end of this month. Meanwhile the Saharawis living in the camps of Tindouf expect another terribly hot summer, and those living in the occupied territory go on with protests, followed by the usual harsh Moroccan repression.

**Human rights abuses**

Amnesty International has been consistently critical of Moroccan human rights abuses, which pre-date the conflict in Western Sahara but have intensified since 1975. An Amnesty report in April 1996 stated that:

"The pattern of "disappearance" of known or suspected political opponents by the Moroccan authorities dates back to the 1960s ... [and] "disappearances" of Sahrawis began to occur at the end of 1975 and continued until the late 1980s."\(^{29}\)

Amnesty also condemned the fact that the Moroccan authorities refuse to investigate 'disappearances', provide information on detainees or compensate ex-detainees. The human rights group described in this way the treatment of some of the 'disappeared':

"After being arrested by the Moroccan army and other security forces the detainees were taken to secret detention centres in Morocco and Western Sahara, where torture and ill-treatment was routine, especially during interrogation. With few exceptions, those detained were never charged with any offence, brought to trial, or put through any legal process. Some were released after weeks and months in secret detention, and hundreds of others simply 'disappeared'."\(^{30}\)

Amnesty has also raised concerns that human rights violations have continued to be perpetrated by Morocco despite the presence since 1991 of MINURSO. Amnesty's criticisms of MINURSO are based on the fact that the mission does not have a comprehensive provision for monitoring the human rights situation in Western Sahara, and also that the limited human rights safeguards contained in MINURSO's mandate are not respected. The lack of an effective international monitoring mission in Western Sahara has enabled the Moroccan military to act with impunity in the region.

In these last three years courageous demonstrations in the occupied territory – known as the ‘Saharawi intifada’ – have been responded with growing repression. The latest Amnesty International Report, of May 2007, mentions hundreds of arrests, allegations of torture, unfair trials and continued intimidation of human rights activists during 2006 in Western Sahara.\(^{31}\)

In May 2006 a delegation from the Office of the United Nations High Commissioner for Human Rights visited the territory. In its secret (but leaked) report, the delegation denounced the human rights violations against the Sahrawi population. A revealing passage of the report reads:

"(...) the Sahrawi people are not only denied their right to self-determination but equally are severely restricted from exercising a series of other rights, and especially rights of particular importance to the right of self-determination, such as the right to express their views about the issue, to create associations defending their right to self-determination and to hold assemblies to make their views known."\(^{32}\)

Sharing an island with the aggressor state and therefore without a supportive neighbor, East Timor was even in a more unsafe position. If, in addition to verbal condemnation of the Indonesian acts and the acknowledging of the right to self-determination of the East Timorese people, the United Nations could also have forced Jakarta to immediately withdraw its troops from the territory, the damage would have been limited. Because of the strong resistance of the people of East Timor towards the occupation, the Indonesian government, knowing it was backed up both military, economically and diplomatically by major countries, trod the same path it had done before, within its own borders,

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32 The report can be accessed on the website of ARSO: [www.arso.org/CODESAResort2.htm](http://www.arso.org/CODESAResort2.htm)
without any scruples, i.e. the physical extermination of its opponents. Amnesty International and other neutral observers succeeded in getting a rough idea of the number of deaths with the help of estimations made by clergymen, by analyzing contradicting figures, published by the Indonesian authorities themselves, and by the accounts of the people of East Timor who had succeeded in escaping from the hermetic isolation to which the island was condemned. They came to the conclusion that up to 1980 that number was definitely more than 200,000, a third of the original size of the population. They also proved that the great majority of those deaths were due to violence carried out by the Indonesian army of occupation.33

Thousands of men, women and children were killed in cold blood from the first day of the invasion. Massacres like those on Uadaboro Mountain and in Taipo (November 1978, ca. 800 killed), in Lacluta (September 1981, ca. 500 killed), in Kraras (August 1983, ca. 700 killed) caused more victims than the infamous massacre of 12 November 1991 at the cemetery of Santa Cruz in Dili. But this was filmed by a courageous cameraman, Max Stahl, and his images changed the world's perception of East Timor. To the victims of these mass slaughters one has to add the casualties of the random bombardments which made hundreds of settlements in East Timor disappear (especially after September 1977) and the number of victims of the successive extrajudicial executions and 'disappearances'.34 As well as the bullets and the bombs, the aggressor used a far more effective weapon: starvation. By massively bombing the fields, subsequently driving people together into 'resettling areas' that were hardly fit for agriculture, and by strongly restricting the mobility of these people, which made it impossible to farm the land regularly, the Indonesian military created a famine, something which would be repeated several times during the years to come, and caused at least 150,000 deaths.35 If we also add the forced birth control, for which Indonesia was indicted by, among others, the former bishop of Dili, Msgr. Ximenes Belo36, we have four of the five acts, which the Genocide Convention gives as examples of that hideous crime.

The aim of the Indonesian government to exterminate the people of East Timor as such, was also demonstrated by its general practice, directed towards the destruction of the people's cultural identity. The destruction of their social structures and production patterns, the Javanization of the territory by means of the transmigration policy, the ban on education in their own language, the suppression of the animistic religion, the whole cultural genocide, is at the same time proof and an extension of the actual genocide of these people.37

The problem of impunity

Unfortunately, those responsible for the grave human rights violations in Western Sahara, East Timor and West Papua continue to enjoy impunity. Impunity is unacceptable, but for several reasons has been the rule in these cases.

Some of the main criminals escaped punishment by dying a peaceful death. Like Pol Pot in Cambodia and Pinochet in Chile, Suharto – responsible for the death of perhaps a million of Indonesians following the 1965 coup and, as said, of more than 200,000 East Timorese and 100,000 Papuans – died last January without ever having served time for his crimes. The same can be said of General Benny Murdani, the architect of the invasion of East Timor, who died in 2004.

34 Ibid., pp.20-52, 81-87.
37 See, for example, Prof. Benedict Anderson, Statement Submitted on East Timor at the Decolonization Committee of the United Nations' General Assembly, October 1980.
Attempts to bring before justice those who are alive have up to now been unsuccessful. In Indonesia the power of the military, somehow reduced with the fall of Suharto, increased again after President Abdurrahman Wahid’s forced departure from office. Neither Megawati Sukarnoputri, nor the current President Susilo Bambang Yudhoyono - himself a retired general - have made possible the trial of those military responsible for grave human rights violations. When in 2003 the Serious Crimes Unit of the East Timor General Prosecutor's Office indicted General (retired) Wiranto and other high-ranking Indonesian military for crimes against humanity committed in 1999 in East Timor, Minister of Foreign Affairs Hassan Wirayuda, made clear that Indonesian citizens could only be tried by an Indonesian court. A very strange reaction, to say the least, when one looks at the results of the Ad Hoc Human Rights Court for East Timor in Jakarta, created earlier to ease international pressure for a UN-sponsored tribunal.

In March 2002, in cooperation with Judicial System Monitoring Programme, a Dili-based non-governmental organization, IPJET sent one of its members (the German-Malaysian international jurist Suzannah Linton) as legal observer to the East Timor trials before that Court. IPJET had strongly criticised the process leading up to its creation and Suzannah Linton’s accounts of the trials provided overwhelming evidence that they were nothing more than a sham. Human Rights Watch came to the same conclusion: "The trials in Jakarta have been a whitewash. Indonesia has failed in its promise to hold the military accountable for the atrocities in East Timor." American congressmen joined their voice to that of international human rights organizations and Timorese and Indonesian NGOs to denounce the whitewash.

The international criticism of the Indonesia's Ad Hoc Human Rights Court led the UN Secretary-General to appoint a Commission of Experts to review the justice processes in Indonesia and Timor-Leste. In June 2005, the Commission presented its report. It condemned the prosecutions before the Court as "manifestly inadequate" and considered that many aspects of the judicial process revealed "scant respect for or conformity to relevant international standards." Importantly, the UN Commission recommended, as measures against the impunity, “that the Security Council adopt a resolution under Chapter VII of the Charter of the United Nations to create an ad hoc international criminal tribunal for Timor-Leste, to be located in a third State. (...) If the recommendation to establish an international criminal tribunal for Timor-Leste is not retained, the Security Council may consider the possibility of utilizing the International Criminal Court as a vehicle for investigations and prosecutions of serious crimes committed in East Timor.”

In July 2001 UNTAET had established the Commission for Reception, Truth and Reconciliation (CAVR in its Portuguese acronym) to investigate the human rights violations in East Timor and make recommendations for legal proceedings. CAVR's 2500-page report, under the name ‘Chega!’ (Portuguese for ‘Stop!’ or ‘Enough!’), was delivered in October 2005 to the then President Xanana Gusmão. It details the crimes against humanity perpetrated in Timor-Leste between 1974 and 1999, immediately before and during Indonesia's occupation of the territory. The report also names key Indonesian military leaders responsible for atrocities, like former General Wiranto, who was Minister of Defense and Chief of the Armed Forces at the time of the killings and widespread destruction of 1999.

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38 Amnesty International was also strongly critical of the law (Law No. 26/2000) that instituted the court, highlighting many deficiencies with the jurisdiction, definition of crimes, judicial procedure and independence of the prosecutors and of the judges (see ASA 21/005/2001 of 9 February 2001).
39 See e.g. her ‘Unravelling the First Three Trials at Indonesia’s Ad Hoc Court for Human Rights Violations in East Timor’, 17 Leiden Journal of International Law no. 2, 2004, pp. 303-361.
Until now, neither the CAVR’s recommendations, nor the recommendations of the UN Commission of Experts have been taken up. It is widely known that some Timorese leaders, like current President José Ramos Horta and Prime Minister Xanana Gusmão, unfortunately give priority to reconciliation and good relations with Jakarta over justice. They have agreed to establish with the government of Indonesia a so-called Commission of Truth and Friendship, exactly for the purpose of avoiding the establishment of an international ad hoc tribunal. That move has been widely rejected by civil society in Timor-Leste and Indonesia, and even boycotted by the United Nations.  

This culture of impunity is further illustrated with two recent news. Two weeks ago the Indonesia's Supreme Court overturned the conviction of Eurico Guterres, a notorious militia leader; with his release, all 18 suspects originally indicted by the Indonesia's Ad Hoc Human Rights Court were acquitted or set free. On the same day of Guterres’ acquittal, the U.S. Assistant Secretary of State Christopher Hill, after meeting President Susilo Bambang Yudhoyono in Jakarta, said that the United States would accept the findings of the Commission of Truth and Friendship, whatever they were.

It is clear that this lack of justice set the precedent for the lawlessness that afflicts Timor-Leste since 2006. As Charles Scheiner, an old East Timor activist, rightly pointed out, “In the current crisis, violence has filled the justice gap. Perpetrators anticipate impunity, and victims, lacking confidence in the courts, take matters into their own hands. This was mentioned by the Commission of Inquiry, but not identified as an abdication of the Security Council, which has refused to establish an international tribunal for Timor-Leste.”

The pillage of the natural resources of Western Sahara

For the sake of trade with Morocco, or even worse, to have a share in the plunder of Western Sahara’s natural resources, many political leaders of several countries - with France on top - turned a blind eye to the illegal annexation of this territory. A recent example is the four-year fisheries agreement that the European Union celebrated last year with Morocco. Under that agreement, European vessels – mostly from Spain and Portugal – will be allowed to fish in waters off the occupied Western Sahara. Prof Roger Clark, of Rutgers Law School, USA, an expert in international criminal law, called Australia a “receptor of stolen goods” when that country celebrated the Timor Gap Treaty with Indonesia in order to participate in the oil exploitation in the sea belonging to occupied East Timor. Those words fit like a glove to the EU institutions– Commission, Parliament and Council – that signed, approved and ratified the fisheries agreement.

45 http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20080405.@03
46 “If it's good enough for East Timor and Indonesia, it should be good enough for us. What we want to see is reconciliation between Indonesia and East Timor. This is the way to go. If you look at East Timor's future, it needs a good relationship with Indonesia.” (http://old.thejakartapost.com/detailheadlines.asp?fileid=20080408.A05&irec=4)
47 Charles Scheiner, Self-determination requires more than political independence: Recent developments in Timor-Leste, in Arts, Karin and Pinto Leite, Pedro (eds.), op.cit., p.140. Sad irony is that apparently Ramos Horta and Xanana Gusmão were themselves victims of their own choice for promoting impunity, with the attempt to their lives last February. On the consequences of impunity for the social and political developments in Indonesia, see Suzannah Linton, Accounting for Atrocities in Indonesia, Singapore Year Book of International Law, Volume X, 2006, pp.199-231.
48 In the above mentioned article, Bastagli also reproached this plunder: “The natural resources of the territory, which under the UN Charter should be used for the sole benefit of the Saharawi people, are being exploited by Morocco. A recent agreement between Morocco and the European Union gave European fishing fleets access to Western Saharan waters, among the richest in the world. Only Sweden spoke against it.”
It was not only the fishing richness of Western Sahara that awoke the greed of Morocco and of other states. The participation in the extraction of phosphates – Western Sahara is the second world producer – was, as said above, one of the reasons that led the Spanish government to accept the annexation. And because Morocco – the first world producer – also exports the phosphates of Western Sahara as its own, many countries are consciously or unconsciously participating in the pillage.

The recent discovery of offshore oil fields in Mauritania and other northwest African countries led likewise some European and American companies to sign contracts with Morocco – a highly oil-dependent country – for the exploration and exploitation of oil in waters belonging to Western Sahara.

A strong solidarity movement with the Saharawi cause, centered in the Western Sahara Resource Watch (WSRW), an international network with member organizations in 30 countries, has fought to bring a halt to these illegal practices. Under pressure from WSRW, Yara, the largest fertilizer company in the world, stated that it would terminate the phosphate trade in Western Sahara. Through successful divestment campaigns, WSRW forced companies like TGS-Nopec, Fugro NV, Thor Offshore, Total, Kerr-McGee, Wessex Exploration and Pioneer Natural Resources to withdraw from the area. A campaign was also launched to persuade the Irish company Island Oil to do the same.

The right of the Saharawi people to their natural resources is soundly based on and flows logically from the norms of international law concerning non-self-governing territories. Héctor Gros Espiell, in his study on the right to self-determination, stated:

“(…) the marketing and use in all its forms of the natural resources and wealth belonging to those peoples, which the colonialist Powers occupying the territory in which they live, are engaging in illegally, is illegal, with all the legal consequences ensuing from that fact”.  

The UN General Assembly has repeatedly asserted that

“the exploitation and plundering of the marine and other natural resources of colonial and Non-Self-Governing Territories by foreign economic interests, in violation of the relevant resolutions of the United Nations, is a grave threat to the integrity and prosperity of those Territories”.  

Resolution III of the UN Conference that adopted the Convention on the Law of the Sea declares,

“(i)n the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.”

Another important UN legal document states,

“No State has the right to promote or encourage investments that may constitute an obstacle to the liberation of a territory occupied by force”.  

As said above Western Sahara is considered by the UN to be a colony and is thus included in the list of non-self-governing territories under Chapter XI of the Charter. According to the United Nations the Administering Power of Western Sahara is Spain, not Morocco; both the UN and the African Union consider Morocco as a mere occupying power. It is therefore clear that Morocco has no rights concerning the natural resources of Western Sahara whatsoever.

In 2002 Hans Corell, then UN Under-Secretary General for Legal Affairs, presented the Security Council with a specific study of the legal consequences of the presence of foreign companies in the exploration of mineral resources in Western Sahara, by contracts closed with a Moroccan public
institution. In that study – although controversially equating the powers of an Administering Power to those of an illegal occupying power – Corell concluded that “if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of (…) international law”.52

This conclusion in law obviously applies to other natural resources of the occupied territory.

**Conclusion**

Whatever the political maneuvers of Morocco, Indonesia and some states may be, one thing they have to recognize: there is no alternative to self-determination. The Saharawis and the West Papuans must decide freely on their future status, as the East Timorese did already.

Respect for international law is a precondition for world peace. The international community ought to strengthen, not to undermine it. The UN should not measure with two different yardsticks, as that is contrary to the most elementary notions of justice and would thus weaken the basic fundaments of modern international law. In other words, the UN has to ensure that also in the cases of Western Sahara and West Papua *realpolitik* does not prevail.

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