

# The legal strategy for West Papua: Will it fly? What might help it to?

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**Benny Wenda (with small son and others) at the UK launch  
of International Lawyers for West Papua, 12 October 2011**

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# **The legal strategy for West Papua. Will it fly? What might help it to?<sup>1</sup>**

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A transnational network, *International Lawyers for West Papua*, is currently considering a legal challenge to the transfer of sovereignty from the Dutch to the Indonesian Government. Although legal action might assist the West Papuan struggle for freedom, we argue that this line of attack is extremely difficult and entails significant risks. An approach to change solely based on using the courts plays to the opponent's strengths: it may not do much to erode Indonesian rule in West Papua, and risks reinforcing it. We also argue that a legal strategy, to be successful, needs the momentum and energy of large numbers of ordinary people, particularly inside West Papua. If court action is pursued, it needs to be backed up by extra-parliamentary and nonviolent forms of collective action waged by large numbers of ordinary people that target and systematically undermine the ways the Indonesian government maintains power.

## **Risks of a legal strategy**

There are several risks associated with legal action in support of difficult political goals. In relation to the West Papuan struggle for freedom, five significant risks need to be considered as part of the movement's assessment of costs and benefits and in its contingency plans.

1. Using legal channels requires considerable money and resources and thus restricts involvement by ordinary people. Even with high profile pro-bono support, a legal case will be extremely expensive. Although West Papua is

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rich in natural resources, the movement is short on cash. Activists should expect the Indonesian government to do all it can to delay and derail the case going to court, both in Indonesia and internationally. If the case does make its way to the courts, the Indonesian government will spare no expense in fighting it. Legal battles are not won solely by money, but it definitely helps. In court, the movement will be facing an opponent with more money and resources.

2. A legal strategy favours the powerful. In terms of access to people of influence on the world stage, the Indonesian government has more power than the movement. Government power is not the only kind of power operating in the West Papuan struggle for freedom, but it is worth factoring the Indonesian government's considerable international influence into an assessment of whether to pursue legal actions or how such a strategy might be strengthened or complemented.
3. There are technical legal issues. There is a risk that the case might never be heard simply because the court accepts objections such as that the plaintiffs are mischievous and or the court does not have jurisdiction. Even if the case does get to an international court there is no guarantee the challenge will be successful. A failure to win the case, even on technical grounds, could undermine the cause for self-determination by giving a legal stamp of approval to the Act of Free Choice.
4. Even if the case is successful, there is no guarantee of any subsequent political change. This is the lesson from many other struggles relying on courts and official bodies.

Consider the United Nations. There were numerous resolutions by the UN General Assembly and Human Rights Commission condemning the Indonesian government's invasion of East Timor and the subsequent human rights violations committed under the occupation. All were ignored by the Indonesian government, some for decades.<sup>4</sup>

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<sup>4</sup> See for instance Irena Christalis, *Bitter Dawn: East Timor, A People's History*, London: Zed Books (2002); James Dunn, *East Timor: A Rough Passage to Independence*. Sydney: Longueville Books (2003).

In the 1990s, the International Court of Justice was asked to rule on the legality of nuclear weapons under international law. The court gave an opinion, some parts of which supported the goals of anti-nuclear campaigners. However, no government with nuclear weapons took any substantial action, such as moving to disarm, in response to the court opinions.

The situation is similar in West Papua. The transfer of sovereignty from the Netherlands government, the former colonial power, to the Indonesian government, the current colonial power, was clearly illegal not to mention marked by intimidation and outright violence. Saltford<sup>5</sup> and Drooglever<sup>6</sup> have shown this convincingly. The fact remains, however, that the Indonesian Government will be unlikely to give up its rule of West Papua just because an international court declares the occupation illegal.

5. A legal strategy could act as a dampener on dissent inside West Papua. Recent events in West Papua, such as the Third Papuan Congress in October 2011 and large demonstrations in support of dialogue and a referendum, suggest this is unlikely. Nevertheless, a prominent court action runs the risk that a legal focus will take precedence over mass civilian based mobilising for change, so ordinary people might become less involved. Putting high hopes in a legal challenge could suggest to Papuans inside and outside the country that Papuans themselves don't have to actively struggle for their own liberation or, that Papuans are not the primary drivers of change because powerful outsiders will save them. That belief is incorrect.

### **Winning in the 'Court of Public Opinion' is more important**

Courts, along with government inquiries, ombudsmen and regulatory agencies, are examples of "official channels." People often believe these sorts of official bodies provide justice, but in practice they seldom work well when dealing with powerful and wealthy perpetrators, such as governments. Official channels are usually very slow, can be expensive, and restrict opportunities for non-experts to participate. Issues

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<sup>5</sup> John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962-1969: The Anatomy of a Betrayal*, London: Routledge (2003)

<sup>6</sup> Pieter Drooglever, *An Act of Free Choice: Decolonisation and the Right to Self-Determination in West Papua*, Oxford: Oneworld Publications (2009).

are taken out of the public domain and moved to more restrictive arenas that are usually less sympathetic. Even when formal inquiries come up with good recommendations, governments often do not act on them.<sup>7</sup>

The case of West Papua is essentially about power politics and vested economic interests. Therefore, winning in the *court of public opinion* (in other words, building a powerful social movement) and raising the political and economic costs of the Indonesian government's continued occupation will be more decisive than a legal victory.

The history of the international movement against nuclear weapons shows that governments have been most constrained when protest is vigorous. When protest has waned, military races have accelerated.<sup>8</sup>

A civil resistance strategy, one that is based on the application of unarmed, extra-parliamentary, collective, citizen power needs to complement conventional political processes like diplomacy, using the United Nations or legal challenges.

### **Strengthening a legal case through building a people's movement**

In the past 25 years, international boundaries have been dramatically redrawn and numerous countries seeking to secede have become independent. On 9 July 2011, South Sudan became the world's newest state. Before that Kosovo and East Timor became independent. Others like Somaliland have become defacto independent countries even though they are not yet recognised by the international community. During the late 1980s and early 1990s several republics of the former Soviet Union also became independent. Most of them did so through nonviolent means. Some, like Estonia, Latvia and Lithuania, won national liberation even though half their population was made up of Russian immigrants. What was decisive about all these movements was that they undermined the occupiers' legitimacy and disrupted their rule. That outcome can be achieved through violent or nonviolent struggle.

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<sup>7</sup> Brian Martin, *Justice Ignited: The Dynamics of Backfire*, Lanham, MD: Rowman & Littlefield (2007); "Backfire materials," <http://www.bmartin.cc/pubs/backfire.html>.

<sup>8</sup> Lawrence S. Wittner, *The Struggle against the Bomb* (3 volumes), Stanford, CA: Stanford University Press (1993–2003).

By nonviolent struggle we mean sustained, unarmed and extra-parliamentary collective action in the pursuit of political and social goals, such as rallies, strikes, boycotts and sit-ins. Nonviolent action has been used in dozens of countries. Also called people power, unarmed resistance or civil resistance, nonviolent movements have ousted dictators, resisted coups and been effective in challenging racism, exploitation and other injustices.<sup>9</sup>

### **Making nonviolent struggle in West Papua more powerful**

There is a nonviolent struggle in West Papua. Since the Fall of Suharto in 1998 that struggle has intensified. Resistance against Indonesian Government rule has transformed from sporadic armed resistance by a handful of poorly armed guerrillas in the mountains and jungles to a popular unarmed resistance movement of tens of thousands of ordinary Papuans living in the cities and towns. Further increases in the number of individuals and the number of groups involved in the struggle would maximise the effectiveness of unarmed resistance.

If you look at a recent peak period of the struggle (July 8-9, 2010), around 2% of the Papuan population were on the street. An optimistic assessment of the numbers of protesters across towns and cities in West Papua during that time was 40,000. To date, West Papua has got nowhere near the numbers Aceh had during the SIRA organised a million person march on Banda Aceh (25% of the population).<sup>10</sup>

In addition to more numbers of people actively involved in the struggle, participation can also be widened. If more key constituencies withdraw their consent for, and cooperation with, Indonesian government rule, the occupation would be made even more untenable. For example, the Papuan political elite still cooperate with Jakarta (except for a few months in 2010 when the MRP did not). The civil service is not organised and does not engage in collective action against Indonesian government

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<sup>9</sup> Kurt Schock, *Unarmed Insurrections: People Power in Nondemocracies*, Minneapolis: University of Minnesota Press (2005); Gene Sharp, *The Politics of Nonviolent Action*, Boston: Porter Sargent (1973); Adam Roberts and Timothy Garton-Ash, eds., *Civil Resistance and Power Politics: The Experiment of Nonviolent Action from Gandhi to the Present*, Oxford: Oxford University Press (2009).

<sup>10</sup> In addition to increasing participation levels there is a need for enhanced strategic skilfulness. A revolution is not won through tactics alone. A strategy – a clear plan – is essential.

rule. The Papuan members of the TNI, Brimob (the Indonesian Paramilitary Mobile Police Force) and POLRI (the Indonesian Police) remain loyal.<sup>11</sup> And except for a handful of courageous church leaders most church congregations are passive. Aside from two powerful strikes against Freeport in 2007 and 2011 Papuan workers are not organised in other sectors of the economy – the banking, education, health and transportation sectors. We are not yet seeing the kinds of mass noncooperation by ordinary Papuans and elite divisions amongst the Papuan elite and Papuan members of the security forces that undermine the legitimacy of the occupation.

Despite daily protests against the state many Papuans still actively support Indonesian rule. Papuans continue to promote *pemekaran*, dividing Papua into smaller administrative units, fuelling an Indonesian bureaucracy. Papuans still continue to vote in local and national elections, legitimising Indonesian government rule in the process. If Papuan people power is to become even more potent, forcing the Indonesian government to negotiate, then more Papuans and more groups of Papuans from key sectors of society need to be actively withdraw their support for the occupation and become involved in mass nonviolent, extra-parliamentary, collective action.

### **Civil resistance in West Papua is more desirable than armed struggle**

Papuans – and their international allies – also need to recognise that self-determination struggles are difficult to win. Recent research into self-determination struggles waged between 1900 and 2006 shows that struggles for independence or national liberation and territory are even more difficult than removing a dictator like Suharto, Mubarak or Gaddafi. Chenoweth and Stephan compared whether armed or nonviolent struggle was more likely to produce self-determination outcomes (like independence). They found that violent and nonviolent anti-occupation struggles had roughly equal chances of succeeding – about 35%.<sup>12</sup>

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<sup>11</sup> There is encouraging evidence that some Papuan members of POLRI, Brimob and the TNI did not open fire on the unarmed crowd during the Third Papuan People's Congress but helped them to escape.

<sup>12</sup> Erica Chenoweth and Maria Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, New York, NY: Columbia University Press (2011): 73. Nonviolent anti-dictatorship or regime change struggles succeed 59% of the time while violent anti-regime struggles

With equal odds of success, nonviolent struggle to end the Indonesian military occupation of West Papua is definitely more desirable than armed struggle: it causes less loss of life, allows for greater participation of ordinary people, and lays the basis for a free and open society after independence. The evidence on the results of mixing armed and nonviolent struggle, on the other hand, indicates that using a mixed defence strategy lessens the likelihood that the movement will achieve their goals.<sup>13</sup>

### **What helps self-determination movements succeed?**

What might improve the prospects of the West Papuan freedom movement? Here are some possibilities that could be part of a nonviolent struggle for freedom in West Papua.

1. Undermine the Indonesian government's attempt to close the province by making the violence of the Indonesian government and the nonviolent resistance of the Papuans visible to transnational networks that mobilise on behalf of Papuans.
2. Expose the failure of governance and the erosion of legitimacy the Indonesian government enjoys in West Papua by withdrawing support for state institutions like the *Majelis Rakyat Papua* (MRP), *Dewan Perwakilan Rakyat Papua* (DPRP – the two Provincial parliaments in Papua Province and Papua Barat Province), local parliaments (DPRD – *Dewan Perwakilan Rakyat Daerah*) and the civil service. An alternative strategy used in Estonia, Latvia and Lithuania was to co-opt state institutions to support movement goals. There were early signs of this approach in April to July 2010 when the MRP supported the campaign to hand back Special Autonomy.
3. Impose economic and reputational costs on transnational corporations through the use nonviolent sanctions inside and outside West Papua to persuade TNCs to pressure the Indonesian government into political negotiations.

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succeed 27% of the time. Violent secessionist struggles succeed 10% of the time compared to 0% for nonviolent struggles. The authors classified the West Papua case as an anti-occupation struggle.

<sup>13</sup> Kurt Schock and Erica Chenoweth, 'The Impact of Simultaneous Violent Resistance Campaigns on the Outcomes of Nonviolent Resistance Campaigns', *USIP/ ICNC Webinar*, <http://www.youtube.com/watch?v=O5bcwtijco8>, November 18 2010.



4. Take the struggle to mainstream Indonesia and the societies of the Indonesian government's elite allies, for example Australian, United States, Dutch, Korean, Chinese, Malaysian, Japanese and British governments and corporations.
5. Coordinate with transnational activist networks to alter the Indonesian government's willingness to maintain the occupation and to affect its capability to do so.
6. Develop a clear strategy inside and outside West Papua. Inside West Papua develop a series of intermediate campaign goals that simultaneously build Papuan power and take them closer to their cherished goal of freedom.

When it comes to challenging the Indonesian government's legitimacy in West Papua, it is also vitally important that local Papuan and transnational solidarity movements continue to expose not only the historical denial of self-determination but also the ongoing failure of governance. This includes not only collecting and publicising the testimonies of surviving participants in the Act of Free Choice but also participating in strikes, boycotts, noncooperation with Special Autonomy, establishing autonomous cultural, religious, economic and political institutions and other forms of mass based nonviolent challenges to Indonesian government rule. Student and youth groups in particular have taken many initiatives; other groups can become more active, including churches, members of the MRP, members of the Papuan civil service, teachers, health workers, women, Papuan workers in resource extractive industries, Papuan members of the security forces and even migrants.

## **Conclusion**

A legal strategy could strengthen the case that Indonesian government rule in West Papua is totally illegitimate, but only if, at the same time, Papuans themselves are actively refusing to cooperate with, and nonviolently disrupting, Indonesian state institutions in West Papua. Faced with an adverse legal opinion, but without sustained and widespread protest, the Indonesian government will simply and legitimately point out that Papuans are participating in elections, that local Papuan politicians are in the positions of Governor and Bupati, that the MRP, provincial and local parliaments

represent Papuan interests, and that there is a large Papuan civil service running the country.

A legal strategy *without* a powerful, organised and sustained people's movement is like a bird of paradise in a gilded cage. It looks appealing but it won't fly. Combining a legal strategy with a powerful civil resistance movement will assist.