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TABLE OF CONTENTS

PRESS REPORTS

ICJ PRESS RELEASE

ICJ/538, 3 July 1995

WORLD COURT DECIDES IT CANNOT ADJUDICATE DISPUTE ON EXPLOITATION OF EAST TIMORESE CONTINENTAL SHELF

Vote on Application by Portugal against Australia is 14-2

THE HAGUE, 30 June (ICJ) – By a vote of 14 to 2, the International Court of Justice today held that it could not adjudicate upon the dispute referred to it by Portugal on Australia's exploitation of the continental shelf of the so-called "Timor Gap."

Portugal had instituted proceedings against Australia in February 1991, stating in its application to the Court that by conducting certain activities in the area concerned, Australia had "failed to observe the obligation to respect the duties and powers of Portugal as the administering Power of East Timor and the right of the people of East Timor to self-determination and the related rights."

Portugal maintained that, in concluding a December 1989 treaty with Indonesia which created a "zone of cooperation in an area between the Indonesian province of East Timor and northern Australia" and in taking measures to apply it, Australia had violated the rights of Portugal and the East Timorese.

Australia objected that there was in reality no dispute between itself and Portugal, and that the case presented by Portugal was artificially limited to the question of the lawfulness of Australia's conduct. The true respondent, Australia maintained, was Indonesia and that Australia was being sued in place of Indonesia.

It also pointed out that while Australia and Portugal had accepted the compulsory jurisdiction of the Court, Indonesia had not. So, for the Court to rule on Australia's conduct, it would first have to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, or the validity of the 1989 treaty between Australia and Indonesia. Since the Court did not have jurisdiction over Indonesia's conduct, it could not adjudicate on the matter.

On the first point, the Court found that by virtue of the fact that Portugal had filed a legal complaint against Australia and that Australia had responded with a denial, there was in fact a legal dispute.

However, the Court supported Australia's second point that Australia's conduct could not be ruled upon without first deciding on the lawfulness of Indonesia's concluding the 1989 treaty; the very subject matter of the Court's decision would necessarily be a determination whether, considering the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor on the resources of its continental shelf.

Given the fundamental principle in the Court's Statute that it can only exercise jurisdiction over a State with its consent, the Court found that it could not make a determination of Indonesia's rights and the lawfulness of its conduct in the absence of that State's consent. The Court concluded that it could not rule on Portugal's claims on the merits, "whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play."

In its Judgment, the Court observed however, that Portugal's assertion that the right of people's to self-determination, as it evolved from the Charter and United Nations practice, had an erga omnes (a right that can be asserted against any Power) character, was irreproachable. The principle of self-determination of peoples was one of the essential principles of contemporary international law, it stated. And for the two parties to the dispute, "East Timor remains a Non-Self-Governing Territory and its people has the right to self-determination."

Judges who voted in favour of today's decision were Bedjaoui, Schwebel, Oda, Jennings, Guillaume, Shahabuddeen, Agui-

lar-Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, and Stephen. Judge Weeramantry and Judge ad hoc Skubiszewski voted against and appended dissenting opinions to the Judgment. Separated opinions were also appended by Judges Oda, Shahabuddeen, Ranjeva and Vereschetin.

BBC'S FIRST REPORT

BBC, June 30, Peter Miles, Lisbon:

In its ruling, the ICJ has broadly followed Australia's line of argument, Australia has maintained throughout the hearing that the case lacked one vital party, Indonesia, Accordingly, the court said that in order to judge Portugal's claim that the oil treaty by Australia and Indonesia in 1989 violated East Timor's right to self-determination, it would first have to judge the legality of Indonesia's actions. This, however, had not been possible since Indonesia was not a party to the case. Portugal argued that the treaty was invalid because it concerned an area over which Indonesia had no sovereignty and that it thereby violated the East Timorese people's right to self-determination and the territory's sovereignty over its own resources. Although Australia has acknowledge East Timor's right to self-determination, it has long recognised Indonesia's sovereignty over the territory.

The ruling is a setback in Portugal's diplomatic efforts to gain support for the cause of East Timor and to increase international pressure on Indonesia to allow the East Timorese to decide their own future.

AUSTRALIA WINS WORLD COURT RULING IN TIMOR OIL ROW

By Andrew Kelly, The Hague, June 30

(Reuter) - The International Court of Justice on Friday rejected Portugal's challenge to a 1989 offshore oil exploration treaty between Australia and Indonesia.

The U.N. court said it lacked the authority to rule on Portugal's claim that Australia violated East Timor's right of self-determination by signing the so-called Timor Gap treaty.

Indonesia annexed East Timor after Portugal pulled out of its former colony in 1975 but the United Nations did not recognise this and continued to regard Lisbon as the administrative power.

Portugal argued that Australia therefore had no right to conclude an agreement with Indonesia.

The court, by a 14-2 majority, said its statute barred it from ruling on Portugal's suit as it would first have to judge the legality of Indonesia's presence in East Timor.

"In order to decide the claims of Portugal, (the court) would have to rule...on the lawfulness of Indonesia's conduct in the absence of that state's consent," the court president said.

"The court can only exercise jurisdiction over a state with its consent," presiding judge Mohammed Bedjaoui of Algeria said.

Unlike Portugal and Australia, Indonesia has not accepted the court's jurisdiction and played no direct role in the case.

Australia's ambassador to the Netherlands Michael Tate said the judgment was a clear victory for Australia.

"The World Court has completely vindicated Australia's legal team in its approach to arguing this case...we're very satisfied as a legal team that by an overwhelming majority the World Court has upheld our arguments," he told reporters.

Portugal's lawyer Miguel Galvão Teles was disappointed the court had not considered the merits of the case but said the decision had not condoned Australia's action.

Teles challenged Jakarta to bring the lingering dispute over East Timor before the International Court.

"We defy Indonesia to accept the court's jurisdiction and then we will deal with them," he said.

In its ruling, the U.N. court emphasised that East Timor remained a non self-governing territory and that its people retained the right to self-determination.

Legal experts said the ruling had not clarified what this right meant in practical terms.

Exiled Timorese resistance leader José Ramos-Horta said he was pleased the court had endorsed East Timor's right of autonomy but criticised Canberra.

"Successive Australian governments have betrayed the people of East Timor..." he said.

The Timor Gap treaty, on which the case centred, governs oil exploration in the 23,550 sq. mile (61,000 sq. km) stretch of sea between East Timor and Australia.

Initial drillings in the area were unsuccessful but in 1994 Australia's Broken Hill company twice struck oil there.

Australia told the court earlier this year it accepted East Timor's right of self-determination but also recognised that Indonesia exercised sovereignty over the territory.

It accused Portugal of manufacturing a case against Australia to gain a platform for its dispute with Indonesia.

The International Court, informally known as the World Court, is the UN's main legal body and resolves disputes between member states in accordance with international law.

INDONESIA, AUSTRALIA WELCOME TIMOR COURT RULING

JAKARTA, June 30 (Reuter) - Indonesia on Friday welcomed a ruling in Australia's favour by the International Court of Justice in The Hague in Canberra's dispute with Portugal over offshore oil exploration in the Timor Gap.

"We are very happy to hear that and, of course, we rejoice," a senior foreign ministry official said when told of the outcome by Reuters.

He said the ministry was waiting to hear from its embassy in the Netherlands before the government made an official comment.

Australia also welcomed the decision with Foreign Minister Gareth Evans saying it removed any possible uncertainty about Australia's exploration rights in the Timor Gap.

"The decision means that Australia will have continued access to those resources in a secure and stable environment," Evans said in a statement released in Canberra.

The court rejected Portugal's challenge to a 1989 oil treaty between Australia and Indonesia, which Lisbon said had violated East Timor's right of self-determination. The court said it lacked jurisdiction to rule on the merits of Portugal's case.

The Timor Gap is between Indonesia and Australia. Indonesia annexed East Timor in 1976 following an invasion the previous year when Portugal pulled out of its former colony.

The United Nations does not recognise Indonesia's action and regards Portugal as the administering power.

The international court said that in order to judge Portugal's case against Australia, it would first have to rule on the legality of Indonesia's action, adding that its statutes prevented this as Jakarta was not a party to the case.

Australia told the court earlier this year it recognised East Timor's right of self-determination, but also acknowledged that Indonesia exercised sovereignty over the territory.

Canberra said the treaty was valid under international law and that Portugal had challenged it only to gain a platform for its dispute with Indonesia.

ICJ RULING NO VINDICATION OF AUSTRALIAN POSITION

The Hague, June 30 AAP – The miners can breathe more easily, but in other respects Australia can take little comfort from the non-decision by the International Court of Justice on the Timor Gap Treaty.

The court, by a 14-2 majority, rejected Portugal's action against the 1989 Australian-Indonesian treaty which divides the oil and gas under a 61,000 square kilometre area of the Timor Sea between them.

But it did so only on the procedural ground that any finding would affect Indonesia, which was not involved in the case because it doesn't accept the court's jurisdiction.

If anything, its decision - especially if the dissenting judges' views are taken into account - puts the "ambiguities" of Australia's longstanding policy towards Indonesia on the question of East Timor further under the spotlight.

This was also the view of East Timorese resistance leader José Ramos-Horta.

Portugal had asked the court to declare that, in making the treaty with Indonesia, Australia had violated the rights of the East Timorese to self-determination and the rights of Portugal as the administering power.

By rejecting the application on procedural grounds, the court never expressed an opinion on these questions.

However, it did affirm the East Timorese right to self-determination, to sovereignty over its natural resources, and the universal nature of these rights.

The right to self-determination was "one of the essential principles of contemporary international law."

It also noted that Australia, during the hearing last February, had said it supported East Timor's right to self-determination.

The difficulty for Australia, as both Mr. Ramos-Horta and dissenting judge Krysztof Skubiszewski pointed out, was in reconciling this support with its de jure recognition of Indonesia's incorporation of East Timor.

Mr. Ramos-Horta told journalists after the decision that the court's endorsement of the right to self-determination was a "victory for the people of East Timor."

"Where will Australia go from here?" he asked. "Is it going to say, no we didn't mean that after all, we meant only for the court to hear us; or is it going to say because you recognise the right to self-determination, we are now going to de-recognise the annexation of East Timor by Indonesia?" Mr. Ramos-Horta said the East Timorese campaign for freedom would continue both on the ground at home and internationally.

The next phase will be when the talks between Portugal and Indonesia resume, under UN auspices, in Geneva on July 8.

Judge Skubiszewski, a Polish lawyer who was Portugal's nominee to the bench, said Australia's position was ambivalent.

He said in a separate 42-page judgment that there was a basic difficulty in reconciling Australia's recognition of Indonesian sovereignty with East Timor's non-self-governing status.

The judge criticised Australia for trying to reduce its justification for making the treaty with Indonesia to "practical" considerations. That attitude could "sap the foundation of any legal rule."

In a more general paragraph, though obviously with East Timor in mind, the judge criticised the way "realities" on the ground were allowed to blur the law.

"When it comes to unlawful use of force, one should be careful not to blur the difference between facts and law," he said. "Even in apparently hopeless situations respect for the law is called for.

"Contemporary history has shown us that, in the vast area stretching from Berlin to Vladivostok, the so-called 'realities,' which more often than not consisted of crime and lawlessness on a massive scale, proved to be less real and less permanent than many assumed.

"In matters pertaining to military invasion, decolonisation and self-determination, that peculiar brand of realism should be kept at a distance."

He said that, although Australia emphasised its commitment to East Timorese self-determination in the court, Foreign Minister Gareth Evans had adopted a narrower approach.

Speaking in the Senate while the case was in progress last February, he had reduced self-determination for East Timor to "the choice of the form of government."

The judge also said Australia should have involved Portugal and the East Timorese in the negotiations over the treaty.

The other dissenting judge, Christopher Weeramantry of Sri Lanka, who was professor of law at Melbourne's Monash University for 20 years before his appointment to the court, said the duty to respect East Timorese rights extends beyond mere recognition to a "duty to abstain from any state action which is incompatible with those rights or which would impair or nullify them."

"By this standard, Australia's action in entering into the Timor Gap Treaty may well be incompatible with the rights of the people of East Timor."

Miguel Galvao Teles, one of the Portuguese government's legal team, said the court had simply decided not to decide.

However, he was pleased the majority judgment had characterised Indonesia's actions in East Timor as an intervention.

"Intervention is necessarily illicit," he said. Nor was there anything in the judgment that could be construed as a condoning or blessing of Australia's actions.

Mr. Galvao Teles said Portugal had always known the procedural question would be difficult. It would, if it could have, brought an action against Indonesia years ago.

"We defy Indonesia to accept the court's jurisdiction so we can deal with them," he said.

The Australian team had the least to say. Ambassador to The Hague and former Justice Minister Michael Tate, who was part of the legal team, left the main talking to Senator Evans in Canberra.

"But as a legal team, we feel totally vindicated," he said.

Australian legal sources said the decision should not be regarded as narrowly technical.

By refusing to hear "the wrong case against the wrong party," the court had safeguarded its own integrity.

Australia's nominee to the court for the case, former governor-general and High Court judge Sir Ninian Stephen, signed the majority judgment.

No-one here knows how much the four-year case has cost Australia and Portugal, which each pays its own costs.

But Mr. Galvao Teles said: "It's never a waste when you support a good cause. And it brought East Timor to public attention."

EXPLOITING THE DECISION

TIMOR AND POLITICAL MARKETING

Diario de Noticias, 2 July 1995. By Fernando de Sousa. Abridged Translated from Portuguese.

The Hague – Although the ICJ did not rule in favour of the Portuguese position, Lisbon and the Timorese could exploit the conclusions of the ruling which referred to Timor's status.

The Portuguese delegation in The Hague was clearly and understandably disappointed on Friday after the ICJ declared itself incompetent to try the case of the Timor Gap.

Portuguese claims that the agreement between Indonesia and Australia on oil production in the sea of Timor is illegal will now not be followed through, and this clearly calls into question Portugal's ability to act as the territory's administering power.

However, the same court did provide some elements of great political importance

which, if cleverly put to use, could result in significant gains at forthcoming meetings with Indonesia. It was important that the ICJ reaffirmed the right to self-determination, and described the Indonesian invasion as an "intervention" which is considered illegal in the eyes of international law.

The fact that the Timorese Resistance has reacted positively to the court's ruling has also been of great help to Portugal. The communiqué released by the CNRM special representative, José Ramos Horta, makes a very clear distinction between the specific set- back for the Timor Gap case, and the significance of the Court's other statements.

In the view of Ramos Horta, what is of utmost importance are the statements in favour of self-determination. The Portuguese authorities ought to start organising a campaign, without delay, to gain the support of international public and political opinion.

Basically, Portugal should now stress the fact that the Court has recognised the Timorese people's right to self-determination. The ICJ's description of Indonesia's action as "intervention" ought to be used to counter Jakarta's arguments against Portugal's actions.

Portugal should also do its utmost to reaffirm its position as administering power in accordance with UN rulings. Considering that just next Saturday there will be another meeting between Foreign Ministers Durão Barroso and Ali Alatas, no time should be lost in getting all this campaigning work underway.

...It is important to mobilise the political potential which resulted from the inter-Timorese meeting in Austria...This meeting enabled the participants to expand on their points of view, to reach better mutual understanding, and brought to the surface areas of agreement capable of bringing Timorese together - a possibility which far from pleases Indonesia.

Diplomatic efforts on behalf of East Timor are more likely to succeed if they are supported by a consistent media strategy. This has, in fact, already started to be applied and is bearing fruit, as can be seen from the international media's growing interest in the subject. It contributes to the political wearing down of the Indonesian authorities, and enables the case of East Timor (and other cases related to different segments of Indonesia's population) to prevent Indonesia from playing a more leading role in the international political scene.

It would be to Portugal's advantage to keep up this pressure. In spite of The Hague's decision, the positive elements of the ruling must not be wasted.

A SEMI-DEFEAT

Publico, 1 July 1995. By Adelino Gomes, Abridged. Translated from Portuguese

Lisbon – It was only to be expected: they all claimed to have won in The Hague.

The decision has reassured Canberra because, as Gareth Evens publicly stated, Australia is going to continue to have access to Timor Sea oil, without any bother from Portugal.

Jakarta will be able to carry on exploiting a territory it has annexed: the International Court of Justice (ICJ) has acknowledged it was unable to judge its most reprehensible acts.

The Timorese, through the CNRM spokesperson, José Ramos Horta, claim they have won a political victory, while Lisbon has stated the result was a technical draw. Durão Barroso even went as far as to say that the ruling actually reinforced Portugal's political-diplomatic capacity.

The attitudes of the Portuguese Foreign Ministry and the Resistance are understandable, but it would be hypocritical to go along with them. They are putting too much emphasis on the judges' recognition, albeit in obscure technical legal jargon, of the illegality of Indonesia's intervention. Although it is true to say that the ICJ could have ignored this reality, it could not have refuted it, as this would have called into question resolutions passed by the General Assembly of the UN, within whose system the ICJ itself works and by whom its judges are elected.

The decision fits the diplomatic cynicism of Gareth Evans (who, it turns out, also recognises the right of the Timorese to self-determination) like a glove, and must have been celebrated with champagne in the office of Ali Alatas, who has been in need of something with which to hold back the wave of international criticism of recent months.

Although isolating the judges' considerations might be a useful tactic to employ for the Portuguese public's consumption, it does not hide the simple truth: the action brought against Australia by Portugal was rejected, and Canberra is going to be able to carry on sharing the riches of East Timor with the territory's occupier.

It will be argued that it would have been worse if the court had rejected on the basis of the substance of the problem, or that, if the action had not been brought against Australia at all, we would be here today criticising our diplomacy for lack of decisiveness.

Portugal was right to put Australia in the dock, even though Australia was not sentenced. ... Durão Barroso gave an excellent political-diplomatic lesson by immediately challenging Indonesia to accept the jurisdiction of the ICJ. It was, in the most optimistic interpretation, a semi-defeat.

COMMENTS FROM PARTIES

PORTUGUESE RESPONSE TO ICJ RULING ON TIMOR GAP

Translated from the Portuguese

Lisbon, June 30 (LUSA) - abridged - Foreign minister Durão Barroso stated today that the Portuguese position for the East Timor people had been "strengthened" by the ICJ decision.

"Our ability to proceed, from a political and diplomatic point of view, in defense of the people of East Timor, not only was not hurt by the ICJ decision but was indeed strengthened by it," said Barroso.

Barroso also encouraged Indonesia to accept the ICJ jurisdiction. "The Portuguese government will accept the ICJ decision if Indonesia declares beforehand that it also accepts it," said Barroso.

Barroso considered that "some points of the court ruling are very important and very positive" because it had recognized the righteousness of Portugal's claim that East Timor has a right to self-determination.

Barroso emphasized also that the ICJ had referred to the presence of Indonesia in East Timor as a situation of "intervention" which, the minister said, in UN language translates into "illegality."

Lisbon, June 30 (LUSA) - The secretary of the Socialist Party [the main opposition party, only slightly to the left relative to the Social-Democrats in government], Antonio Guterres, today regretted the ICJ decision, stating that it represented "a defeat of the Court itself." According to Guterres, the ICJ demonstrated that it is "unable to do justice."

EVANS: EAST TIMOR CALLED INDONESIA'S 'RUNNING SORE'

Canberra, July 1 (Reuter) – The conflict in East Timor remains Indonesia's "running sore" and the pressure continues on Jakarta to ease its grip on the former Portuguese colony, Australian Foreign Minister Gareth Evans said on Saturday.

Evans' comments followed the defeat of Portugal's attempt in the International Court of Justice to rule out an oil treaty between Indonesia and Australia because it

did not recognise East Timor's right to self-determination.

Indonesia welcomed the decision, but Evans said the court decision would not reduce the impetus for Indonesia to resolve the "continuing East Timor agony."

"We will just keep on continually plugging away and making the point that this has become a running sore internationally for Indonesia, it hasn't helped Indonesia's reputation in any way," Evans told Australian Broadcasting Corporation radio.

"There's a lot of pressure on Indonesia to come up with some kind of reconciliation package which will meet the needs and aspirations of the East Timor people for a decent lifestyle with some decent protection for human rights and a much less oppressive military presence there," Evans said. Indonesia annexed East Timor in 1976 after Portugal pulled out in 1975, and has fought an independence movement ever since.

In Jakarta, an East Timorese human-rights activist said on Saturday he believed Timorese would accept the court ruling but expressed doubt if local people would be involved in the oil exploration.

"I believe the East Timorese will accept the ruling by the International Court of Justice on Timor Gap, but it is still a question if they would be involved in the exploration at all," Clementino Dos Reis Amaral told Reuters.

Amaral is a member of a government-appointed, human-rights commission.

"Based on the experience, development projects in East Timor are carried out by people from outside the region. So it is still a question if the oil exploration would involve East Timorese," he said.

"East Timor should benefit from the exploration," he said.

TECHNICAL K.O. – DURÃO BARROSO'S CHALLENGE

Publico, 1 July 1995. By J. T. de Negreiros, Abridged Translated from Portuguese

Lisbon – In Lisbon, Durão Barroso stressed the fact that the International Court of Justice (ICJ) had recognised the right of the Timorese to self-determination, and the territory's non-autonomous status, in order to state that "our diplomatic capacity to continue, from a politico-diplomatic point of view, defending the people of East Timor has not only been unaffected by the ruling, but has actually been strengthened by it."

The Portuguese Foreign Minister, who will again be meeting with Ali Alatas and Boutros Ghali next Saturday to discuss East Timor, went on to challenge Jakarta: "The Portuguese Government will accept the ICJ's decision if Indonesia states it will also recognise its jurisdiction."

Resistance leader Ramos Horta went further in his evaluation of yesterday's ruling, stating that he was "very satisfied" with what he described as a "political victory."

The Australian and Indonesian Governments, indifferent to these views, welcomed the decision taken in The Hague. In Canberra, Foreign Minister Gareth Evens said that the ruling would allow oil production in the sea of Timor to carry on "in a safe and stable atmosphere." In Jakarta, one of Ali Alatas' colleagues told Reuters simply that: "We are very happy and, naturally, we are congratulating ourselves."

PORTUGAL'S TAKE ON WORLD COURT NON-DECISION

Excerpted from "Statement by Mr. Rui Quartin Santos, Representative of Portugal on the Question of East Timor, Delivered before the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples" New York, July 12th, 1995.

Mr. Chairman

As it is known to the distinguished members of this Special Committee, the International Court of Justice has delivered on 30 June last, its judgement over the "Case concerning East Timor (Portugal versus Australia)."

As your are also certainly aware, the Court concluded that it could not, in this case, exercise its jurisdiction, because Indonesia, not accepting the mandatory jurisdiction of the Court, was absent from the proceedings. And since the Court decided that the rule on the merit of the case would necessarily imply to rule on the lawfulness of Indonesia's conduct regarding East Timor, the latter's absence lead to the Court's declining to exercise its jurisdiction.

It should be thus pointed out that the Court's decision was taken on purely procedural grounds due to the reason I have just referred to. There was no judgement on Portugal's claims and therefore no conclusion on the lawfulness of Australia's action in negotiating, concluding and implementing the so-called "Timor Gap agreement" with Indonesia.

But it should be also recalled that the ICJ did not fail to recognise that Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from the United Nations practice, has an "erga omnes" character is "irreproachable." And the Court also recognised that "the General Assembly, which reserves to itself the right to determine the territories which have to be referred as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated the East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect "for the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV) - (v. paragraph 31 of the judgement).

Even though the Court did not wish to rule on Indonesia's conduct towards East Timor, due to its absence, it mentioned "the intervention of the armed forces of Indonesia in the territory" (v. paragraph 14 ibidem) and said also that "on 7 December 1975 the armed forces of Indonesia intervened in East Timor" (v. paragraph 13 ib.), expressions which imply the qualification of such a conduct as being against international law.

In reaction to this judgement, the Portuguese Government challenged the Government of Indonesia to accept the jurisdiction of the ICJ and to abide by its ruling over the case. This challenge has failed, however, to be positively responded to this day.

The Court's decision over this procedural point, which prevented a judgement over the substance being delivered, does not hinder the legal and political grounds over which Portugal's action to complete the decolonization of East Timor in conformity with international law and to uphold the rights of the East Timorese has been carried out, the latter's right to self-determination and the territory's non-self-governing status having been clearly recognised by the Court.

COMMENTS FROM ADVOCATES

JOSÉ RAMOS-HORTA ON ICJ'S RULING

The following statement was issued June 30 in The Hague by José Ramos-Horta, Special Representative of the CNRM:

We welcome the sentence that has just been handed down by the International Court of Justice on the case Portugal v. Australia as a victory for the people of East Timor inasmuch as the highest UN legal body has endorsed the right of the people of East Timor to self-determination.

It is well-known that the essence of the Portuguese Republic's case against Australia rested on the merits of the right of the people of East Timor to self-determination, This right is universally recognised in several UN General Assembly and Security Council resolutions. Even Australia stated during the oral proceedings that it recognises the right of the people of East Timor to self-determination.

The sentence that had just been read should be a signal to Indonesia that as much as it tries to suppress the right of the people of East Timor to self-determination, the Rule of Law will prevail.

It is also a clear sign to Australia that its hypocritical stance, pretending to be a law abiding citizen of the world while at the same time it violates one of the peremptory norms of international law, has been thoroughly exposed.

The Portuguese Republic must be commended for its integrity and courage in standing up for justice and for the right of a small nation. This 800-year old country of a brave and proud people that for centuries pioneered the sea routes opening up most of the world, was first among the European nations in the exchange of culture, has been true to its great and rich history. The East Timorese people will for ever be indebted to the Portuguese people for their friendship, support and solidarity. They were fully behind Portugal in this case and mandated the Portuguese Republic to take Australia to the world court.

Successive Australian governments have betrayed the people of East Timor and trampled upon the values of justice and freedom for all people shared by Australians. While we have only contempt to the hired guns and mercenaries in the Australian legal squad and condemn the Australian Government for its pathetic and hypocritical behaviour, we must not confuse them with the Australian people who share with the East Timorese the same notions of peace and human liberty and have been generous to us.

The ambitions of Foreign Minister Gareth Evans to be the next UN Secretary General and a Nobel Peace Prize Laureate have been severely damaged by his own arrogant and hypocritical stance over the conflict in East Timor and the human rights situation in Indonesia. We will canvass support around the world to defeat Mr. Evans' attempts to be the next UN Secretary General. In these trying times, the UN needs a Secretary- General candidate with integrity, a humble man or woman, a good listener, cool under pressure; not a volatile, unpredictable, temperamental, self-serving and arrogant politician with a pasted up book on the UN.

Significant references in International Court of Justice Decision on Portugal Vs Australia case concerning East Timor.

CNRM Special Representative, José Ramos Horta, has welcomed the sentence handed down by the International Court of Justice in The Hague on 30 June 1995 on the case Portugal Vs Australia, inasmuch as the highest UN legal body has endorsed the right of the East Timorese people to self-determination.

The ICJ decision states among others:

Par. 29: .... In the Court's view, Portugal's assertion that the right of self-determination, as it evolved in the Charter and from United Nations practice, has an 'ergo omnes' character, is irreproachable. The principle of self determination of peoples has been has been recognised by the United Nations Charter and in the jurisprudence of the Court.....

Par 31. ....For the two parties the Territory of East Timor remains a non-self-governing territory and its people has the right of self-determination. Moreover the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes the application of Chapter XI of the charter, has treated East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514(XV). .....

Par 37. The Court recalls in any event that it has taken note in the present Judgement (paragraph 31) that for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.

BCET: AUSTRALIA'S "VICTORY" PURELY PROCEDURAL

Press release, June 30

The British Coalition for East Timor is dismayed that the International Court of Justice has today decided, in a 14 to 2 vote, that it cannot rule on Portugal's case against Australia disputing the legality of the Timor Gap Treaty. At the same time, we stress that the "victory" of Australia is a purely technical matter, and that the Court insists on the right of East Timor to self-determination.

Portugal brought a case against Australia concerning the 1989 Treaty, which allows joint Australian-Indonesian oil exploration off the coast of East Timor, on the grounds that Indonesia's occupation of East Timor is illegal and has never been recognised by the United Nations.

The Court concluded that Australia's part in the treaty could not be ruled upon without a decision upon the legality of Indonesia's occupation. That decision the Court insists it is unable to make, as Indonesia does not recognise the authority of the Court in any proceeding, and that "it could not make such a determination ... in the absence of [Indonesia's] consent."

"We are, of course, disappointed in this decision," said Maggie Helwig of BCET. "It seems very ironic that a state can be exempted from judgement on the legality of its actions simply because it refuses to recognise the jurisdiction of an international court.

"Nevertheless, we are very glad to see that the World Court has continued to stress the people of East Timor have been deprived of their fundamental right to self-determination, and that they must be granted that right."

The Court's decision emphasised that the right to self-determination "is irreproachable" and that "East Timor remains a non-self-governing territory and its people has the right to self-determination."

TAPOL: JAKARTA DOES NOT DARE TO FACE WORLD COURT JURISDICTION

30 June 1995

In the wake of today's ruling of the International Court of Justice about the Timor Gap Treaty, TAPOL, the Indonesia Human Rights Campaign believes that the pro-democracy movement in Indonesia should note that the court has clearly upheld the right of the people of East Timor to self-determination, emphasising that East Timor "remains a non-self-governing territory."

It is more than likely that the Indonesian regime, trying as always to uphold its unlawful and brutal occupation of East Timor, will use the court's decision as a vindication of its position. This is totally groundless. As is clear from the ruling, Australia "won" the case purely on a technicality, not on the merits of the case, because Indonesia was not a party to the case before the court.

This is not a signal for the forces of occupation to continue to assert their "right" to play havoc with the lives of the people of East Timor. On the contrary, we have no doubt whatever that the people of East

Timor will continue to press their righteous case on the international community with renewed vigour, displaying the courage and resourcefulness that have distinguished their struggle since 1975.

As we approach the 20th anniversary of the invasion of East Timor, we in TAPOL salute the people of East Timor and assure them of our continuing support in their struggle for justice.

We also call upon the pro-democracy movement in Indonesia to confound all attempts by the Jakarta government to use the ICJ ruling as a "victory" for its position. In refusing to accept the jurisdiction of the world court, Jakarta has only drawn attention to the profound weakness of its claim, its fear of allowing the world's leading legal institution to rule on the issue of East Timor.

In face of this development, we in TAPOL stress that we will continue to expose as forcefully as we can the persistent human rights violations that have become the daily plight of the people of East Timor. We are confident that human rights and pro-democracy groups in Indonesia will take the same position, giving all possible support to the people of East Timor.

ETAN/US: WORLD COURT AVOIDS SUBSTANCE, DENIES EAST TIMOR ITS DAY IN COURT

July 1, 1995

The East Timor Action Network today condemned the failure of the World Court to rule on the substance of Portugal's case against Australia disputing the legality of the Timor Gap Treaty. However, it applauded the Court's clear statement that the people of East Timor have a right to self-determination and continue to be a non-self-governing territory.

In a 14 to 2 vote, the International Court of Justice, citing technicalities, said on June 30 that it can not rule on Portugal's case against Australia because its treaty partner, Indonesia does not recognize the jurisdiction of the World Court.

"We are very disturbed by this decision," said John M. Miller speaking for ETAN. "By refusing jurisdiction, Indonesia has allowed two thieves, itself and Australia, to profit from their crime. This oil rightfully belongs to the people of East Timor."

"Far worse than being deprived of their oil, the people of East Timor have been denied their right to self-determination. The court should have had the courage to follow through on its statement endorsing that right," said Mr. Miller.

"The court's decision clearly puts the fate of the East Timorese in the international political arena. The United States government must forcefully press Indonesia to live up to its obligations under international law and allow a UN-supervised referendum on independence," Mr. Miller continued.

The Timor Gap Treaty, signed in 1989, allows joint Australian-Indonesian oil exploration off the coast of East Timor. In its case against Australia, Portugal said that Indonesia's occupation of East Timor is illegal and has never been recognized by the United Nations. Therefore any agreement with Indonesia concerning the resources of East Timor with Indonesia is illegal.

The Court concluded it could not rule on Australia's part in the treaty without deciding on the legality of Indonesia's occupation of the island nation. Since Indonesia does not recognize the authority of the Court in any proceeding, the Court said "it could not make such a determination ... in the absence of [Indonesia's] consent."

The Court's decision emphasized that the right to self-determination "is irreproachable" and that "East Timor remains a non-self-governing territory and its people have the right to self-determination."

The United Nations Decolonization Committee will hold its annual hearing on East Timor on July 11 at UN headquarters in New York.

ETAN/US was founded following the 1991 massacre. ETAN/US supports genuine self-determination and human rights for the people of East Timor in accordance with the UN Charter and pertinent General Assembly and Security Council resolutions. ETAN/US currently has a dozen local chapters.

ACET SOLIDARITY ON ICJ NON-DECISION

AUSTRALIAN COALITION FOR A FREE EAST TIMOR

Australia-East Timor Association (NSW), Australians for a Free East Timor (NT), Campaign for an Independent East Timor (SA), Campaign for an Independent East Timor (ACT), Friends of East Timor (WA), Hobart East Timor Committee (Tas), Lismore Friends of East Timor (NSW)

Media Release 1 July 1995

TIMOR GAP TREATY IN THE WORLD COURT

- International Court of Justice finds it cannot adjudicate on the case
- Jakarta's disregard for international institutions and rule of law highlighted yet again.
- Principle of self-determination reaffirmed as essential.
- Timor Gap Treaty legality left unanswered.

Only hours ago the International Court of Justice in the Hague ended its deliberations on the case brought against Australia by Portugal, which challenged the validity of the Timor Gap Zone of Cooperation Treaty signed between Indonesia and Australia in 1989. The result, as had been anticipated for some time, was a victory for neither side. Instead, the ICJ found that on technical grounds it could not rule on the case, as Indonesia, whose actions in invading and occupying East Timor since 1975 are central to the case, refuses to recognise the jurisdiction of the Court. Significantly however, the Court is at pains to reaffirm that self-determination, for which the long-suffering people of East Timor have been fighting for decades, remains an essential principle of contemporary international law, and the finding explicitly drew attention to the numerous UN resolutions ordering Indonesia to leave East Timor - a clear message to Jakarta, whose arrogant disregard of East Timorese sovereignty and aspirations has been repeatedly condemned by the UN. Closer examination of the Court's statement in the next few days is likely to reveal this further.

The result has highlighted again Jakarta's policy of disdainful refusal to recognise the International Court of Justice. The ICJ is the world's highest legal body, created in 1945 through the UN Charter as an integral part of the United Nations in its mandate to maintain international peace and security. But for Jakarta, it seems, international justice is purely optional.

For the Australian Government, which has staunchly defended the Treaty, the result will be of little use in assuaging mounting domestic and international criticism of Australia's role in signing the Treaty, as well as assisting Jakarta both diplomatically and through military training. Such criticism has included previous UN Secretary-General Perez de Cuellar, who made it known in a public forum in Brunei in September 1993 that Australia's entry into the Treaty had significantly clouded a solution to the problem of East Timor. The Australian government will be painfully aware that the ICJ finding has in no way confirmed the legality of the Timor Gap Treaty, which remains extremely questionable.

The Treaty can be seen to quite clearly violate accepted principles of international law. For example, its basic foundation, Australian de jure recognition of an Indonesian sovereignty over East Timor, clearly contradicts the Declaration on Principles of Inter-

national Law Concerning Friendly Relations, a vitally important resolution adopted by the General Assembly in 1970, as part of a process of clarification of articles of the UN Charter. Australia was a co-sponsor of this resolution, which states:

"The territory of a state shall not be subject to acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from threat or use of force shall be recognised."

Similarly, the 1984 UN Conference that adopted the Law of the Sea Treaty resolved that in the case of dependent territories, such as East Timor, the sea area is in effect a trust that is to be held until the people themselves become independent. The ICJ decision has explicitly reaffirmed East Timor's status as a non-self-governing territory.

None of these fundamental flaws in the Treaty were able to be addressed or clarified through the current case, due to Jakarta's refusal to face international legal scrutiny, an intransigence fully supported by the Australian government.

The avoidance of the central issues of the case on technical grounds, which was Australia's aim, may well come back to haunt the Australian government. Having failed to establish the Treaty's legality will leave the ongoing oil exploration in the Timor Gap under a cloud of uncertainty, particularly in the current international climate of increasing hostility to Indonesia's illegal occupation of East Timor.

So desperate is Canberra to remain on side with the Indonesian Generals that Senator Evans has recently even attacked Australia's erstwhile ally, the United States, for talking too loudly on human rights in East Timor. The US, once a major diplomatic and military supporter of Indonesia's occupation of East Timor, suspended the sale of light arms and the provision of training to Indonesia following the 1991 Dili massacre. Evans will be extremely disturbed by a report released yesterday by the respected US magazine, The Nation, that Admiral Richard Macke, the Commander in Chief of US armed forces in the Pacific has privately told US Congressional officials that Indonesia should withdraw its troops from occupied East Timor and allow the Timorese to hold a UN-supervised referendum to determine their own political future.

The ICJ, as a result of Indonesian refusal to accept the jurisdiction of the UN body, has been unable to adjudicate on the legality or otherwise of the Timor Gap Treaty. It has not found in Australia's favour. The case has highlighted the need to bring Jakarta to account internationally, not only in the diplomatic capitals and peak bodies, but on the ground in East Timor, where the presence of UN observers and specialised agencies is vitally needed. For Australia, the case leaves the Government embarrassed, as it has failed to establish the Treaty as legal, and in the process has exposed itself to unprecedented levels of international and domestic attention on its shameful role in the ongoing international crime taking place in East Timor.

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A DIFFERENT VIEW

From: Arif Havas <ARIF.HAVAS@ITU.CH>

[I have been unable to verify this poster's address or identity. Draw your own conclusions as to the source of the message.

– John (apakabar@clark.net)]

ANALYSIS OF THE REASONING OF THE JUDGEMENT OF ICJ ON TIMOR GAP AND STATEMENTS MADE BY RAMOS HORTA, EAST TIMOR ACTION NETWORK ON THE JUDGEMENT

Note : The following quotation of the judgement is derived from the International Court of Justice communiqué nos.95/19 & 95/19bis 30 June 1995. The address of International Court of Justice is Peace Palace, 2517 KJ The Hague. Tel. 070.302.23.23 Fax. 070.364.99.28.

1. The part of the reasoning of the judgement reads:

The Court takes note of the fact that, for the two parties, the territory of East Timor remains a non-self governing territory and its people has the right to self-determination, and that the express reference to Portugal as the "administering power" in a number of the above/mentioned resolutions is not at issue between them. The Court finds, however, that it cannot be inferred from the sole fact that a number resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as a "givens" which constitute a sufficient basis for determining the dispute between the Parties."

1. In its conclusion, the Court, inter alia, states:

"The Court recalls in any event that it has taken note in the judgement that, for the two parties, the Territory of East Timor remains a non-self governing territory and its people has the right to self-determination."

2. Part of Ramos Horta statement reads:

"We welcome the sentence that has just been handed down by the International Court of Justice on the case Portugal Vs Australia as a victory for the people of East Timor inasmuch as the highest UN legal body has endorsed the right of people of East Timor to self-determination."

3. Part of East Timor Action Network statement reads:

..".the Court's clear statement that the people of East Timor have a right to self-determination and continue to be a non-self-governing territory. ... The Court should have had the courage to follow through on its statement endorsing that right. ... The Court's decision emphasized that the right to self-determination "is irreproachable" and that "East Timor remains a non-self governing territory and its people has the right to self-determination."

4. Analysis:

a. On 30 June 1995, ICJ rendered a JUDGEMENT not SENTENCE as stated by Horta. The word "sentence" is confined to criminal proceeding only. (please consult BLACK'S LAW). The choice of using "sentence," therefore, is outrightly wrong. Such might be originated from ignorance, ill-advised thought, lack of knowledge, wrong translation or another ulterior motive.

b. As quoted, the Court states that ..". Takes note of the fact that, for the two Parties, ... East Timor remains a non-self governing territory and its people has the right to self-determination...." This sentence has no other meaning than simply the fact that the Court only TAKES NOTE on what THE TWO PARTIES (PORTUGAL AND AUSTRALIA) think. Clearly, there is no ENDORSEMENT on the part of ICJ on the issue of non-self governing territory. ICJ did not state "THE COURT ENDORSES..." nor "THE COURT BELIEVES..."

To make things even clearer, the Court restates that position of non-endorsing or position of hey-guys-I'm-just-taking-note in its part of conclusion :"The Court recalls in any event that it has TAKEN NOTE that in the Judgement that, FOR THE TWO PARTIES..." This only reaffirms the Court firm position that IT DOES NOT DO ANYTHING MORE THAN JUST

TAKING NOTE. THERE IS NO SUCH THING LIKE ENDORSING OR ANYTHING THAT COULD EVEN BE REMOTELY INTERPRETED BY SANE HUMAN BEING AS ENDORSING.

c. Nonetheless, Ramos Horta states that "the highest UN legal body has endorsed the right of the people of East Timor to self-determination." East Timor Action Network has done pretty much the same. TAPOL and British Coalition for East Timor are also mimicking Horta. One may wonder why. The reasons are probably simple. They are either ignorance or being offensive by twisting the facts that clearly and squarely are not in their favor. They wanted to create an opinion first, before the long and boring legal judgement is out in the circulation. Or else. If you ever see "A Few Good Man," you would see that Tom Cruise mentions this :..". galactically stupid ...." I, of course, never suggest that these people are GALACTICALLY STUPID, but you never know.

d. The Court's clear position NOT TO ENDORSE anything that was claimed by Ramos Horta and his ilk is consistent with the thought that follows the sentence of JUST TAKING NOTE. The Court says:

"The Court finds, however, that it cannot be inferred from ... resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power ... that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor."

The word "however" is used with clear intention. The Choice of using "however" basically says that after TAKING NOTE, the Court then wants to introduce its position namely that the Court REJECTS the Portuguese assertion that it has every right endowed by the GA and SC resolutions. It further REJECTS the very claim of Portugal as the administering Power of East Timor. This constitutes nothing but a major blow to its long-standing (and only) argument. It is indeed a major blow for the basis as well as the content of the Portuguese position is severely damaged by the highest UN legal body, the very body that Portugal has accepted its jurisdiction.

Another study on the compliance of Portugal towards that Judgement, especially on the part that clearly states the ICJ's non-recognition to Portugal as administering Power of East Timor shall be soon conducted.

e. Another line of reasoning that further reaffirm the Court's position of non-recognition to Portugal's claim as administering Power is: "Without prejudice to the question whether the resolutions under discussion could be binding in nature ...." This clause reveals the fact that the Court has not even the inclination to consider whether all of GA and SC resolutions on East Timor are legally binding.

The following clause that says ..". the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between Parties." provides further that the Court rejects that those resolutions are the only basis for determining the merit of the case. If the Court ever views that those resolutions are not legally binding, the whole Portuguese position will inevitably collapse.

f. Finally, reality indeed bites and that is why Ramos Horta and his ilks seem to have taken a counter-balance tactic. Their attempt to twist the fact, a glaring fact that ICJ did not endorse anything that they claimed is not only repulsive but also rather moronic.

5. In the same statement, Ramos Horta also mentions:

> "The people of East Timor will for ever be indebted to the Portuguese people for their friendship, support and solidarity, and were fully behind Portugal in this case and mandated the Portuguese Republic to take Australia to the world court."

I just could not stop wondering which kind or may be what kind of East Timorese who were colonized and bled for 450 years and left bleeding by their colonial masters in the most irresponsible manner but still felt oblige to thank their colonial masters for the so called friendship, support and solidarity.

Now, I understand what neo-colonialism actually means.

COMMENT FROM EXPERTS

IAIN SCOBBIE: A VERY POSITIVE RULING

Comments by Dr. Iain Scobbie, Senior lecturer in International Law, Law School, University of Glasgow

30 June 1995

The International Court of Justice (ICJ) decision in the East Timor case is encouraging. Although the court refused to entertain the case on a technical procedural point, it made a clear substantive ruling on the essential point - that the East Timorese People has a right to self determination.

Given that it decided that the case could not proceed to merits because of Indonesian interests, this ruling on self determination was strictly unnecessary. That the court chose to declare that East Timor has not accomplished self determination demonstrates that the court desired to place this on record as a judicial determination after hearing full argument on the point.

Moreover the terms of the ruling are striking. Self determination is described as a right ERGA OMNES - that is binding on all states. This indicates that the court's determination extends to Indonesia. Although the court decided in favour of Australia, this ruling endorses the key point of the Portuguese argument.

In essence, although Australia can claim that it won the case, it lost on this crucial human rights question. The judgement will also give guidance to UN Human Rights bodies in dealing with East Timor. The judgement is positive and a cause for some celebration.

THE ICJ DECISION - A PYRRHIC VICTORY

by James Dunn

There is something unseemly, even distasteful, about Senator Evan's triumphant reaction to last Friday's decision by the International Court of Justice on the Timor Gap Treaty. In doing so he misrepresented the real meaning of the Court's decision. It did not endorse the conclusion of this Treaty, which in effect neatly handed over to Indonesia resources rightly belonging to East Timor. Essentially the ICJ finding was that it could not pass judgement on a treaty involving Indonesia, simply because that country refuses to accept its jurisdiction.

In short the Court has declared that it is powerless to pass judgement on the principles at stake in the concluding of the Timor Gap Treaty. There is, however, a positive message in the way it deliberately drew attention to the fact that East Timor remains a "non-self-governing territory" whose people have yet to exercise their right to self-determination. In effect the Court was denying Indonesia's claim to have legally integrated the territory which, it could be argued, implicitly questions the legal integrity of the Treaty.

After having avoided use of the term for some time Senator Evans is now at pains to point out that his government also acknowledges the Timorese right to self-determination, despite its formal (de jure) recognition of Indonesia's integration of the territory. But this is surely a totally contradictory formula which the Government is now using to keep its feet in both camps, as it were. In short Australia cannot recognise East Timor as legally a part of Indonesia and, in the same breath, claim that the Timorese have the right not to be part of Indonesia.

This issue was in fact included in Australia's case before the ICJ, where eminent Australian counsel argued that this country has long supported East Timor's right to self-determination, including back in 1975, when the territory was seized by Indonesia. In practice it was a sheer nonsense, a patently and cynically false way of embellishing our irresponsible past. True, we did mention the word occasionally in the mid-seventies for the sake of diplomatic correctness, but the real thrust of the policies of both the Whitlam and Fraser governments was to encourage the Suharto Government's position that East Timor should become part of Indonesia and, once the territory had been invaded, to encourage other countries to come to terms with integration, and not to get too upset over its ugly realities. The real thrust of Australian diplomacy in the seventies was therefore to discourage other members of the international community from challenging Jakarta's aggression, and to avoid giving credibility to the reports of gross human rights abuses that were emerging from East Timor at the time.

When the Hawke Government came into office Bill Hayden (then Foreign Minister), and later Gareth Evans, had opportunities to change direction from the shameful compliance of previous governments, but they too succumbed to a kind of cynical opportunism which led to the conclusion of a treaty that in effect disinherited the people of East Timor of their most valuable economic resource, to the great profit of the aggressors. The ICJ decision may delight the oil industry and their political sponsors, but we have nothing to celebrate. The failure of the ICJ to address a deplorable injustice to the people of East Timor is to do with the limitations of its mandate and not with the justice of the matter.

TEXT OF OPINION

TEXT OF WORLD COURT DECISION

From Australia Dept. of Foreign Affairs & Trade Web site: http://www.dpie.gov.au/dfat/ild/icjdir.html

INTERNATIONAL COURT OF JUSTICE

General List No. 84 30 June 1995

CASE CONCERNING EAST TIMOR
(PORTUGAL v. AUSTRALIA)

TREATY OF 1989 BETWEEN AUSTRALIA AND INDONESIA CONCERNING THE "TIMOR GAP"

Objection that there exists in reality no dispute between the Parties - Disagreement between the Parties on the law and on the facts - Existence of a legal dispute.

Objection that the Application would require the Court to determine the rights and obligations of a third State in the absence of the consent of that State - Case of the Monetary Gold Removed from Rome in 1943 - Question whether the Respondent's objective conduct is separable from the conduct of a third State.

Right of peoples to self-determination as right erga omnes and essential principle of contemporary international law - Difference between erga omnes character of a norm and rule of consent to jurisdiction.

Question whether resolutions of the General Assembly and of the Security Council constitute "givens" on the content of which the Court would not have to decide de novo.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.

Rights and obligations of a third State constituting the very subject matter of the decision requested -

The Court cannot exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate on the dispute referred to it by the Application.

JUDGMENT

Present: President BEDJAOUI; Vice-President SCHWEBEL; Judges ODA, Sir Robert JENNINGS, GUILLAUME, SHAHABUDDEEN, AGUILAR-MAWDSLEY, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN; Judges ad hoc Sir Ninian STEPHEN, SKUBISZEWSKI; Registrar VALENCIA-OSPINA.

In the case concerning East Timor,

between

the Portuguese Republic, represented by

- H.E. Mr. Antonio Cascais, Ambassador of the Portuguese Republic to the Netherlands, as Agent;
- Mr. José Manuel Servulo Correia, Professor in the Faculty of Law of the University of Lisbon and Member of the Portuguese Bar,
- Mr. Miguel Galvão Teles, Member of the Portuguese Bar, as Co-Agents, Counsel and Advocates;
- Mr. Pierre-Marie Dupuy, Professor at the University of Paris II (Panthe-Assas) and Director of the Institut des hautes Etudes internationales of Paris,
- Mrs. Rosalyn Higgins, Q.C., Professor of International Law in the University of London, as Counsel and Advocates;
- Mr. Rui Quartin Santos, Minister Plenipotentiary, Ministry of Foreign Affairs, Lisbon,
- Mr. Francisco Ribeiro Telles, First Embassy Secretary, Ministry of Foreign Affairs, Lisbon, as Advisers;
- Mr. Richard Meese, Advocate, Partner in Frère Cholmeley, Paris,
- Mr. Paulo Canelas de Castro, Assistant in the Faculty of Law of the University of Coimbra,
- Mrs. Luisa Duarte, Assistant in the Faculty of Law of the University of Lisbon,
- Mr. Paulo Otero, Assistant in the Faculty of Law of the University of Lisbon,
- Mr. Iain Scobbie, Lecturer in Law in the Faculty of Law of the University of Dundee, Scotland,
- Miss Sasha Stepan, Squire, Sanders & Dempsey, Counsellors at Law, Prague, as Counsel;
- Mr. Fernando Figueirinhas, First Secretary, Portuguese Embassy in the Netherlands, as Secretary,

and

the Commonwealth of Australia, represented by

- Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, as Agent and Counsel;
- H.E. Mr. Michael Tate, Ambassador of Australia to the Netherlands, former Minister of Justice,
- Mr. Henry Burmester, Principal International Law Counsel, Office of International Law, Attorney-General's Department, as Co-Agents and Counsel;
- Mr. Derek W. Bowett, Q.C., Whewell Professor emeritus, University of Cambridge,
- Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,
- Mr. Alain Pellet, Professor of International Law, University of Paris X-Nanterre and Institute of Political Studies, Paris,
- Mr. Christopher Staker, Counsel assisting the Solicitor-General of Australia, as Counsel;

- Mr. Christopher Lamb, Legal Adviser, Australian Department of Foreign Affairs and Trade,
- Ms. Cate Steains, Second Secretary, Australian Embassy in the Netherlands,
- Mr. Jean-Marc Thouvenin, Head Lecturer, University of Maine and Institute of Political Studies, Paris, as Advisers,

THE COURT, composed as above, after deliberation, delivers the following Judgment:

1. On 22 February 1991, the Ambassador to the Netherlands of the Portuguese Republic (hereinafter referred to as "Portugal") filed in the Registry of the Court an Application instituting proceedings against the Commonwealth of Australia (hereinafter referred to as "Australia") concerning "certain activities of Australia with respect to East Timor." According to the Application Australia had, by its conduct, "failed to observe ... the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] ... and ... the right of the people of East Timor to self-determination and the related rights." In consequence, according to the Application, Australia had "incurred international responsibility vis-à-vis both the people of East Timor and Portugal." As the basis for the jurisdiction of the Court, the Application refers to the declarations by which the two States have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute.

2. In accordance with Article 40, paragraph 2, of the Statute, the Application was communicated forthwith to the Australian Government by the Registrar; and, in accordance with paragraph 3 of the same Article, all the other States entitled to appear before the Court were notified by the Registrar of the Application.

3. By an Order dated 3 May 1991, the President of the Court fixed 18 November 1991 as the time-limit for filing the Memorial of Portugal and 1 June 1992 as the time-limit for filing the Counter-Memorial of Australia, and those pleadings were duly filed within the time-limits so fixed.

4. In its Counter-Memorial, Australia raised questions concerning the jurisdiction of the Court and the admissibility of the Application. In the course of a meeting held by the President of the Court on 1 June 1992 with the Agents of the Parties, pursuant to Article 31 of the Rules of Court, the Agents agreed that these questions were inextricably linked to the merits and that they should therefore be heard and determined within the framework of the merits.

5. By an Order dated 19 June 1992, the Court, taking into account the agreement of the Parties in this respect, authorized the filing of a Reply by Portugal and of a Rejoinder by Australia, and fixed 1 December 1992 and 1 June 1993 respectively as the time-limits for the filing of those pleadings. The Reply was duly filed within the time-limit so fixed. By an Order of 19 May 1993, the President of the Court, at the request of Australia, extended to 1 July 1993 the time-limit for the filing of the Rejoinder. This pleading was filed on 5 July 1993. Pursuant to Article 44, paragraph 3, of its Rules, having given the other Party an opportunity to state its views, the Court considered this filing as valid.

6. Since the Court included upon the Bench no judge of the nationality of either of the Parties, each Party proceeded to exercise the right conferred by Article 31, paragraph 3, of the Statute to choose a judge ad hoc to sit in the case; Portugal chose Mr. Antonio de Arruda Ferrer-Correia and Australia Sir Ninian Martin Stephen. By a letter dated 30 June 1994, Mr. Ferrer-Correia informed the President of the Court that he was no longer able to sit, and, by a letter of 14 July 1994, the Agent of Portugal informed the Court that its Government had chosen Mr. Krzysztof Jan Skubiszewski to replace him.

7. In accordance with Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that the pleadings and annexed documents should be made accessible to the public from the date of the opening of the oral proceedings.

8. Between 30 January and 16 February 1995, public hearings were held in the course of which the Court heard oral arguments and replies by the following:

For Portugal:
- H.E. Mr. Antonio Cascais,
- Mr. José Manuel Servulo Correia,
- Mr. Miguel Galvão Teles,
- Mr. Pierre-Marie Dupuy,
- Mrs. Rosalyn Higgins, Q.C.
- For Australia:
- Mr. Gavan Griffith, Q.C.,
- H.E. Mr. Michael Tate,
- Mr. James Crawford,
- Mr. Alain Pellet,
- Mr. Henry Burmester,
- Mr. Derek W. Bowett, Q.C.,
- Mr. Christopher Staker.

9. During the oral proceedings, each of the Parties, referring to Article 56, paragraph 4, of the Rules of Court, presented documents not previously produced. Portugal objected to the presentation of one of these by Australia, on the ground that the document concerned was not "part of a publication readily available" within the meaning of that provision. Having ascertained Australia's views, the Court examined the question and informed the Parties that it had decided not to admit the document to the record in the case.

10. The Parties presented submissions in each of their written pleadings; in the course of the oral proceedings, the following final submissions were presented:

On behalf of Portugal, at the hearing on 13 February 1995 (afternoon):

"Having regard to the facts and points of law set forth, Portugal has the honour to

- Ask the Court to dismiss the objections raised by Australia and to adjudge and declare that it has jurisdiction to deal with the Application of Portugal and Application is admissible, and

- Request that it may please the Court:

(1) To adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources and, secondly, the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia, which is under an obligation not to disregard them, but to respect them.

(2) To adjudge and declare that Australia, inasmuch as in the first place it has negotiated, concluded and initiated performance of the Agreement of 11 December 1989, has taken internal legislative measures for the application thereof, and is continuing to negotiate, with the State party to that Agreement, the delimitation of the continental shelf in the area of the Timor Gap; and inasmuch as it has furthermore excluded any negotiation with the administering Power with respect to the exploration and exploitation of the continental shelf in that same area; and, finally, inasmuch as it contemplates exploring and exploiting the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party (each of these facts sufficing on its own):

(a) has infringed and is infringing the right of the people of East Timor to self-determination, to territorial integrity and unity and its permanent sovereignty over its natural wealth and resources, and is in breach of the obligation not to disregard but to respect that right, that integrity and that sovereignty;

(b) has infringed and is infringing the powers of Portugal as the administering Power of the Territory of East Timor, is impeding the fulfilment of its duties to the people of East Timor and to the international community, is infringing the right of Portugal to fulfil its responsibilities and is in breach of the obligation not to disregard but to respect those powers and duties and that right;

(c) is contravening Security Council resolutions 384 and 389 and is in breach

of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations;

(3) To adjudge and declare that, inasmuch as it has excluded and is excluding any negotiation with Portugal as the administering Power of the Territory of East Timor, with respect to the exploration and exploitation of the continental shelf in the area of the Timor Gap, Australia has failed and is failing in its duty to negotiate in order to harmonize the respective rights in the event of a conflict of rights or of claims over maritime areas.

(4) To adjudge and declare that, by the breaches indicated in paragraphs 2 and 3 of the present submissions, Australia has incurred international responsibility and has caused damage, for which it owes reparation to the people of East Timor and to Portugal, in such form and manner as may be indicated by the Court, given the nature of the obligations breached.

(5) To adjudge and declare that Australia is bound, in relation to the people of East Timor, to Portugal and to the international community, to cease from all breaches of the rights and international norms referred to in paragraphs 1, 2 and 3 of the present submissions and in particular, until such time as the people of East Timor shall have exercised its right to self-determination, under the conditions laid down by the United Nations:

(a) to refrain from any negotiation, signature or ratification of any agreement with a State other than the administering Power concerning the delimitation, and the exploration and exploitation, of the continental shelf, or the exercise of jurisdiction over that shelf, in the area of the Timor Gap;

(b) to refrain from any act relating to the exploration and exploitation of the continental shelf in the area of the Timor Gap or to the exercise of jurisdiction over that shelf, on the basis of any plurilateral title to which Portugal, as the administering Power of the Territory of East Timor, is not a party";

On behalf of Australia, at the hearing on 16 February 1995 (afternoon):

"The Government of Australia submits that, for all the reasons given by it in the written and oral pleadings, the Court should:

(a) adjudge and declare that the Court lacks jurisdiction to decide the Portuguese claims or that the Portuguese claims are inadmissible; or

(b) alternatively, adjudge and declare that the actions of Australia invoked by Portugal do not give rise to any breach by Australia of rights under international law asserted by Portugal."

11. The Territory of East Timor corresponds to the eastern part of the island of Timor; it includes the island of Atauro, 25 kilometres to the north, the islet of Jaco to the east, and the enclave of OE-Cusse in the western part of the island of Timor. Its capital is Dili, situated on its north coast. The south coast of East Timor lies opposite the north coast of Australia, the distance between them being approximately 430 kilometres. In the sixteenth century, East Timor became a colony of Portugal; Portugal remained there until 1975. The western part of the island came under Dutch rule and later became part of independent Indonesia.

12. In resolution 1542 (XV) of 15 December 1960 the United Nations General Assembly recalled "differences of views ... concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as 'overseas provinces' of the metropolitan State concerned"; and it also stated that it considered that the territories under the administration of Portugal, which were listed therein (including "Timor and dependencies") were non-self-governing territories within the meaning of Chapter XI of the Charter. Portugal, in the wake of its "Carnation Revolution," accepted this position in 1974.

13. Following internal disturbances in East Timor, on 27 August 1975 the Portuguese civil and military authorities withdrew from the mainland of East Timor to the island of Atauro. On 7 December 1975 the armed forces of Indonesia intervened in East Timor. On 8 December 1975 the Portuguese authorities departed from the island of Atauro, and thus left East Timor altogether. Since their departure, Indonesia has occupied the Territory, and the Parties acknowledge that the Territory has remained under the effective control of that State. Asserting that on 31 May 1976 the people of East Timor had requested Indonesia "to accept East Timor as an integral part of the Republic of Indonesia," on 17 July 1976 Indonesia enacted a law incorporating the Territory as part of its national territory.

14. Following the intervention of the armed forces of Indonesia in the Territory and the withdrawal of the Portuguese authorities, the question of East Timor became the subject of two resolutions of the Security Council and of eight resolutions of the General Assembly, namely, Security Council resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976, and General Assembly resolutions 3485 (XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1977, 33/39 of 13 December 1978, 34/40 of 21 November 1979, 35/27 of 11 November 1980, 36/50 of 24 November 1981 and 37/30 of 23 November 1982.

15. Security Council resolution 384 (1975) of 22 December 1975 called upon "all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination"; called upon "the Government of Indonesia to withdraw without delay all its forces from the Territory"; and further called upon

> "the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination."

Security Council resolution 389 (1976) of 22 April 1976 adopted the same terms with regard to the right of the people of East Timor to self-determination; called upon "the Government of Indonesia to withdraw without further delay all its forces from the Territory"; and further called upon "all States and other parties concerned to co-operate fully with the United Nations to achieve a peaceful solution to the existing situation ...."

General Assembly resolution 3485 (XXX) of 12 December 1975 referred to Portugal "as the administering Power"; called upon it "to continue to make every effort to find a solution by peaceful means"; and "strongly deplore[d] the military intervention of the armed forces of Indonesia in Portuguese Timor." In resolution 31/53 of 1 December 1976, and again in resolution 32/34 of 28 November 1977, the General Assembly rejected

> "the claim that East Timor has been incorporated into Indonesia, inasmuch as the people of the Territory have not been able freely to exercise their right to self-determination and independence."

Security Council resolution 389 (1976) of 22 April 1976 and General Assembly resolutions 31/53 of 1 December 1976, 32/34 of 28 November 1977 and 33/39 of 13 December 1978 made no reference to Portugal as the administering Power. Portugal is so described, however, in Security Council resolution 384 (1975) of 22 December 1975 and in the other resolutions of the General Assembly. Also, those resolutions which did not specifically refer to Portugal as the administering Power recalled another resolution or other resolutions which so referred to it.

16. No further resolutions on the question of East Timor have been passed by the Security Council since 1976 or by the General Assembly since 1982. However, the Assembly has maintained the item on its agenda since 1982, while deciding at each session, on the recommendation of its General Committee, to defer consideration of it until the following session. East Timor also continues to be included in the list of non-self-governing territories within the meaning of Chapter XI of the Charter; and the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples remains seized of the question of East Timor. The Secretary-General of the United Nations is also engaged in a continuing effort, in consultation with all parties directly concerned, to achieve a comprehensive settlement of the problem.

17. The incorporation of East Timor as part of Indonesia was recognized by Australia de facto on 20 January 1978. On that date the Australian Minister for Foreign Affairs stated: "The Government has made clear publicly its opposition to the Indonesian intervention and has made this known to the Indonesian Government." He added: "[Indonesia's] control is effective and covers all major administrative centres of the territory." And further:

> "This is a reality with which we must come to terms. Accordingly, the Government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize de facto that East Timor is part of Indonesia."

On 23 February 1978 the Minister said: "we recognize the fact that East Timor is part of Indonesia, but not the means by which this was brought about."

On 15 December 1978 the Australian Minister for Foreign Affairs declared that negotiations which were about to begin between Australia and Indonesia for the delimitation of the continental shelf between Australia and East Timor, "when they start, will signify de jure recognition by Australia of the Indonesian incorporation of East Timor"; he added: "The acceptance of this situation does not alter the opposition which the Government has consistently expressed regarding the manner of incorporation." The negotiations in question began in February 1979.

18. Prior to this, Australia and Indonesia had, in 1971-1972, established a delimitation of the continental shelf between their respective coasts; the delimitation so effected stopped short on either side of the continental shelf between the south coast of East Timor and the north coast of Australia. This undelimited part of the continental shelf was called the "Timor Gap."

The delimitation negotiations which began in February 1979 between Australia and Indonesia related to the Timor Gap; they did not come to fruition. Australia and Indonesia then turned to the possibility of establishing a provisional arrangement for the joint exploration and exploitation of the resources of an area of the continental shelf. A Treaty to this effect was eventually concluded between them on 11 December 1989, whereby a "Zone of Cooperation" was created "in an area between the Indonesian Province of East Timor and Northern Australia." Australia enacted legislation in 1990 with a view to implementing the Treaty; this law came into force in 1991.

19. In these proceedings Portugal maintains that Australia, in negotiating and concluding the 1989 Treaty, in initiating performance of the Treaty, in taking internal legislative measures for its application, and in continuing to negotiate with Indonesia, has acted unlawfully, in that it has infringed the rights of the people of East Timor to self-determination and to permanent sovereignty over its natural resources, infringed the rights of Portugal as the administering Power, and contravened Security Council resolutions 384 and 389. Australia raised objections to the jurisdiction of the Court and to the admissibility of the Application. It took the position, however, that these objections were inextricably linked to the merits and should therefore be determined within the framework of the merits. The Court heard the Parties both on the objections and on the merits. While Australia concentrated its main arguments and submissions on the objections, it also submitted that Portugal's case on the merits should be dismissed, maintaining, in particular, that its actions did not in any way disregard the rights of Portugal.

20. According to one of the objections put forward by Australia, there exists in reality no dispute between itself and Portugal. In another objection, it argued that Portugal's Application would require the Court to rule on the rights and obligations of a State which is not a party to the proceedings, namely Indonesia. According to further objections of Australia, Portugal lacks standing to bring the case, the argument being that it does not have a sufficient interest of its own to institute the proceedings, notwithstanding the references to it in some of the resolutions of the Security Council and the General Assembly as the administering Power of East Timor, and that it cannot, furthermore, claim any right to represent the people of East Timor; its claims are remote from reality, and the judgment the Court is asked to give would Court is asked to give would be without useful effect; and finally, its claims concern matters which are essentially not legal in nature which should be resolved by negotiation within the framework of on-going procedures before the political organs of the United Nations. Portugal requested the Court to dismiss all these objections.

21. The Court will now consider Australia's objection that there is in reality no dispute between itself and Portugal. Australia contends that the case as presented by Portugal is artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent is Indonesia, not Australia. Australia maintains that it is being sued in place of Indonesia. In this connection, it points out that Portugal and Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute, but that Indonesia has not.

In support of the objection, Australia contends that it recognizes, and has always recognized, the right of the people of East Timor to self-determination, the status of East Timor as a non-self-governing territory, and the fact that Portugal has been named by the United Nations as the administering Power of East Timor; that the arguments of Portugal, as well as its submissions, demonstrate that Portugal does not challenge the capacity of Australia to conclude the 1989 Treaty and that it does not contest the validity of the Treaty; and that consequently there is in reality no dispute between itself and Portugal.

Portugal, for its part, maintains that its Application defines the real and only dispute submitted to the Court.

22. The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see Mavrommatis Palestine Concessions, P.C.I.J., Series A, No. 2, p. 11; Northern Cameroons, ICJ Reports 1963, p. 27; and Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, ICJ Reports 1988, p. 27, para. 35). In order to establish the existence of a dispute, "It must be shown that the claim of one party is positively opposed by the other" (South West Africa, Preliminary Objections, ICJ Reports 1962, p. 328); and further, "whether there exists an international dispute is a matter for objective determination" (Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, ICJ Reports 1950, p. 74).

For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than

Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

On the record before the Court, it is clear that the Parties are in disagreement, both on the law and on the facts, on the question whether the conduct of Australia in negotiating, concluding and initiating performance of the 1989 Treaty was in breach of an obligation due by Australia to Portugal under international law.

Indeed, Portugal's Application limits the proceedings to these questions. There nonetheless exists a legal dispute between Portugal and Australia. This objection of Australia must therefore be dismissed.

23. The Court will now consider Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. The declarations made by the Parties under Article 36, paragraph 2, of the Statute do not include any limitation which would exclude Portugal's claims from the jurisdiction thereby conferred upon the Court. Australia, however, contends that the jurisdiction so conferred would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. Portugal agrees that if its Application required the Court to decide any of these questions, the Court could not entertain it. The Parties disagree, however, as to whether the Court is required to decide any of these questions in order to resolve the dispute referred to it.

24. Australia argues that the decision sought from the Court by Portugal would inevitably require the Court to rule on the lawfulness of the conduct of a third State, namely Indonesia, in the absence of that State's consent. In support of its argument, it cites the judgment in the case of the Monetary Gold Removed from Rome in 1943, in which the Court ruled that, in the absence of Albania's consent, it could not take any decision on the international responsibility of that State since "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (ICJ Reports 1954, p. 32).

25. In reply, Portugal contends, first, that its Application is concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia. According to Portugal, such conduct of Australia in itself constitutes a breach of its obligation to treat East Timor as a non-self-governing territory and Portugal as its administering Power; and that breach could be passed upon by the Court by itself and without passing upon the rights of Indonesia. The objective conduct of Australia, considered as such, constitutes the only violation of international law of which Portugal complains.

26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the judgment given by the Court in the case of the Monetary Gold Removed from Rome in 1943 and confirmed in several of its subsequent decisions (see Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports 1984, p. 25, para. 40; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports 1984, p. 431, para. 88; Frontier Dispute (Burkina Faso/Republic of Mali), ICJ Reports 1986, p. 579, para. 49; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), ICJ Reports 1990, pp. 114-116, paras. 54-56 and p. 112, para. 73; and Certain Phosphate Lands in Nauru, ICJ Reports 1992, pp. 259-262, paras. 50-55).

27. The Court notes that Portugal's claim that, in entering into the 1989 Treaty with Indonesia, Australia violated the obligation to respect Portugal's status as administering Power and that of East Timor as a non-self-governing territory, is based on the assertion that Portugal alone, in its capacity as administering Power, had the power to enter into the treaty on behalf of East Timor; that Australia disregarded this exclusive power, and, in so doing, violated its obligations to respect the status of Portugal and that of East Timor.

The Court also observes that Australia, for its part, rejects Portugal's claim to the exclusive power to conclude treaties on behalf of East Timor, and the very fact that it entered into the 1989 Treaty with Indonesia shows that it considered that Indonesia had that power. Australia in substance argues that even if Portugal had retained that power, on whatever basis, after withdrawing from East Timor, the possibility existed that the power could later pass to another State under general international law, and that it did so pass to Indonesia; Australia affirms moreover that, if the power in question did pass to Indonesia, it was acting in conformity with international law in entering into the 1989 Treaty with that State, and could not have violated any of the obligations Portugal attributes to it. Thus, for Australia, the fundamental question in the present case is ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia.

28. The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.

29. However, Portugal puts forward an additional argument aiming to show that the principle formulated by the Court in the case of the Monetary Gold Removed from Rome in 1943 is not applicable in the present case. It maintains, in effect, that the rights which Australia allegedly breached were rights erga omnes and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court (see Legal Consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, pp. 31-32, paras. 52-53; Western Sahara, ICJ Reports 1975, pp. 31-33, paras. 54-59); it is one of the essential principles of contemporary international law. However, the Court considers that the erga omnes character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act,

even if the right in question is a right erga omnes.

30. Portugal presents a final argument to challenge the applicability to the present case of the Court's jurisprudence in the case of the Monetary Gold Removed from Rome in 1943. It argues that the principal matters on which its claims are based, namely the status of East Timor as a non-self-governing territory and its own capacity as the administering Power of the Territory, have already been decided by the General Assembly and the Security Council, acting within their proper spheres of competence; that in order to decide on Portugal's claims, the Court might well need to interpret those decisions but would not have to decide de novo on their content and must accordingly take them as "givens"; and that consequently the Court is not required in this case to pronounce on the question of the use of force by Indonesia in East Timor or upon the lawfulness of its presence in the Territory.

Australia objects that the United Nations resolutions regarding East Timor do not say what Portugal claims they say; that the last resolution of the Security Council on East Timor goes back to 1976 and the last resolution of the General Assembly to 1982, and that Portugal takes no account of the passage of time and the developments that have taken place since then; and that the Security Council resolutions are not resolutions which are binding under Chapter VII of the Charter or otherwise and, moreover, that they are not framed in mandatory terms.

31. The Court notes that the argument of Portugal under consideration rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over the Territory and, where the latter is concerned, to deal only with Portugal. The Court is not persuaded, however, that the relevant resolutions went so far.

For the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination. Moreover, the General Assembly, which reserves to itself the right to determine the territories which have to be regarded as non-self-governing for the purposes of the application of Chapter XI of the Charter, has treated East Timor as such a territory. The competent subsidiary organs of the General Assembly have continued to treat East Timor as such to this day. Furthermore, the Security Council, in its resolutions 384 (1975) and 389 (1976) has expressly called for respect for "the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)."

Nor is it at issue between the Parties that the General Assembly has expressly referred to Portugal as the "administering Power" of East Timor in a number of the resolutions it adopted on the subject of East Timor between 1975 and 1982, and that the Security Council has done so in its resolution 384 (1975). The Parties do not agree, however, on the legal implications that flow from the reference to Portugal as the administering Power in those texts.

32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes, furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory. Finally, the Court observes that, by a letter of 15 December 1989, the Permanent Representative of Portugal to the United Nations transmitted to the Secretary-General the text of a note of protest addressed by the Portuguese

Embassy in Canberra to the Australian Department of Foreign Affairs and Trade on the occasion of the conclusion of the Treaty on 11 December 1989; that the letter of the Permanent Representative was circulated, at his request, as an official document of the forty-fifth session of the General Assembly, under the item entitled "Question of East Timor," and of the Security Council; and that no responsive action was taken either by the General Assembly or the Security Council.

Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.

33. It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a non-self-governing territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources.

34. The Court emphasises that it is not necessarily prevented from adjudicating when the judgment it is asked to give might affect the legal interests of a State which is not a party to the case. Thus, in the case of Certain Phosphate Lands in Nauru (Nauru v. Australia), it stated, inter alia, as follows:

"In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application ... In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. ... In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (ICJ Reports 1992, pp. 261-262, para. 55.)

However, in this case, the effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (Monetary Gold Removed from Rome in 1943, ICJ Reports 1954, p. 32).

35. The Court concludes that it cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent. This conclusion applies to all the claims of Portugal, for all of them raise a common question: whether the power to make treaties concerning the continental shelf resources of East Timor belongs to Portugal or Indonesia, and, therefore, whether Indonesia's entry into and continued presence in the Territory are lawful. In these circumstances, the Court does not deem it necessary to examine the other arguments derived by Australia from the non-participation of Indonesia in the case, namely the Court's lack of jurisdiction to decide on the validity of the 1989 Treaty

and the effects on Indonesia's rights under that treaty which would result from a judgment in favour of Portugal.

36. Having dismissed the first of the two objections of Australia which it has examined, but upheld its second, the Court finds that it is not required to consider Australia's other objections and that it cannot rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play.

37. The Court recalls in any event that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination.

38. For these reasons,

THE COURT,

By 14 votes to 2,

Finds that it cannot in the present case exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.

IN FAVOUR: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar-Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin; Judge ad hoc Sir Ninian Stephen;

AGAINST: Judge Weeramantry; Judge ad hoc Skubiszewski.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this thirtieth day of June, one thousand nine hundred and ninety-five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Portuguese Republic and the Government of the Commonwealth of Australia, respectively.

Mohammed BEDJAOUI, President.

Eduardo VALENCIA-OSPINA, Registrar.

Judges ODA, SHAHABUDDEEN, RANJEVA and VERESHCHETIN append separate opinions to the Judgment of the Court.

Judge WEERAMANTRY and Judge ad hoc SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

(Initialled) M. B.

(Initialled) E. V. O.

CONCURRING OPINIONS

SEPARATE OPINION OF JUDGE ODA

1. I voted in favour of the Judgment because I agreed with the Court that the Application brought by Portugal against Australia on 22 February 1991 should be dismissed, as the Court lacks jurisdiction to entertain it.

However, I am unable to subscribe to the reason given by the Court for this finding, that is, that

> "[the Court] cannot, in this case, exercise the jurisdiction it has by virtue of the declarations made by the Parties under Article 36, paragraph 2, of its Statute because, in order to decide the claims of Portugal, it would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent" (Judgment, para. 35; emphasis added.)

When it refers to the "consent" of Indonesia the Court itself seems to be uncertain as to what this "consent" of Indonesia would have meant. Would it have meant that, in order for the Court to exercise its jurisdiction, Indonesia would have had to have intervened in these proceedings or would it have meant that Indonesia would have had to have accepted that jurisdiction under Article 36(2) of the Statute?

For my part, I believe that the Court cannot adjudicate upon the Application of Portugal for the sole reason that Portugal lacked locus standi to bring against Australia this particular case concerning the continental shelf in the Timor Sea.

2. Portugal, in its Application, defined the dispute, on the one hand, as "relate[d] to the opposability to Australia:

> (a) of the duties of, and delegation of authority to, Portugal as the administering Power of the Territory of East Timor; and
>
> (b) of the right of the people of East Timor to self-determination, and the related rights (right to territorial integrity and unity and permanent sovereignty over natural wealth and resources)" (Application, para. 1). On the other hand, Australia, which did not regard Portugal as having authority over the Territory of East Timor in the late 1980's, has only been accused by Portugal in its Application of having engaged in "[the] activities ... [which] have taken the form of the negotiation and conclusion by Australia with a third State [Indonesia] of an agreement relating to the exploration and exploitation of the continental shelf in the area of the 'Timor Gap' and the negotiation, currently in progress, of the delimitation of that same shelf with that same third State [Indonesia]" (Application, para. 2; emphasis added).

3. If there had been anything for Portugal to complain about this would not have been "the opposability" to any State of either "the duties of, and delegation of authority to, Portugal as the administering Power of the Territory of East Timor," or "the right of the people of East Timor to self-determination, and the related rights" (Application, para. 1). Any complaint could only have related to Portugal's alleged title, whether as an administering Power or otherwise, to the Territory of East Timor together with the corresponding title to the area of continental shelf which would overlap with that of Australia. In this respect Portugal, in its Application, has given an incorrect definition of the dispute and seems to have overlooked the difference between the opposability to any State of its rights and duties as the administering Power or of the rights of the people of East Timor and the more basic question of whether Portugal is the State entitled to assert these rights and duties.

In particular Portugal contends, with regard to paragraph (b) in the quotation in paragraph 2 above, that the right of the people of East Timor to self-determination and the related rights guaranteed by the UN Charter to a people still under the control of a colonial State or of an administering Power for Non-Self-Governing territories should be respected by the whole international community under whichever authority and control that people may be placed. Australia has not challenged the "right of the people of East Timor to self-determination, and the related rights." The right of that people to self-determination and other related rights cannot be made an issue -and is not an issue - of the present case.

The present case relates solely to the title to the continental shelf which Portugal claims to possess as a coastal State. This point cannot be over-emphasized.

4. What, then, did Australia actually do to Portugal or the people of East Timor? It is essential to note that, in the area of the "Timor Gap," Australia has not asserted a new claim to any seabed area intruding into the area of any State or of the people of the Territory of East Timor, nor has it acquired any new seabed area from any State or from that people (see Sketch-map on page 3).

In fact, Australia's original title to the continental shelf in the "Timor Gap" cannot be challenged at all by any State or by any people. Under the contemporary rules of international law, Australia is entitled ipso

jure to its own continental shelf in the southern part of the Timor Sea - but at the same time a State which has territorial sovereignty over East Timor, and which lies opposite to Australia at a distance of roughly 250 nautical miles, has the title with respect to the continental shelf off its coast in the northern part of the "Timor Gap" (see Sketch-map: vertical hatching). How far each continental shelf extends is determined not in geographical terms but by the legal concept of the continental shelf.

The continental shelves to which both States are thus entitled overlap somewhere in the middle of the "Timor Gap." Just as in the cases contemplated by Article 6(1) of the 1958 Convention on the Continental Shelf and by Article 83(1) of the 1982 UN Convention on the Law of the Sea, Australia should have negotiated with the coastal State lying opposite to it across the Timor Sea (see Sketch-map: State X as indicated therein) and did indeed negotiate with that State with respect to the overlapping continental shelves.

5. A recital of the events which have taken place since the 1970s in relation to the delimitation of the continental shelf in the relevant areas can usefully be given at this stage.

Pursuant to the Agreement "establishing certain seabed boundaries" (UNTS, Vol. 974, p. 307), Australia and Indonesia drew a line of delimitation east of longitude 133o 23' E in the Arafura Sea on 18 May 1971 - in the area between Australia, on the one hand, and West Irian (Indonesian territory on the island of New Guinea) and Aru Island (Indonesian territory), on the other. On 9 October 1972 the same two Governments, acting under the Agreement "establishing certain seabed boundaries in the area of the Timor and Arafura seas, supplementary to the Agreement of 18 May 1971" (UNTS, Vol. 974, p. 319)(N.B. the Chart attached to this Agreement is reproduced as page 5 of this opinion), defined other lines of delimitation west of longitude 133o 23' E extending to longitude 127o 56' E in the area of the Timor and Arafura seas between Australia, on the one hand, and the Tanimbar Islands (Indonesian territory), on the other. Another line was drawn westward from longitude 126o 00' E. This latter agreement, however, left open a gap of nearly 120 nautical miles between these two lines off the coast of "Portuguese Timor" (as it is called on a chart attached to the Agreement), which was commonly known as the "Timor Gap."

At that time Portugal did not, however, attempt to negotiate with Australia on the delimitation of the continental shelf in the area thus left open for Portugal's benefit by the 1972 Agreement between Indonesia and Australia. This certainly leads one to question whether Portugal did, at that time, deem itself to be in the position of a coastal State with sovereignty over the eastern part of the island of Timor (East Timor) and whether it in fact thought that it could claim a title to the continental shelf in the "Timor Gap."

Instead of dividing the area by drawing a boundary, as in the case of the 1971/1972 Agreements with Indonesia as explained above, Australia agreed in the 1989 Treaty with Indonesia "on the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia" to constitute a "Zone of Cooperation." The content of the 1989 Treaty - what was gained and lost in the "Timor Gap" both by Australia and by the State lying opposite to it (see Sketch-map: State X as indicated therein) - cannot be disputed, as the Treaty was drawn up with the consent of the States concerned.

6. Indonesia had apparently claimed since the 1970s the status of a coastal State for the Territory of East Timor, considered to be one of its provinces (as explained in paragraph 13 below), and, as such, had negotiated with the opposite State, Australia, on the overlapping part of their respective continental shelves. On that basis, Australia concluded in 1989 a treaty with Indonesia which would remain in force for an initial 40-year term and successive terms of 20 years unless the two States agreed otherwise (Art. 33)(Annexes to the Application, p. 46). If Portugal had claimed the status of a coastal State, whether as administering Power of the Non-Self-Governing Territory or otherwise, and had thus claimed the corresponding title to the continental shelf in the northern part of the "Timor Gap" extending southward from the coast of East Timor, then Portugal could and should have initiated a dispute over that title with Indonesia which had made a similar claim. The party with which Portugal should have engaged in a dispute over the conflicting titles to the continental shelf in the northern part of the "Timor Gap" (see Sketch-map: vertical hatching) could only have been Indonesia.

A dispute could have turned on which of the two States, Indonesia or Portugal, was a coastal State located on the Territory of East Timor and thus was entitled to the continental shelf extending southwards from the coast of the Territory of East Timor, thus meeting the continental shelf of Australia in the middle of the "Timor Gap." This is the dispute in relation to which Portugal could have instituted proceedings against Indonesia on the merits. However, any issue concerning the seabed area of the "Timor Gap" could not have been the subject-matter of a dispute between Portugal and Australia unless and until such time as Portugal had been established as having the status of the coastal State entitled to the corresponding continental shelf (in other words, Portugal would have to be designated as State X, see Sketch-map).

Chart attached to the Agreement of 9 October 1972

7. If Portugal was the coastal State with a claim to the continental shelf in the "Timor Gap" (see Sketch-map: vertical hatching), then the treaty which Australia concluded with Indonesia in 1989 would certainly have been null and void from the outset. Alternatively, if Indonesia was the coastal State, and thus had a right over the relevant area of the continental shelf (see Sketch-map: vertical hatching), then Portugal quite simply had no right to bring this case. In order to do so, Portugal would have had to have been a coastal State lying opposite to Australia.

In order to entertain the Application against Australia with respect to the continental shelf in the "Timor Gap" or, more specifically, the area called the "Zone of Cooperation" which Australia claims in part, the Court needs to be convinced, as a preliminary issue, of the standing of Portugal in this case as being a coastal State with a claim to the continental shelf in the Timor Sea as of 1991, the year of the Application (see Sketch-map: State X as indicated therein).

As I repeat, an issue on which Portugal could have initiated a dispute would have been its own entitlement to the continental shelf off the coast of East Timor, but could not have related to the competence of Australia to conclude a treaty with Indonesia.

8. The present Judgment, in my view, seems to rely heavily on the jurisprudence of the Monetary Gold case (1954). That case does not seem to be relevant to the present case as the Court found in 1954 that "[t]o go into the merits of [questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy]" in a case brought by Italy against France, among other co-Respondents, "would be to decide a dispute between Italy and Albania" and that "[t]he Court cannot decide such a dispute without the consent of Albania" (ICJ Reports 1954, p. 32). In that case "Albania's legal interests would not only be affected by a [Court's] decision, but would form the very subject-matter of the decision" (ibid.).

The present case is quite different in nature. The dispute does not relate to whether Indonesia, the third State, was entitled in principle to conclude a treaty with Australia, but rather the subject-matter of the whole case relates solely to the question of whether Portugal or Indonesia, as a State

lying opposite to Australia, was entitled to the continental shelf in the "Timor Gap." This could have been the subject of a dispute between Portugal and Indonesia, but cannot be a matter in which Portugal and Australia can be seen to be in dispute with Indonesia as a State with "an interest of a legal nature which may be affected."

9. East Timor was under Portuguese control from the 16th century onwards and the Constitution of Portugal of 1933 stated that the territory of Portugal comprised East Timor in Oceania. East Timor kept the status of an overseas territory of Portugal even after the war, in contrast to Indonesia which gained its independence from the Netherlands. There is no doubt that, prior to 1974, Portugal had sovereignty over East Timor as one of its own overseas provinces and that Portugal, as the coastal State, would have had a right to the continental shelf in the seabed areas off the coast of East Timor in the Timor Sea.

10. On the other hand, the UN Charter contains a "declaration regarding Non-Self-Governing Territories" (Chapter XI) under which member States which have or assume responsibilities for the administration of the colonial territories, accept as a sacred trust the obligation to promote the well-being of the inhabitants of these territories and, to this end, to transmit regularly to the Secretary- General statistical and other information of a technical nature relating to the territories. Portugal never supplied regular information on its own colonies scattered throughout the world and was not seen to have acknowledged that those colonies had the status of Non-Self-Governing Territories under the UN system.

In 1960 the UN General Assembly, after having made the "Declaration on Decolonization" proclaiming the right of all peoples to self-determination (A/RES/1514(XV)), adopted a resolution addressed in particular to Portugal in which it considered East Timor to be a Non-Self-Governing Territory within the meaning of Chapter XI of the Charter and requested Portugal to transmit to the Secretary-General information on East Timor, among other Non-Self-Governing Territories under Portuguese control (A/RES/1542(XV)).

11. Between 1961 and 1973 the General Assembly repeatedly appealed to Portugal to comply with the decolonization policy of the UN and continued to condemn Portugal's colonial policy and its persistent refusal to carry out that UN policy. In 1963 the Security Council for its part deprecated the attitudes of the Portuguese Government and its repeated violations of the principles of the Charter, urgently calling upon Portugal to implement the decolonization policy (S/RES/180 (1963); S/RES/183 (1963)), and in 1965 once again passed a resolution deploring Portugal's failure to comply with the previous General Assembly and Security Council resolutions (S/RES/218 (1965)). In 1972, the Security Council repeated its condemnation of the persistent refusal of Portugal to implement the earlier resolutions (S/RES/312 (1972); S/RES/322 (1972)).

Portugal did not take any steps to assume the duties and responsibilities of a governing authority in relation to those territories which should have been treated as Non-Self-Governing Territories in accordance with the UN concept, and continued to regard them merely as its overseas provinces.

12. Following the "Carnation Revolution" in April 1974, the Government in Portugal was replaced by a new regime. The "Law of 27 July 1974," promulgated by the Council of State, revised the old Portuguese Constitution and acknowledged the right to self-determination - including independence - of the territories under Portuguese administration. The new Government of Portugal convened conferences on decolonization in May 1975 in Dili and in June 1975 in Macao, to which it invited the representatives of several East Timorese political groups. The "Law of 17 July 1975" relating to the decolonization of East Timor, which resulted from those conferences, was intended to put an end to the sovereignty of Portugal over East Timor in October 1978.

On the other hand Indonesia, which seems not to have sought previously to annex East Timor to its own territory and had maintained friendly relations with Portugal, appears to have begun considering the annexation of East Timor in the 1970s. In July 1975, the President of Indonesia asserted that East Timor would not be competent to attain its independence. The political group UDT, which supported the approach of the Indonesian Government, organized a coup d'état on 11 August 1975. The local government in East Timor did not receive any effective assistance from Portugal itself; its members left in August 1975 for the island of Atauro north of Timor and, in December 1975, moved away from that island and thus left the area. Portugal did not accept the request of the FRETILIN group to return to East Timor and Indonesia began to prepare for a large-scale military invasion of the territory. These developments marked the end of Portuguese rule in East Timor.

13. On 28 November 1975 the FRETILIN declared the full independence of the territory and the establishment of the Democratic Republic of East Timor. On the other hand, some other political parties, such as UDT and APODETI, which considered that it would be difficult for East Timor to maintain its independence, were willing to be annexed by Indonesia and on 30 November 1975 the representatives of those groups made a declaration of the separation of the territory from Portugal and its incorporation into Indonesia.

In early December 1975 Indonesia sent an army of 10,000 men to Dili. On 17 December 1975, the pro-Indonesian parties declared the establishment of a provisional government of East Timor in Dili. Responding to an alleged appeal from the people of East Timor, Indonesia passed a law on 15 July 1976 providing for annexation, which the President of Indonesia signed on 17 July 1976. East Timor was thus given the status of the 27th province of Indonesia. The Portuguese authorities, which had already left the island, have never returned to East Timor since that time.

14. As from the year 1974, which was marked by the change in Portuguese colonial policy under the new regime, the General Assembly continued to adopt successive resolutions on the implementation of the Declaration on Decolonization. In its 1974 resolution, the General Assembly welcomed the acceptance by the new Government of Portugal of the principle of self-determination and independence and its unqualified applicability to all the peoples under Portuguese colonial domination, calling upon Portugal to pursue the necessary steps to ensure the full implementation of the "Declaration on Decolonization" (A/RES/3294(XXIX)).

In 1975 the General Assembly, for the first time, adopted a resolution relating to East Timor in which it called upon Portugal as the administering Power to continue to make every effort to find a solution by peaceful means through talks between the Government of Portugal and the political parties representing the people of Portuguese Timor; strongly deplored the military intervention of the armed forces of Indonesia, and called upon Indonesia to desist from further violation of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forces from the Territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence (A/RES/3485(XXX)).

Further to that General Assembly resolution, the Security Council, on 22 December 1975, deplored the intervention of the armed forces of Indonesia in East Timor, regretting that the Government of Portugal was not discharging fully its responsibilities as administering Power in the territory under Chapter XI of the Charter, called upon Indonesia to withdraw all its forces from the Territory without delay, and called upon Portugal as administering Power to co-

operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination (S/RES/384 (1975)). Several months later, on 22 April 1976, the Security Council once again passed a resolution in which it did not refer to the responsibility of Portugal as the administering Power of East Timor but was only concerned with the military intervention of Indonesia in that territory (S/RES/389 (1976)) .

15. In a resolution of 1976, the General Assembly, following the same approach as the one adopted in the previous year, upheld the rights of the people of East Timor and strongly criticised the action of Indonesia (A/RES/31/53). It should be noted, however, that Indonesia's claim that East Timor should be integrated into its territory was rejected solely in order to uphold the rights of the people of East Timor but not to protect the rights and duties of the State of Portugal in relation to East Timor or the status of Portugal as the administering Power. In 1977 the General Assembly kept to the outline of the previous year's resolution (A/RES/32/34); the Government of Portugal did not feature in this resolution at all. In 1978 the General Assembly desisted from its rejection of Indonesia's claim that East Timor had been integrated. The 1978 resolution made no request for the withdrawal of the Indonesian military from East Timor, but emphasised the inalienable right of the people of East Timor to self-determination and independence, and the legitimacy of their struggle to exercise that right (A/RES/33/39). Since then the position of the General Assembly has remained the same; that is, the emphasis has been upon the relief of the people of East Timor (see A/RES/34/40, A/RES/35/27 and A/RES/36/50).

16. In 1980 the General Assembly welcomed the diplomatic initiative taken by the Government of Portugal with a view to finding a comprehensive solution to the problem of East Timor, and indicated that the General Assembly had heard the statements of the representative of Portugal (as the administering Power), the representative of Indonesia, various East Timorese petitioners and representatives of non-governmental organizations, as well as the representative of FRETILIN (A/RES/35/27).

In 1982 the General Assembly, after having heard the statements of the representatives of Portugal, Indonesia, the FRETILIN and others, requested the Secretary-General to initiate consultations with all parties directly concerned with a view to exploring avenues for achieving a comprehensive settlement of the problem (A/RES/37/30). The consultations thus requested in the 1982 resolution have not yet yielded any fruitful result.

The General Assembly has included an item on the "Question of East Timor" on the agenda of every session since 1983. However, on the recommendation of the General Committee, the General Assembly has deferred consideration of the item of East Timor to the subsequent session ever since that time. The question of East Timor may be said to be a subject which has been shelved since 1983.

17. Portugal, which was willing to grant independence to the people of East Timor under the new Constitution of 1974, has not exercised any authority over the territory ever since the local authority was forced to leave East Timor in 1975 on account of the turmoil in the island. Portugal has not, since 1974, supplied any information or statistics as required under the UN Charter and

under the 1960 "Declaration on Decolonization." The United Nations, when dealing with the problem of East Timor since 1976, has never indicated that Portugal should have the right and the duty to administer this area as a Non-Self-Governing Territory.

The authority of Indonesia has been exercised in the territory for nearly 20 years since that time. The United Nations has not given its approval to the annexation of East Timor by Indonesia. However the rejection of Indonesia's claim that East Timor should be integrated into its territory disappeared from the 1978 resolution and the demand for the withdrawal of the Indonesian army ceased to be made. The fact is that the interest of the General Assembly was directed more to humanitarian aid than to the form of administration of the territory.

18. The incident which took place in 1991 at the Santa Cruz Cemetery in Dili in East Timor was extremely serious from this very standpoint. Whether the right of the people of East Timor to self-determination has been duly respected by Indonesia may well be questioned in some other proceedings before the Court or in the different fora of the United Nations.

While the military intervention of Indonesia in East Timor and the integration of East Timor into Indonesia in the mid-1970s were not approved by the United Nations, there has not been any reason to assume that Portugal has, since the late 1970s and up to the present time, been entrusted with the rights and responsibilities of an administering Power for the Non-Self-Governing Territory of East Timor. Few States in the international community have in the recent past regarded, or at present regard, Portugal as a State located in East Timor or would maintain that as such it may lay claim to the continental shelf off the coast of East Timor.

19. Irrespective of the status of East Timor -which is still in abeyance according to the United Nations - and irrespective of the rights of the people of East Timor to self-determination guaranteed by the UN Charter, it is clear that Portugal has not been considered - at least since the early 1980s - to be a coastal State lying opposite to Australia and that in 1991, when Portugal's Application was filed in the Registry of the Court, it did not have any authority over the region of East Timor, from the coast of which the continental shelf extends southwards in the Timor Sea.

20. It follows that Portugal lacks standing as an Applicant State in this proceeding which relates to the continental shelf extending southward into the Timor Sea from the coast of East Timor in the "Timor Gap." For this reason alone, the Court does not, in my view, have jurisdiction to entertain the Application of Portugal and the Application must be dismissed.

Shigeru ODA.

SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

While the Court is to be applauded for recalling that the right of peoples to self-determination is one of the essential principles of customary international law, possessing the characteristic of an absolute right erga omnes and for upholding the Australian objection to the effect that Portugal's application would necessitate a ruling on the rights and obligations of Indonesia, it is nevertheless regrettable that this case should not have led the Court to analyze the extent and limitations of the jurisprudence in Monetary Gold. It would have been appropriate to highlight the true overall economy of the 1954 Judgment, to ensure that no doubt remained regarding questions of jurisdiction at a time when recourse to the jurisdiction of the Court is receiving growing support from the international community. The virtue of this approach would have been all the more instructive in that it could usefully have been supplemented by meticulous analysis of that State's request on the basis of a consideration of its subject-matter. Such an improvement would not have affected the operative part of the Judgment delivered by the Court in this case.

I. ANALYSIS OF THE CASE LAW IN MONETARY GOLD

The consensual nature of international jurisdiction prohibits the Court from adjudicating on the legal interests of a State which has not clearly expressed its consent to

jurisdiction. Such was the basic principle evoked by the Judgment of 1954. In the present case, was it necessary for the Court to adjudicate, as a prerequisite, by applying the jurisprudence of the Monetary Gold, on the lawfulness of Indonesia's presence in the territory of East Timor? This is the crux of the matter. The Judgment responds positively to this question by means of petitio principii, whereas it would perhaps have been preferable to ponder how far the analysis of the structure of the Court's reasoning, both in 1954 and in 1992, in the case of Certain Phosphate Lands in Nauru, justified a conclusion as to whether or not it was valid to transpose the jurisprudence of Monetary Gold.

The conclusive passage in the 1954 Judgment deserves to be recalled: "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." (ICJ Reports 1954, p. 32.)

This conclusion is explained by the logical sequence of propositions which form the structure of the Court's reasoning. The sequence of this reasoning is as follows: the reply to the question of the possible responsibility of Albania vis-à-vis Italy, the determining proposition, subsequently conditioned the possibility of the reply to the question of the definitive attribution of the Albanian Gold, the substance of the dispute. In other words, the determining proposition turned upon a question of subjective personal rights governing mutual relations between two legal entities, whereas the principal question turned upon a true objective point of law: the attribution of the gold. This being so, it was impossible for a court of a consensual nature to adjudicate upon a question of subjective rights without the consent of all the parties concerned: the relevant decision, by a constitutive act or by a declarative act, would have determined the substance of the rights and obligations governing the relations between the Parties.

On reading the conclusive paragraph of the Judgment of 1992 in the case of Certain Phosphate Lands in Nauru, one may wonder whether one is not faced with a departure from previous doctrine:

> "In the present case, a finding by the Court regarding the existence or, the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (ICJ Reports 1992, pp. 261-262.)

The problem of the 1992 Judgment turns upon a preliminary objection relating to the jus standi ut singuli of Australia as Respondent in a dispute about responsibility, in other words in the context of subjective rights. Notwithstanding the mandate or trusteeship agreements, which determined the legal situation of the relations between the three mandatory or trust powers, the Court did not find it necessary, as a prerequisite, to rule on the legal problems relating to relations between the United Kingdom, Australia and New Zealand.

To analyze these propositions, the elements pertinent to an understanding of the decision by which the Court accepts the exercise of its jurisdiction must be called to mind. To begin with, the very subject-matter of the Judgment concerns Australia's obligation to reply before the Court to the allegations that it has violated its obligations as mandatory then trust power. Secondly, as regards the actual subject-matter of the procedural rights, the act of seising the Court has the effect of imposing a general, impersonal system, in other words, a system of objective law, upon the various players involved, be they the Parties themselves or the Court; in other words, the legal ties resulting from the seisin of the Court are not contractual or subjective in nature, since the modifications proposed by the parties to a case originate in Article 101 of the Rules.

It is therefore the objective nature of the legal relations which exist between those involved in the proceedings, relations stemming from the act of seisin, which explains, in the preliminary phase, the fact that the Court did not deem it necessary to transpose the jurisprudence of the Monetary Gold, inasmuch as that jurisprudence required that a dispute implicating a State absent from the proceedings should first be settled. In the present case, the structure of the Portuguese Application presupposes that the givens of the dispute, which have given rise to an agreement of principle by the two Parties in contention, concern a question of an objective right erga omnes, namely, East Timor's acknowledged status as a non-self-governing territory and the right of the people of Timor to self determination. Hence, in logical terms, one is faced with a hypothesis which is the inverse of that envisaged in the Monetary Gold. This observation causes one to wonder whether it was adequate purely and simply to refer to the principle set out in that Judgment.

In the case of the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), moreover, did the Court not recall the intrinsic limits on the scope of the jurisprudence in Monetary Gold in the following terms? -

> "The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings." (Judgment of 26 November 1984, ICJ Reports 1984, p. 431, para. 88.)

A prior decision, in the meaning in which it is understood in the Judgment delivered in the case of the Monetary Gold would be essential, it seems to me, when the object of that prior decision is subjective rights, in other words, rights relating to the legal situation of a State which has not consented to the jurisdiction or which does not appear before the Court. Can the same principle be transposed in cases where the prior decision concerns a question of objective rights opposable erga omnes? This question can no longer be avoided since the jus cogens falls within the province of positive law. The difficulty resides in the fact that, by nature, the rules of objective law transcend the order of conventional rules and that disputes involving objective law call into question the legal interests of third States. Is the purpose of the rule of the Monetary Gold to limit the domain of the Court's jurisdiction ratione juris solely to disputes involving subjective rights? To refer without any explanation to the jurisprudence in Monetary Gold leaves too many questions open for it to satisfy the requirements of the good administration of justice, one of whose components is the foreseeability of legal decisions; this observation is all the more valid since the same results could have been obtained and reinforced on the basis of an actual analysis of Portugal's Application.

II. SUBJECT- MATTER OF PORTUGAL'S APPLICATION

In my view, a scrupulous examination of the subject-matter of Portugal's Application did not oblige the Court, as a prerequisite, to adjudicate on the lawfulness of the entry into and continued presence of Indonesia in the territory of East Timor; such an approach would also have led to the conclusion that the Court could not exercise the jurisdiction which it possesses by virtue of the acceptance by Portugal and Australia of the jurisdiction of the Court under Article 36, paragraph 2, of the Statute. Portugal is simultaneously pursuing three objectives: first, the preservation of the right of the people of East Timor to self-determination; second, the "nullification" of the obligations stipulated by Australia and Indonesia in the

1989 Treaty and, at the same time, depriving Indonesia of the benefit of the legal effects of the principle pacta sunt servanda. One is therefore faced with an Application concerning a dispute relating to questions of objective rights and subjective rights. An examination of the relations between the propositions concerning each type of right shows that the questions of objective rights are the justification for matters of subjective rights being taken into account, which must be regarded as the Applicant's principal and final conclusion. Moreover, this cause and effect relationship between the submissions of the Application calls to mind the distinction between submissions and false submissions, as highlighted by the Court in the Minquiers and Ecrehos case (Judgment of 17 November 1953, ICJ Reports 1953, p. 52).

In the present dispute, by partly but principally requiring the "nullification" of the treaty obligations entered into by Australia vis-à-vis Indonesia and thus depriving Indonesia of the benefit of the effects of the principle pacta sunt servanda, a decision of the Court would have adjudicated directly upon Indonesia's rights. Such a solution cannot be accepted in international law without there being any need, as a prerequisite, for a decision relating to the lawfulness of the entry into and continued presence of Indonesia in the territory of East Timor. Where the questions of objective rights are concerned, the Court observes that there is no longer any reason to adjudicate on that part of Portugal's submission which calls for the right of the people of East Timor to self-determination to be declared opposable to Australia. The Judgment takes note of the fact that the dispute in the relations between the two Parties on this point has been resolved during the proceedings; but in so doing, has the Court not deprived itself of the opportunity to indicate in detail the fate it intended to reserve to its jurisdiction, since a dispute arose turning upon an objective right?

On examination, the agreement of principle reached between Portugal and Australia concerning the right of the people of Timor shows the acceptance, by them, of a norm of international law, the expression of convictio juris, whose legal consequences must be deduced, both as regards the Applicant and the Respondent. In ruling that the case should be dismissed, the Judgment has refrained from adjudicating upon a dispute between the Parties which is still pending - the legal consequences of the agreement of principle concerning the right of the people of East Timor to self-determination; the Judgment should have done this by showing the need for a prior decision in order to adjudicate upon this question of objective law, which it does not do.

But could the Court, in the context of the interpretation it has given of the jurisprudence of Monetary Gold, go beyond a simple acknowledgment, in legal terms, of a situation of fact, from which it does not draw the legal consequences?

In my view, the difficulties the Court had to confront resulted from the fact that it was difficult to establish the summa divisio between the parties and the third party in an international act: Australia is the centre of gravity of the whole case. But is it realistic to consider that State as an absolute third party, falling within the residual category exterior to the circle of the Parties: Portugal vis-à-vis the 1989 Treaty and Indonesia vis-à-vis the Judgment? This approach, bearing the hallmark of realism, reveals the limitations of an [abstract and] theoretical view of the principle of the relative effect of the conventions and of res judicata.

Realism in such a tricky case should have led the Court to offer the Parties involved an appropriate legal framework for holding in check the undesirable effects of a legal act or a situation. In acting thus, the Court would not be concerned with choosing between the practical measures which the interested States or the competent organs of the United Nations can take in order to solve the more general problem of East Timor. In adjudicating on the submissions relating to the fundamental questions of procedure, the Court could have spelled out the scope of the jurisprudence relating to the prior decision in its relations with the multiple facets which have attracted the attention of the two Parties in dispute and precluded the possibilities for erroneous interpretation of the Judgment.

It was a difficult exercise but one to which a solution proved possible, inasmuch as the operative part itself did not pose any problems. But in dealing with these difficulties, the Court is laying down the framework for the development of international law and performing one of its principal functions, described by Sir Robert Jennings in the following terms:

"Ad hoc tribunals can settle particular disputes; but the function of the established 'principal judicial organ of the United Nations' must include not only the settlement of disputes but also the scientific development of general international law ... there is therefore nothing strange in the ICJ fulfilling a similar function for the international community." (Judge Sir Robert Jennings, "The Role of the International Court of Justice in the Development of International Environmental Protection Law.")

Raymond RANJEVA.

SEPARATE OPINION OF JUDGE VERESHCHETIN

While I am in agreement with the Judgment delivered by the Court, I feel obliged to deal in this opinion with one important issue which, in my view, although not addressed in the reasoning of the Judgment, also bars the Court from adjudicating upon the submissions in the Application of the Portuguese Republic.

* *

Besides Indonesia, in the absence of whose consent the Court is prevented from exercising its jurisdiction over the Application, there is another "third party" in this case, whose consent was sought neither by Portugal before filing the Application with the Court, nor by Australia before concluding the Timor Gap Treaty. Nevertheless, the applicant State has acted in this Court in the name of this "third party" and the Treaty has allegedly jeopardized its natural resources. The "third party" at issue is the people of East Timor.

Since the Judgment is silent on this matter, one might wrongly conclude that the people, whose right to self-determination lies at the core of the whole case, have no role to play in the proceedings. This is not to suggest that the Court could have placed the States Parties to the case and the people of East Timor on the same level procedurally. Clearly, only States may be parties in cases before the Court (Article 34 of the Statute of the Court). This is merely to say that the right of a people to self-determination, by definition, requires that the wishes of the people concerned at least be ascertained and taken into account by the Court.

To do so in this case the Court should have had reliable evidence on how far the Application was supported by the people of East Timor. It was especially important in the circumstances of the case, where the rights consequential to the status of Portugal as administering Power, including the right to litigate before the Court for the people of East Timor, were strongly contested by the respondent State. I have no desire whatever to cast any doubt on Portugal's good intentions in bringing the case before the Court. However, without clear evidence to the contrary, the Court cannot easily dismiss the contention that, 20 years after the loss of effective control of the Territory, Portugal is not in a position to act in the Court with full knowledge of the wishes and views of the majority of the East Timorese people.

Even under normal circumstances, the denomination of an applicant State as administering Power does not diminish the necessity for the Court to check its claims

by reference to the existing evidence of the will of the people concerned. As was observed by Portugal in the oral pleadings, the right of a people to self-determination presumes that:

> "In the concrete situation it must be looked at to see whether the interests of an administering Power (if as is usual, it is still in effective control), or any other power, really coincide with those of the people." (CR 95/13, p. 36, para. 88 (Prof. Higgins).)

This would seem to suggest that the same requirements apply a fortiori to an administering Power which for many years has not been in effective control of the territory concerned. Portugal also asserted that it represents the territory of East Timor in the domain of relations between States "in close contact with the representatives of the people of East Timor" (CR 95/12, p. 63, para. 21

(Prof. Correia)). It reproached Australia (in principle quite rightly) for not having previously "secured the approval of the peoples of the territory through their leaders" of the Treaty at issue (CR 95/13, p. 38, para. 94 (Prof. Higgins)).

After all these statements, one might have expected Portugal's Application to be substantiated by credible evidence that Portugal had itself secured the support of its Application by the East Timorese people. However, neither in the written pleadings and annexed documents, nor in the course of the oral arguments and replies, has the Court been provided with such evidence, except for cursory press references which did not even mention the object of the dispute - the Timor Gap Treaty (e.g., CR 95/12, pp. 69-70 (Prof. Correia)).

The necessity for the Court to have this evidence was only reinforced by the fact that the other Party in the dispute sought to disclaim the alleged disregard and infringement of the legal rights and interests of the people of East Timor. It argued, inter alia, that:

> "if Australia had done nothing, and refused to negotiate this agreement [the Timor Gap Treaty] with Indonesia, there would have been no chance of any exploitation of any of the disputed areas: the economic benefits to the people would have been nil" (CR 95/11, p. 42 (Prof. Bowett)).

Moreover, "[I]n Australia's view, the real situation is that East Timor will be deriving economic benefits from resources on the Australian shelf." (Ibid., p. 44.) In its Rejoinder, Australia also argues that: "The Treaty is potentially far more beneficial to the people of East Timor provided Indonesia passed on an equitable part of the benefits to the people." (P. 72, para. 160.) And that the: "Judicial recourse by Portugal against Australia is not, therefore, 'le moyen le plus effectif' by which the rights of the people of East Timor to their natural resources can be protected." (Ibid., p. 73, para. 160.)

The argument of Australia on this crucial matter for the case has also not been supported by any evidence of the previous consultation of the people of East Timor, and therefore did not sound convincing. However, since the Court, for the reasons stated in the body of the Judgment, stopped short of deciding the dispute on the merits, it could not be expected to pronounce on Australia's duty (or lack of it) to consult the East Timorese people.

The matter is quite different when it comes to Portugal's duty to consult the leaders or representatives of the people before submitting the case to the Court on its behalf. In the latter instance, the question was connected with the admissibility of the Application and remained within the framework of the preliminary jurisdictional finding of the Court. The Court should have reacted to the repeated statements by Portugal that its rights and interests in this case were only "functional" and that "the main interest in bringing the present proceedings belongs to the people of East Timor" (CR 95/6, p. 56, para. 15 (Prof. Correia)).

True, in the Western Sahara Advisory Opinion the Court noted that:

> "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory." (ICJ Reports 1975, p. 25, para. 59.)

The Court went on to say that:

> "Those instances were based either on the consideration that a certain population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances." (Ibid.)

In the instance of East Timor, however, the General Assembly has found it appropriate not "to dispense" with the requirement of consulting the inhabitants of East Timor in "exploring avenues for achieving a comprehensive settlement of the problem" (General Assembly resolution 37/30 of 23 November 1982). The Assembly required the Secretary-General "to initiate consultations with all parties directly concerned" (ibid.; emphasis added).

In accordance with this resolution, the Secretary-General has been holding consultations, not only with the Governments of Indonesia and Portugal, but "with a broad cross-section of East Timorese representing various trends of opinion" as well (doc. SG/SM/5519 of 9 Jan. 1995). Thus, in the consultations under way in the United Nations on the future of East Timor, the East Timorese people is considered as a distinct party "directly concerned," which can speak for itself through its representatives.

In contrast to the instances mentioned in the above dictum of the Court in the Western Sahara case, where the consultation of the inhabitants of a given territory "was totally unnecessary, in view of special circumstances," in the case before the Court the "special circumstances" described above dictate the necessity for the Court at least to ascertain the views of the East Timorese representatives of various trends of opinion on the subject matter of the Portuguese Application.

In the absence of direct evidence of these views, which admittedly may be difficult to obtain given the present situation in East Timor, the Court could have been provided with the opinion of the appropriate organs of the United Nations, which exercise overall supervision of the non-self-governing territories. However, the Court has not had its attention drawn to any pronouncements of the Security Council, the General Assembly, the Committee of 24 or any other organs of the United Nations which could serve as an expression of the international community's concern regarding the concrete matter under consideration in the Court. In the course of the pleadings no reference was made to any resolutions of these organs challenging the Timor Gap Treaty, or reflecting the overt discontent of the people of East Timor with that Treaty (as is the case, for instance, with the human rights situation in East Timor). This, moreover, despite the fact that the Treaty had been under negotiation for ten years, and that Portugal had informed the Secretary-General, and through him, all the Members of the United Nations of her protest on the occasion of its conclusion in 1989.

The United Nations Charter, having been adopted at the very outset of the process of decolonization, could not explicitly impose on the administering Power the obligation to consult the people of a non-self-governing territory when the matter at issue directly concerned that people. This does not mean, however, that such a duty has no place at all in international law at the present stage of its development and in the contemporary setting of the decolonization process, after the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)).

In the Western Sahara Advisory Opinion the Court states that: "in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory" (ICJ Reports 1975, p. 25, para. 59; emphasis added). By implication, it means that, as a rule, the requirement to consult does exist and only "in certain cases" may it be dispensed with. The exceptions to this rule are stated in the same dictum of the Court and, as has been shown above, they could not be held to apply in the present case. I believe that nowadays the mere denomination of a State as administering Power may not be interpreted as automatically conferring upon that State general power to take action on behalf of the people concerned, irrespective of any concrete circumstances.

In light of the above considerations, I conclude that the absence of Indonesia's consent is but one of the reasons leading to the inability of the Court to decide the dispute. The other, in my opinion, no less important, reason is the lack of any evidence as to the views of the people of East Timor, on whose behalf the Application has been filed.

Vladlen S. VERESHCHETIN.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

The case touches on important principles of contemporary international law - principles which have changed the shape of the international community, altered the composition of its leading institutions, affected their orientation, and influenced their outlook. But, the mandate of the Court being limited by the consensual nature of its jurisdiction, its decision has turned on the preliminary question how far it may adjudicate where the outcome would have consequences for the legal position of a third party. In support of the Judgment, I would add the following observations.

I. THE PRINCIPLE THAT THE COURT CANNOT EXERCISE JURISDICTION OVER A STATE WITHOUT ITS CONSENT

Reflecting a view generally held in municipal law, Article 59 of the Statute of the Court provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." But it does not follow that the Court is free to determine a dispute between parties in entire disregard of the implications of the decision for the legal position of a non-party. Under one form or another of an "indispensable parties" rule, the problem involved is solved in domestic legal systems through an appropriate exercise of the power of joinder. The Court lacks that power; and the right of intervention, or to institute separate legal proceedings where possible, is not always a sufficient safeguard. Hence, when situations arise in which the requested judgment would in fact, even though not in law, amount to a determination of the rights and obligations of a non-party, the Court is being asked to exercise jurisdiction over a State without its consent. Monetary Gold says it cannot do that.

That precedent has given rise to questions[1]. In a fundamental sense the questions stem from the fact that, as was remarked by Judge Jessup, "Law is constantly balancing conflicting interests" (Barcelona Traction, Light and Power Company, Limited, Second Phase, ICJ Reports 1970, p. 206, para. 81, separate opinion). The interests which are in conflict here, and which need to be balanced against each other if collision is to be avoided, are those of Portugal in having its case determined by the Court notwithstanding possible effects of the decision on Indonesia, and those of Indonesia in not having its rights and obligations determined by the Court without its consent. Problems of this kind are apt to arise from the fact that, in the increasingly complex character of international relations, legal disputes between States are rarely purely bilateral. The argument follows that, as it was put to the Court in another case, if

> "the Court could not adjudicate without the presence of all such States, even where the parties before it had consented fully to its jurisdiction, the result would be a severe and unwarranted constriction of the Court's ability to carry out its functions" [2].

It is difficult to think of any point at which a balance may be struck between these competing considerations without the Court having sometimes to assume jurisdiction notwithstanding that the interests of a non-party State would to some extent be affected, as has happened in some cases. A fair interpretation is that what the Court has been doing was to identify some limit beyond which the degree to which the non-party State would be affected would exceed what is judicially tolerable. That limit is reached where, to follow the language of the Court, the legal interests of the non-party would not merely be affected by the judgment, but would constitute its very subject-matter.

Possibly another formulation might have been invented; but the test adopted is not in substance new to legal thought. The juridical problem to be solved has recognisable parallels in other areas of the law: it concerns the extent to which a given course of action could be regarded as lying within a permissible field although it produces effects within a forbidden one. No doubt with the constitutional jurisprudence of some countries in mind, in the case of the Application of the Convention of 1902 Governing the Guardianship of Infants Judge Spender remarked that a "law may produce an effect in relation to a subject-matter without being a law on that subject matter" (ICJ Reports 1958, p. 118). That approach could be redirected to the problem before the Court: would the requested judgment produce an effect in relation to the legal interests of Indonesia without being a judgment on those interests?

Obviously, there could be argument concerning marginal situations; but there is a dividing line, and it is often practicable to say that a given situation falls on one side or the other of it. Monetary Gold represents that line. Whatever the academic criticisms, the essential principle of the case has not been challenged. The case may be distinguished, but the cases distinguishing it have also affirmed it. Nor would it be correct to say, without important qualification, that since 1954 the principle of the case has in no sense been applied; it is possible to attribute the shape of the judgments given in some of the cases to the need to take account of it[3]. Certainly, where a case cannot be distinguished, the principle applies. In this case, the effort of Portugal was to distinguish and not to attack Monetary Gold; its counsel rejected what he understood to be an Australian attempt to "imply that Portugal is questioning the soundness of the Monetary Gold case" (CR 95/6, p. 11, Professor Dupuy). It is not necessary to examine all the cases, real or hypothetical, which may be thought supportive of an attempt to distinguish Monetary Gold. Certain Phosphate Lands in Nauru has been considered in the Judgment. I shall limit myself to one other case.

Corfu Channel, Merits, comes closest to the view that the Court is not necessarily prevented from acting by the circumstance that the lawfulness of the conduct of a third State may seem to be involved. In that case, the argument of Albania, as correctly recalled in Judge Weeramantry's dissenting opinion, should have been enough to alert the Court to the question whether it could properly find against Albania if it could not do so without making a determination as to Yugoslavia's international responsibility in its absence[4]. However, it does not appear to me that the evidence was examined with a view to making a finding of international responsibility against Yugoslavia in respect of its alleged conduct; it was examined as a method of proof, or disproof, of the British allegation that the mines had been laid with the connivance of Albania. Assuming that

the mine-laying operation had been carried out by two Yugoslav warships, the United Kingdom argued that this

> "would imply collusion between the Albanian and the Yugoslav Governments, consisting either of a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines" (ICJ Reports 1949, p. 16; and ICJ Pleadings, Corfu Channel, Vol. IV, p. 495, Sir Frank Soskice).

By its suggested request or acquiescence, Albania would make Yugoslavia's acts its own; it would be by making Yugoslavia's acts its own that it would engage international responsibility. In effect, proof of the mines having been laid by Yugoslavia would be part of the factual material evidencing the commission of acts by Albania which independently engaged its international responsibility. A determination by the Court that Yugoslavia engaged international responsibility by reason of its alleged conduct in laying the mines would not have to be made for the purpose of making a finding of international responsibility against Albania. The Court did not have before it the type of issue later raised in Monetary Gold, in which a determination that the absent State had engaged international responsibility would have had to be made as a precondition to its admitted ownership of the gold being legally set aside by the Court and passed on by it to others. Corfu Channel is not at variance with Monetary Gold; nor does it show that the latter is inapplicable to the circumstances of the instant case.

In 1984 the Court observed that the "circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction" (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, ICJ Reports 1984, p. 431, para. 88). True, too, outside of the prohibited area, "it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case" (Continental Shelf (Libyan Arab Jamahiriya/Malta) Application for Permission to Intervene, ICJ Reports 1984, p. 25, para. 40). But these remarks also recognized that the principle of the case remains intact, being directly founded on the consensual nature of the Court's contentious jurisdiction. Would it apply to prevent the Court from adjudicating on the merits of Portugal's case?

II. WHETHER THE REQUESTED JUDGMENT WOULD REQUIRE THE COURT TO DETERMINE INDONESIA'S LEGAL INTERESTS

The premise of Portugal's claim is that, whatever may be the basis, it possesses the exclusive power to enter into treaties on behalf of East Timor in respect of the resources of its continental shelf; Australia contends that it is Indonesia which possesses the power. The premise of Portugal's claim is thus in dispute.

The Court must first resolve this dispute relating to Portugal's premise, by determining that the treaty-making power belonged to Portugal and therefore of necessity that it did not belong to Indonesia, before it could go on to determine whether Australia engaged international responsibility by negotiating and concluding the 1989 Treaty with Indonesia and by commencing to implement it. In effect, a prerequisite to a decision against Australia is a determination that Indonesia did not possess the treaty-making power. In the ordinary way, the Court could not make that determination without considering whether the circumstances of Indonesia's entry into and continuing presence in East Timor disqualified it from acquiring the power under general international law. That would involve the determination of a question of Indonesia's responsibility in the absence of its consent. The Court cannot do that.

That would seem to end the case, but for an argument by Portugal that the resolutions of the General Assembly and the Security Council conclusively established its status as the administering Authority; that that status carried with it the exclusive power to enter into treaties on behalf of East Timor in respect of the resources of its continental shelf; that the resolutions should in these respects be treated by the Court as donnees; and that in consequence a decision by the Court on Indonesia's legal interests would not be required.

However, this way of putting the matter does not efface the fact that what Portugal is asking the Court to accept as donnees is not the mere text of the resolutions, but the text of the resolutions as interpreted by Portugal. The various resolutions would constitute the basis of the Court's decision; they would not remove the need for a decision to be taken by the Court as to what they meant. As the Parties accept, the Court has power to interpret the resolutions.

Portugal's interpretation of the resolutions is closely contested by Australia. The issue so raised by Australia is not frivolous; the Court would have to decide it. The Court has done so. On the conclusion which it has reached, the resolutions do not suffice to settle the question whether the treaty-making power lay with Portugal, as Portugal claims, or with Indonesia, as Australia claims. Other matters would have to be investigated before that question could be answered. Such other matters would include the question whether, by reason of its alleged conduct, Indonesia engaged international responsibility which disqualified it from acquiring that power under general international law. Portugal accepts that the Court cannot act if the international responsibility of Indonesia would have to be passed upon.

However, even if Portugal's interpretation of the resolutions is correct, the result need not be affected. The prerequisite of which the Court must ultimately be satisfied is that, whatever may be the basis, the treaty-making power lay with Portugal and not with Indonesia. If the Court were to accept Portugal's interpretation of the resolutions as correct, what it would be deciding, without hearing Indonesia on a substantial question of interpretation, is that it was Portugal and not Indonesia which possessed the treaty-making power; acceptance of Portugal's interpretation as correct would merely shorten the proof of Portugal's claim to the power. Indonesia's legal interests would nonetheless be determined in its absence. In effect, the question is not merely whether Portugal's interpretation is correct, but whether, in reaching the conclusion that it is correct, the Court would be passing on Indonesia's legal interests.

There is a further point. As the Court would be barred by the Monetary Gold principle from acting even if Portugal's interpretation of the resolutions were correct, it is possible to dispose of Portugal's Application without the necessity for the Court to determine whether or not the resolutions do indeed bear the interpretation proposed by it; the Court could arrive at its judgment assuming, but without deciding, that Portugal's interpretation is correct.

The matter may also be considered from the point of view of the effects of the requested judgment on the rights of Indonesia under the 1989 Treaty and on the validity of the Treaty itself.

First, as to Indonesia's rights under the Treaty. Submission 5(b) of the requested judgment would require Australia to abstain from implementing the Treaty; Indonesia would thus lose the benefit of implementation of the Treaty by Australia. That is not a matter of theoretical interest; Indonesia would be deprived of concrete benefits to which it is entitled under the Treaty, including possible financial benefits, in much the same way as the judgment requested in Monetary Gold would have deprived Albania of its right to the property involved in

that case. Article 59 of the Statute of the Court would not protect Indonesia against these effects.

In El Salvador v. Nicaragua, El Salvador asked that "the Government of Nicaragua be enjoined to abstain from fulfilling the ... Bryan-Chamorro Treaty ..." (American Journal of International Law, 1917, Vol. 11, p. 683). The Central American Court of Justice replied:

> "The Court is without competence to declare the Bryan-Chamorro Treaty to be null and void, as in effect, the high party complainant requests it to do when it prays that the Government of Nicaragua be enjoined 'to abstain from fulfilling the said Bryan-Chamorro Treaty.' On this point the Court refrains from pronouncing decision, because, as it has already declared, its jurisdictional power extends only to establishing the legal relations among the high parties litigant and to issuing orders affecting them, and them exclusively, as sovereign entities subject to its judicial power. To declare absolutely the nullity of the Bryan-Chamorro Treaty, or to grant the lesser prayer for the injunction of abstention, would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court." (Ibid., p. 729.)

Although El Salvador had not asked for an order declaring the Bryan/Chamorro Treaty to be invalid[5], in the view of the Central American Court of Justice its prayer for an order enjoining Nicaragua "to abstain from fulfilling" the Treaty was "in effect" a request that the Court should "declare the ... Treaty to be null and void," which of course it could not do in the absence of the other party to the Treaty. Thus, to grant "the lesser prayer for the injunction of abstention" would have the same effect as a declaration of invalidity; they would both "be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court." The injunction was refused.

Second, as to the validity of the 1989 Treaty. There are situations in which the Court may determine that an international obligation has been breached by the act of negotiating and concluding an inconsistent treaty, without the decision being considered as passing on the validity of the treaty[6]. But a situation of that kind is distinguishable from one in which the essential ground of the alleged breach and of any relief sought necessarily implies that a State which is a party to a bilateral treaty with the respondent but not a party to the case lacked the capacity in international law to enter into the treaty. Where this would be the true ground of decision, as it would be here, it is difficult to avoid the conclusion that the validity of the treaty was being passed upon in the absence of the State concerned. Further, as pointed out above, an order enjoining Australia from implementing the Treaty would itself presuppose a finding of invalidity.

In El Salvador v. Nicaragua, the Central American Court of Justice made it clear, and rightly so, that it would not decline to act on "the trivial argument that a third nation ... possesses interests connected with the matters or questions in controversy." (American Journal of International Law, 1917, Vol. 11, p. 699.) But the Court obviously did not consider that the argument was "trivial" in so far as the requested judgment would require it to determine the rights of a non-party State, inclusive of the question of the validity of a treaty entered into between that State and the respondent. It was on the clear basis that it could not and would not determine these matters, either directly or indirectly, that it found it possible to declare that the respondent "is under the obligation - availing itself of all possible means provided by international law - to re-establish and maintain the legal status that existed prior to the" treaty[7]. In effect, the Court was able to assume competence to act in relation to some of the reliefs claimed by El Salvador, but not in relation to all. Here, by contrast, none of the reliefs requested by Portugal could be granted without passing on the legal interests of an absent State.

In an interesting and careful argument, counsel for Portugal submitted that

> "other courts ... have ruled on the violation of obligations derived from a treaty, in cases where there was a conflict of obligations, without ruling on the resolution of the conflict, despite the absence of the other party to the treaty from which the other incompatible obligation derived" (CR 95/13, p. 55, Professor Galvão Teles).

Counsel cited Soering v. United Kingdom (EHRR, vol. 11, p. 439), The Netherlands v. Short (ILM, 1990, Vol. 29-II, pp. 1375 et seq.) and Ng v. Canada (CC PR/C/49/D.469/1991), adding that the judicial function of the adjudicating bodies in those cases obliged them "to answer the questions that were put to them. They were not, for example, required to decide on the rights of the United States, which was a party to the treaty and absent from the proceedings." As this argument of counsel seems to recognise, the dividing line is set by asking whether the requested judgment would be deciding not merely the rights of the parties, but those of the absent State as well. In my opinion, the judgment requested in this case would decide the rights of an absent State. Institutional and structural differences apart, this is a point on which the three cited cases are distinguishable.

It was also argued for Portugal that, by virtue of Article 59 of the Statute of the Court, a judgment of the Court in favour of it would be binding only as between itself and Australia; Indonesia, as a non-party to the case, would not be bound. But the problem involved is more fundamental than that to which that provision is directed. The provision applies to a judgment duly given as between the litigating parties; until such a judgment has been given, the provision does not begin to speak (see, on this point, Monetary Gold Removed from Rome in 1943, ICJ Reports 1954, p. 33, first paragraph). For the reasons set out above, the judgment requested by Portugal would not be a judgment duly given even as between the litigating Parties. The fact that, by virtue of Article 59 of the Statute, Indonesia would not be bound is not a reason why the Court should attempt to do what it cannot legally do: the provision does not operate as a standing reservation in law subject to which the Court is at liberty to pronounce on the legal interests of a State in the absence of its consent.

III. PORTUGAL'S FIRS T SUBMISSION

A word may be said on the question whether the grounds on which the Judgment rests prevented the Court from granting the first of Portugal's five submissions, in which the Court was asked

> "[t]o adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources and, secondly, the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia, which is under an obligation not to disregard them, but to respect them."

There is no need to dwell on the distinction between arguments and conclusions[8]. Portugal recognizes the distinction; it does not suggest that the Court can grant its first submission considered as an argument intended to support the requested judgment but not in itself constituting part of the decision. It is necessary then to see what is the sense in which Portugal's first submission could be regarded as part of the requested decision.

Portugal's first submission can only be considered as part of the requested decision if, as the wording of the submission itself implies, a judicial declaration that the claimed rights are opposable to Australia is required to ensure that Australia recognises that it "is under an obligation not to disregard them, but to respect them." The implication is that Australia has been disregarding them, and not respecting them. But, if it is asked why it should be thought that Australia has been disregarding them and not respecting them, the answer can only be that Australia has negotiated and concluded the 1989 Treaty with Indonesia and has commenced to implement it.

Thus, the fundamental issue raised by Portugal's first submission is the same as the question whether the treaty-making power is held in law by Portugal or by Indonesia. As the Court cannot determine that question in the absence of Indonesia, it cannot competently grant the submission. A submission, however worded, can only be granted if the granting of it is necessary for the resolution of the dispute between the parties to the case. If the Court cannot determine the dispute, it cannot grant any of the submissions sought.

IV. CONCLUSION

International law places the emphasis on substance rather than on form. When the matter is thus regarded, it is apparent that Portugal's Application would require the Court, in the absence of Indonesia, to determine Indonesia's legal interests, inclusive of its claim to the treaty-making power in respect of East Timor and a question of its international responsibility, as a prerequisite to a determination of Portugal's claim that Australia engaged international responsibility to Portugal by negotiating and concluding the 1989 Treaty with Indonesia and by commencing to implement it. I agree that the Court cannot act.

Mohamed SHAHABUDDEEN.

TEXT OF DISSENTS

DISSENTING OPINION OF JUDGE WEERAMANTRY

INTRODUCTION

I respectfully agree with the first part of the Court's decision, wherein the Court dismisses Australia's objection that no real dispute exists between itself and Portugal. It is my view that such a real dispute does exist and I support the Court's Judgment on this point.

I am also in agreement with the Court's observations in regard to the right to self-determination of the people of East Timor, their right to permanent sovereignty over their natural resources, and the erga omnes nature of these rights. The stress laid by the Court on self-determination as "one of the essential principles of contemporary international law" (Judgment, para. 29) has my complete and unqualified support.

However, I regret that my conclusions in regard to the second part of the Judgment differ from those of the great majority of my colleagues, who have held that the Court cannot adjudicate on Portugal's claim in the absence of Indonesia. In deference to their opinion and in recognition of the importance of the issue, I feel obliged to set out in some detail the reasons for my conclusion that the absence of Indonesia does not prevent the Court from considering Portugal's claim.

Apart from its being a crucial factor in this case, the principle involved is important to the jurisprudence of the Court, for it concerns the Court's jurisdictional reach in the wide range of third-party-related disputes which are increasingly brought before it in a more closely interrelated world.

Had the Court ruled differently on the preliminary issue of jurisdiction, there are numerous other issues of great importance which it would have considered in its Judgment. In view of its preliminary ruling, the Court's Judgment stops, so to speak, "at the threshold of the case" [1]. It therefore does not examine such seminal issues as the duties flowing to Australia from the right to self-determination of the people of East Timor or from their right to permanent sovereignty over their natural resources. It does not examine the impact of the Timor Gap Treaty upon their rights. It does not examine the ius standi of Portugal to institute this action on behalf of the people of East Timor.

The preliminary objection to the ius standi of Portugal calls into question the adequacy of the entire protective structure fashioned by the UN Charter for safeguarding the interests of non-self-governing territories, not yet in a position themselves to look after their own interests.

Australia's submission that it is not in breach of any international duty necessitates a consideration of State obligations implicit in the principle of self-determination, the very basis of nationhood of the majority of Member States of the United Nations. It raises also the important juristic question of the nature of international duties correlative to rights erga omnes. Are they limited to mere compliance with specific directions and prohibitions, or are they set in the context of an overarching principle, transcending specific directions and prohibitions?

The jurisdictional objections raised by Australia require some consideration also of the status and legal consequences of resolutions of the General Assembly and the Security Council. In addition, there are several questions relating to judicial propriety which were stressed by Australia in its submissions.

LINKAGE BETWEEN JURISDICTION AND THE MERITS

Since these issues were fully argued by both sides, since they are all of deep significance, and since the view I take crosses the jurisdictional threshold into the substance of the case, my judicial duty compels me to address these questions[2]. In any event, the view I take of the jurisdictional objection upheld by the Court requires a consideration of all these matters, quite apart from their relevance to the merits. There is in this case such a close interlinkage between the preliminary objections and the merits that the former cannot be considered apart from the latter.

At a meeting convened by the President of the Court on 1 June 1992, in terms of Article 31 of the Rules of Court, the Parties agreed that questions raised by Australia regarding jurisdiction and admissibility were inextricably linked to the merits, and should therefore be heard and determined along with the merits. There was therefore a full hearing, both on the preliminary issues and on the merits.

This was in line with the position stated in the Australian Counter-Memorial that:

> "these bars to the Court's right to hear the claim are, in this case, inextricably linked with the merits so that it could be difficult to deal with them separately and to establish that they possess an exclusively preliminary character" (Counter-Memorial, p. 9, para. 20).

In the result, this case does not present that sharp division between questions of jurisdiction and admissibility, and questions relating to the merits, that is often present in

cases before this Court, such as the South West Africa cases.

THE BACKGROUND

A short preliminary recital of some of the surrounding circumstances will place in context the ensuing legal discussions.

Portugal's long colonial occupation of East Timor, which had commenced in the sixteenth century, came to an end more than four centuries later in 1975, when the Portuguese administration withdrew from the territory. Initially the Portuguese administration withdrew from the mainland to the island of Atauro, also a part of the Territory, on 27 August 1975. Three months after the Portuguese evacuation of the mainland, on 28 November 1975, the FRETILIN (Frente Revolucianària de Timor-Leste Independente), a group seeking independence for the territory, declared independence. A few days later, on 7 December 1975, Indonesian military forces entered East Timor. The next day the Portuguese administration withdrew from Atauro.

Indonesia has been in control of the Territory since the entry of its military forces, and enacted a law on 17 July 1976 incorporating East Timor into its national territory, on the basis that the people of East Timor had on 31 May 1976 requested Indonesia to accept East Timor as an integral part of Indonesian territory. However, this incorporation has not thus far been accepted or recognized by the United Nations which, in the language of the Secretary-General, is engaged in the search for "a comprehensive and internationally acceptable solution to the question of East Timor" [3]. The question of East Timor, still not the subject of the internationally acceptable solution sought by the Secretary-General, receives continuing attention in the reports of the Secretary-General. It is also kept by the General Assembly as an item on its agenda from year to year.

Several resolutions of the Security Council and the General Assembly refer to the circumstances in which the Portuguese withdrawal and the Indonesian occupation occurred. It will suffice to refer at this point to two Security Council resolutions - resolutions 384 and 389 of 22 December 1975 and 22 April 1976, respectively.

The first of these noted that General Assembly resolution 3485 (XXX) of 12 December 1975 had requested the Committee of Twenty-four (the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples) to send a fact-finding mission to East Timor, and expressed grave concern at the deterioration of the situation in that territory. Expressing grave concern also at the loss of life in East Timor, it deplored the intervention of the armed forces of Indonesia in East Timor. The resolution further expressed regret that the Government of Portugal had not discharged fully its responsibilities as administering Power in the Territory under Chapter XI of the Charter.

Against this background, it:

"1. Calls upon all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV);

2. Calls upon the Government of Indonesia to withdraw without delay all its forces from the Territory;

3. Calls upon the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination;

4. Urges all States and other parties concerned to co-operate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the Territory."

The second resolution again reaffirmed:

"the inalienable right of the people of East Timor to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960"

and called upon all States:

"to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV)."

It also called upon the Government of Indonesia "to withdraw without further delay all its forces from the Territory."

Australia was heard before each of these Security Council resolutions was passed.

Six days before the first resolution, at the 1865th meeting of the Security Council, held on 16 December 1975, the Australian representative, invited by the President to make a statement, observed:

"The immediate requirement as we see it, is for a cease-fire, to spare the people of Timor further bloodshed and to create a climate in which a constructive programme of decolonization can be resumed" (United Nations, Official Records of the Security Council, Thirtieth Year, 1865th Meeting, 16 December 1975, para. 99; Memorial, Vol. II, p. 158)

and he concluded his statement as follows:

"In conclusion, I would once again emphasize, as indeed the General Assembly did in its resolution 3485 (XXX), that the purpose and aim of the United Nations, underlying any action which the Council may decide, is to enable the people of the Territory freely to exercise their right to self-determination. The main question now is to establish conditions in which the people of Timor can make its own free choice." (Ibid., para. 106; Memorial, ibid., p. 159.)

Eight days before the second resolution, at the 1909th Meeting of the Security Council held on 14 April 1976, the Australian representative, again invited by the President to make his statement, said:

"In my last statement to the Council on East Timor [1865th meeting] I emphasized that the Australian Government and people were most conscious that a stable settlement in East Timor could rest only on the free choice by the people concerned. It remains the firm policy of the Australian Government that the people of the Territory should exercise freely and effectively their right to self-determination, and, if their decision is to have any validity, it must be made in the full knowledge of the alternatives from which they are to make their choice. My Government does not, however, presume to lay down any precise formula or modalities for self-determination. We should prefer to respond to the wishes of the Timorese people themselves as to the best means by which they might genuinely exercise their right of self-determination." (United Nations, Official Records of the Security Council, Thirty-first Year, 1909th Meeting, 14 April 1976, para. 38; Memorial, ibid., p. 214.)

It is not necessary at this point to recapitulate the terms of the several General Assembly resolutions (eight in all), each of which stressed the importance of East Timor's right to self-determination, and proceeded on the basis that that right had yet to be exercised. They will be referred to in due course later in this opinion.

Portugal, claiming that it is still the administering Power of East Timor, seeks relief in this case against Australia in relation to a treaty entered into on 11 December 1989 between Australia and Indonesia. The treaty related to the resources lying between

the coastal littorals of East Timor and Australia. This treaty has been referred to in the proceedings as the Timor Gap Treaty, from the circumstance that the delimitation of the continental shelf between Australia and Indonesia stopped short on either side of that portion of the shelf lying between the south coast of East Timor and the north coast of Australia. This undelimited part of the continental shelf is referred to as the Timor Gap (Memorial, Vol. I, p. 52, para. 2.01).

It should be added that the jurisdiction of this Court is based upon Australia's declaration under Article 36(2), by which Australia has submitted to the jurisdiction of this Court. Indonesia has not filed a declaration under Article 36(2).

A word needs also to be said about Portugal's past colonial record, concerning the legal relevance of which there will be more discussion in a later part of this opinion. Australia has argued that it has left much to be desired. Portugal had indeed resolutely opposed the principle of self-determination for its colonies. It should be noted, however, that after the change of regime in Portugal on 25 April 1974, the Portuguese Government reaffirmed its obligations under Chapter XI of the Charter and, on 24 July 1974, the Council of State of Portugal approved a constitutional law abrogating the former territorial definition of the Republic of Portugal and acknowledging the right of self-determination, including independence, for Territories under Portuguese administration (Memorial, Vol. II, p. 54). The Timor Gap Treaty

This Treaty, entered into on 11 December 1989 between Australia and Indonesia, is alleged by Portugal to infringe the rights of the people of East Timor. It is titled "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and northern Australia." The preamble recites the desire of the Parties to

> "enable the exploration for and exploitation of the petroleum resources of the continental shelf of the area between the Indonesian Province of East Timor and northern Australia yet to be the subject of permanent continental shelf delimitation between the Contracting States."

These petroleum reserves have been estimated, according to Portugal, at between 500 million and 5000 million barrels[4]. Whatever their precise extent, they may safely be assumed to be of considerable value. Under the Treaty, a joint Australian/Indonesian regime was set up for exploiting the oil resources on the continental shelf between Australia and East Timor. The Treaty expressed the desire of the parties that "exploration for and exploitation of these resources proceed without delay," and provided for a sharing of these resources as between the two Governments in a Zone of Cooperation between the "Indonesian Province of East Timor" and northern Australia, comprising three areas, A, B and C, on the following basis:

> "(a) In Area A, there shall be joint control by the Contracting States of the exploration for and exploitation of petroleum resources, aimed at achieving optimum commercial utilization thereof and equal sharing between the two Contracting States of the benefits of the exploitation of petroleum resources, as provided for in this Treaty;
>
> (b) In Area B, Australia shall make certain notifications and share with the Republic of Indonesia Resource Rent Tax collections arising from petroleum production on the basis of Article 4 of this Treaty; and
>
> (c) In Area C, the Republic of Indonesia shall make certain notifications and share with the Australia Contractors' Income Tax collections arising from petroleum production on the basis of Article 4 of this Treaty." (Portuguese Application Instituting Proceedings, Annexes, pp. 28-29.)

Article 33 provides that the Treaty shall remain in force for an initial period of forty years from the date of its entry into force. Unless the two Contracting States agree otherwise, it shall continue in force after the initial forty year term for successive terms of twenty years, unless by the end of each term, including the initial term of forty years, the two States have concluded an agreement on the permanent continental shelf delimitation in the area covered by the Zone of Cooperation.

The preambular paragraph to the Treaty recites that they are provisional arrangements which "do not jeopardize or hamper the reaching of final agreement on the delimitation of the continental shelf."

To give effect to this Treaty, the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (No. 36 of 1990) was passed by the Parliament of Australia. Article 3 states that the object of the Act is to enable Australia to fulfil its obligations under the Treaty. Under Article 8:

> "A person must not undertake petroleum operations in Area A of the Zone of Cooperation except under and in accordance with a production sharing contract, or with the approval of the Joint Authority"

established under Article 7 of the Treaty.

The internal legislative measures taken by Australia for the implementation of the Treaty are among the acts which are alleged by Portugal to infringe the rights of the people of East Timor, the powers of Portugal as administering authority, the relevant Security Council resolutions and the obligations incumbent on Member States to cooperate in good faith with the United Nations.

SCHEME OF OPINION

This opinion will analyse in Part A the third-party rule, concentrating on what has been described as the principle in Monetary Gold, which has been urged by Australia as presenting a preliminary objection to the Court's jurisdiction. This principle is the basis on which Portugal's action is dismissed by the Court. The purpose of this analysis is to ascertain whether Australia's actions, taken by themselves, can be viewed as constituting a breach by Australia of its own duties under international law, quite apart from the duties and actions of Indonesia. If the answer to this question is in the affirmative, an independent cause of action would be maintainable against Australia, without any necessity to pass judgment upon the legal duties and conduct of Indonesia.

Part B will deal with the objection relating to Portugal's status to institute these proceedings. Among the matters arising under this head are the protective structure of the United Nations Charter in relation to non-self-governing territories, the legal force of the relevant UN resolutions, and the question whether Portugal needed prior UN authorization to maintain this Application.

The question of jurisdiction depends on whether a cause of action can be made out against Australia, based upon Australia's individual obligations under international law, and Australia's individual actions, quite independently of Indonesia. For this purpose, it will be necessary in this opinion to examine the rights of East Timor under international law, and the international obligations of Australia in relation to those rights.

Part C therefore examines the rights of self-determination and permanent sovereignty over natural resources enjoyed by the people of East Timor. These are the principles on which Portugal's substantive case depends. Granted the applicability of these principles to East Timor, the central question for determination is whether the actions of the Respondent State are in accordance with those principles.

Part D will analyse the international obligations of Australia. It will scrutinize the juristic nature of the general legal duties lying upon all States in respect of self-determination, and the particular legal duties lying upon Australia vis-à-vis East Timor. It will then examine whether, through its con-

duct in entering into the Timor Gap Treaty, Australia was in breach of its international legal duties.

Part E deals with matters relating to judicial propriety, on which a many-faceted argument was presented by Australia. This opinion does not deal with Australia's submission regarding the absence of a justiciable dispute, as that has been dealt with in the Court's Judgment. However, it considers briefly some of Australia's other contentions - such as the contentions that the proceedings are a misuse of the processes of the Court, that they have an illegitimate object, and that they have been instituted before an inappropriate forum.

This opinion does not touch any matter which travels outside the scope of the preliminary objections raised by Australia. Nor does it touch upon any actions or conduct of Indonesia, apart from the circumstance of Indonesia's military intervention, which has been referred to also in the Judgment of the Court (para. 14).

PART A. THE POSITION OF THIRD PARTY STATES

1. The jurisdictional issue

(i) The contentions of the Parties

In seeking relief against Australia in respect of this Treaty, is Portugal entering judicial ground not traversable except in the presence of Indonesia? Is this in fact a contest between Portugal and Indonesia under guise of a contest with another State which is not the true respondent? If the answers to these questions are in the affirmative, Australia's submissions must be accepted, and Portugal's claim must be dismissed.

Australia invokes Monetary Gold Removed from Rome in 1943 (ICJ Reports 1954, p. 19) as a central authority on which it rests its contention that the Court lacks jurisdiction to entertain Portugal's claim. Australia's contention is that a determination against Australia necessarily involves as a prerequisite a determination against Indonesia in regard to the illegality of its occupation of East Timor. Since Indonesia is not before the Court, it is argued that the principle of Monetary Gold, which decided that the Court could not adjudicate upon Italian and United Kingdom claims to a certain quantity of Albanian gold in the absence of Albania, operates as a jurisdictional barrier to Portugal's claim.

Portugal, on the other hand, submits that its claim is not against Indonesia, but against Australia, that the wrongdoing it alleges is not against Indonesia, but against Australia, and that the totality of its case is made up only of elements drawn from Australia's own international obligations, and Australia's own unilateral actions. It submits that Indonesia may well be affected by the Judgment, but that it is Australia's, and not Indonesia's, conduct that is the very subject-matter of the case.

(ii) The circumstances before the Court

The question of jurisdiction is not an isolated question of law, but a mixed question of law and fact. As observed in a well known treatise on the Court's power to determine its own jurisdiction:

"The power of the International Court to determine its jurisdiction has therefore two aspects: the interpretation of the jurisdictional instruments and the interpretation (and characterization) of the facts of the dispute itself. In fact, the jurisdiction of the Court can result only from the interaction of the elements involved in this process." (Ibrahim F.I. Shihata, The Power of the International Court to Determine its Own Jurisdiction, 1965, p. 299.)

It becomes necessary, therefore, as a backdrop to the ensuing discussion, to refer briefly to some of the salient facts.

The circumstances which are either admitted by Australia, or manifest on the documents, or of sufficient notoriety for the Court to take judicial notice of them, are as follows:

(a) the people of East Timor have a right to self-determination which Australia is obliged to recognize (see Part C, infra.);

(b) the people of East Timor have a right to permanent sovereignty over the natural resources of the territory, which Australia is obliged to recognize (for a fuller discussion, see Part C, infra.);

(c) among these resources are a share of the maritime resources of the Timor Gap area, i.e., the portion of sea situated between the opposite coasts of East Timor and Australia - a resource they share with Australia;

(d) those resources continue to belong in law to East Timor, so long as East Timor remains a non-self-governing territory;

(e) Australia has admitted throughout the case that East Timor still remains a non-self-governing territory[5];

(f) the United Nations still regards East Timor as a non-self governing territory;

(g) this area is extremely rich in oil and natural gas potential. Whatever its extent, it forms in all probability the principal economic asset of the East Timorese people, awaiting them at such time as they achieve self-determination;

(h) Portugal, the former colonial authority, has left the territory, but is still considered by the United Nations to be the administering authority;

(i) no other power has been recognized by the United Nations as having authority over the territory;

(j) on 7 December 1975, Indonesian military forces occupied the territory, and Indonesia is now in full control thereof;

(k) Indonesia has not, to this date, been recognized by the United Nations as having authority over the territory, and, nearly twenty years after the Indonesian occupation, the United Nations is still engaged in a search for an "internationally acceptable solution to the question of East Timor" (Reply, Vol. II, p. 59);

(l) Australia has entered into a Treaty with Indonesia, dividing between Australia and Indonesia the resources of the Timor Gap area;

(m) in that Treaty, Australia expressly recognizes East Timor as "the Indonesian Province of East Timor";

(n) confronted with the legitimate need to exploit its own resources, and needing, for this purpose, a treaty with the opposite coastal State, Australia did not seek directions or authorization from the United Nations before entering into this Treaty, despite the facts that East Timor was still a non-self-governing territory, and that the United Nations had not recognized the incorporation of the territory into Indonesia. No suggestion was made before the Court that any such direction or authorization was sought;

(o) this Treaty has been entered into for an initial period of 40 years, with possible renewals for 20 years at a time;

(p) the Treaty makes no provision for any proceeds of exploitation of the area to be earmarked for the people of East Timor whenever their status is determined;

(q) the people of East Timor have never at any stage, either directly or through any duly constituted legal representative, given their consent to the Treaty;

(r) while Australia is entitled to its share of the resources of the Timor Gap area, no delimitation, in a manner recognized by law, has thus far taken place between Australia and East Timor. Till such time, the exact division between Australian and East Timorese resources must remain unclear. The possibility must therefore exist of some benefit to Australia from East Timorese resources which, upon another division according to law, might have been allotted to East Timor;

(s) Australia has joined in a treaty under which a non-renewable natural re-

source would, to the extent of its exploitation under the Treaty, be permanently lost to the people of East Timor. Over a period of 40 years, the entire resource could well be lost for ever;

(t) Portugal cannot, in law, obtain any financial benefits for itself from this action, if successful, and will need to report to the United Nations and to act under UN supervision.

The entirety of the opinion that follows does not travel beyond the circumstances itemized above.

(iii) Do the circumstances of the case attract any necessity to consider a third State's conduct?

It is against this specific background of admitted or manifest circumstances that the preliminary objection must be considered as to whether the "Monetary Gold principle" presents a barrier to the consideration of Portugal's claim. It has been strenuously argued that Monetary Gold does present such a barrier. Having regard to the multiplicity of circumstances set out above, which relate to Australia's obligations and actions alone, I regret very much that I am unable to agree. In my view, all the essentials necessary for the Court to adjudicate upon Portugal's claim against Australia are present, without the need for any adjudication against Indonesia.

Australia is party to a treaty which deals, inter alia, with resources acknowledgedly belonging to the East Timorese people, who are acknowledgedly a non-self-governing people. So long as they continue to be a non-self-governing people, those resources will continue to belong to them by incontrovertible principles of the law of nations. At such time as they achieve self-determination, they may deal with these resources in such manner as they freely choose. Until such time, the international legal system protects their rights for them, and must take serious note of any event by which their rights are disposed of, or otherwise dealt with, without their consent. Indeed, the deepest significance of the right of a non-self-governing people to permanent sovereignty over natural resources lies in the fact that the international community is under an obligation to protect these assets for them.

The Respondent fully acknowledges that East Timor is still a non-self-governing territory and so, also, does the United Nations, which is the appropriate authority on these matters. While the United Nations still awaits "an internationally acceptable solution" to the question, the Court must examine whether it accords with the international rule of law that any Member State of the United Nations should be in a position:

(a) to enter into a Treaty with another State, recognizing that the territory awaiting self-determination has been incorporated into another State as a province of that State; and

(b) to be party to arrangements in that Treaty which deal with the resources of that Territory, without the consent either of the people of the Territory, or of their authorized representative.

That is the dominant issue before the Court. It centres on the actions of the Respondent and not of the third State.

In the light of the totality of incontrovertible circumstances outlined earlier in this section, the Court does not need to enter into an inquiry into the lawfulness of the conduct of that third State or of its presence in East Timor.

If East Timor is still a non-self-governing territory, every member of the community of nations, including Australia, is under a duty to recognize its right to self-determination and permanent sovereignty over its natural resources. If this is so, as is indubitably the case, the Court would be in possession of all the factual material necessary for the Court to pronounce upon the responsibility of the Respondent State, which is in fact before it. Nor would it, in the slightest degree, be encroaching upon the prohibited judicial territory of making a judicial determination in relation to an absent third party.

(iv) Is the Court under an obligation to reinvestigate matters dealt with in the UN resolutions?

Australia submits that, despite the UN resolutions calling upon the Government of Indonesia to withdraw its military forces from East Timor, reaffirming the right of the people of East Timor to self-determination, and rejecting the claim that East Timor has been incorporated into Indonesia, the Court would itself have to determine the question of the legality of Indonesia's control over East Timor, were it to proceed with this case. In the absence of such a determination, according to the Australian submission, the Court cannot hold that Indonesia could not lawfully enter into the Treaty and, without such a finding, the Court cannot hold that Australia has acted wrongfully in entering into the Treaty.

To enter upon such an inquiry would be to enter upon an immense factual and political investigation. It would call for an examination de novo of voluminous evidence regarding the circumstances of Indonesia's military entry into and subsequent control over East Timor and of the numerous intricate military, political and diplomatic activities involved in any such military intervention, followed by continuing occupation. Upon this evidentiary material, the Court would be required to reach a judicial determination. Nor is it possible in any event to engage in such an inquiry in the absence of Indonesia.

Such an argument disregards the fact that the materials essential to decision are already before the Court. It disregards the practicalities of the judicial process. It disregards the scheme of the UN Charter which distributes appropriate tasks and responsibilities among the principal organs of the United Nations. By postulating a virtual impossibility as a prerequisite to justice, it denies justice, however legitimate the claim. The Court cannot be reduced to inaction in this fashion by throwing upon it a burden duly discharged by the appropriate UN organs, acting within their proper authority. Such a position seems too artificial and removed from reality to be the law or the procedure under which this Court functions.

Of course, this Court, as the principal judicial organ of the United Nations, can in appropriate circumstances be called upon to consider whether a particular organ of the United Nations has acted beyond its authority or in a manner not authorized by law. Such issues have been brought before this Court in cases such as Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) and (Libyan Arab Jamahiriya v. United States of America) (ICJ Reports 1992, p. 3 and p. 114, respectively). No suggestion has been made of any such circumstances in the present case. The only grounds on which the force of the resolutions has been attacked is that, owing to a supposedly diminishing support for them upon a counting of votes and, owing to the lapse of time since their adoption, they have in some way lost their authority. There is no warrant in United Nations law for either of these contentions, as more fully discussed later.

In short, the substantive and procedural principles governing this Court's jurisdiction cannot operate so restrictively as to prevent it from reaching a determination in a case such as this, where all the ingredients necessary to such a decision are before it and where that decision can be reached without trespassing upon the rule enshrined in the Court's Statute that its jurisdiction flows only from consent. That the judgment will affect the interests of a third party State is not a factor which, according to the well established jurisprudence upon this matter, operates as a barrier to jurisdiction. Such effects upon third parties are always part of the judicial process and are manifesting themselves increasingly as the world con-

tracts into a more closely interknit community.

These aspects are more fully considered later in this opinion. The purpose of the foregoing discussion has been to show that the circumstances of this case render the Monetary Gold principle inapplicable, in that the claim against the Respondent State does not in any way necessitate the investigation of the conduct of a third party State and, least of all, a judicial finding against it.

However, in view of the great importance attached to it in the argument before the Court, and in deference to the Court's reliance on the principle, this opinion turns now to a more detailed consideration of the Monetary Gold case to ascertain whether, even if it were applicable, it would present any barrier to Portugal's claim.

2. The Monetary Gold principle

(i) Subject-matter

One of the matters at issue in Monetary Gold was whether Albanian gold should be awarded to Italy on the basis of Albanian wrongdoing. It was clearly impossible for the Court to determine this question in the absence of Albania, whose property and wrongdoing were the very subject-matter on which the Italian claim was based.

The present case presents a totally different picture. The obligations and the conduct of Indonesia are not the very subject-matter of this case. The obligations and the conduct of Australia are, and Australia is before the Court.

Independently of an inquiry into the conduct of Indonesia, the preceding section of this opinion has shown that the Court has before it sufficient materials relating to the duties, the responsibilities and the actions of Australia, to enable it to make a pronouncement thereon. It does not need to open up vast expanses of inquiry into Indonesia's conduct, or military operations or any other items which may have provoked international concern, to decide this matter. Far less does it need to adjudicate upon these. The sharp focus upon Australia's acts and responsibilities which is necessary for a determination of these issues can only be blurred by such an undertaking.

(ii) Parties

In Monetary Gold the two States between whose rights the Court was called upon to adjudicate were Italy and Albania in the first claim, and the United Kingdom and Albania in regard to the second (see section (iv) below). Albania, the State whose property was sought to be appropriated, and whose wrongdoing was alleged, was not before the Court. In the present case, unlike in Monetary Gold, no claim is made against an absent third party. The two States between whose rights the Court has to adjudicate are Portugal and Australia, both of whom are before the Court.

In Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections (ICJ Reports 1992, p. 240), likewise, the two parties between whose rights the Court had to adjudicate were Australia and Nauru, both parties before the Court. In both Nauru and the present case, other parties are affected, but in neither case is that factor an obstacle to jurisdiction.

(iii) Rationale

Two of the most often cited pronouncements of principle in Monetary Gold are the following:

> "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." (ICJ Reports 1954, p. 32.)

> "Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding on any State, either the third State, or any of the parties before it." (Ibid., p. 33.)

The Court was stressing, quite naturally, that Albania's interests would not merely be affected by the decision, but would be the very subject-matter of the decision, and that "the vital issue" to be settled concerned the international responsibility of Albania itself. The generality of the phraseology adopted by the Court has sometimes led to a tendency to cite these passages as authority for propositions far wider than were warranted by the extremely limited circumstances of the case - namely, that Albanian property could not be appropriated on the basis of Albanian wrongdoing in the absence of Albania. In the present case, no claim is being made against Indonesia, no decision is sought against Indonesia, and the vital issue is not the international responsibility of Indonesia.

Indonesia's legal interests may be affected by the decision, but they are not the very subject-matter of the decision, in the sense that Albanian gold was the actual subject-matter of Monetary Gold.

The Court's determinations on matters pertaining to Australia's obligations and actions may indeed have consequences, not only for Indonesia but for other countries as well, for Australia has, in the course of its submissions, informed the Court that several countries have dealt with Indonesia in respect of East Timor (CR 95/10, pp. 20-21). If the Judgment of the Court raises doubts about the validity of those treaties, those other countries who have acted upon the validity of the treaty may well be affected. Yet, it cannot be suggested that they be all joined, or that, for that reason, the Court is not competent to hear the claim before it.

The broad dicta in Monetary Gold must not be stretched beyond what the context of the case allows.

(iv) Italian and United Kingdom claims distinguished

An analysis of the two claims in Monetary Gold brings its underlying principle into clearer relief.

The first claim in Monetary Gold related to Italy's contention that the Albanian gold should be delivered to Italy in partial satisfaction of the damage caused to Italy by the Albanian law of January 13, 1945, which had expropriated certain Italian assets. The second related to Italy's claim to priority over the claim of the United Kingdom to receive the gold in partial satisfaction of the judgment in the Corfu Channel case.

The first claim, based upon an Albanian action alleged by Italy to be wrongful, could not, quite clearly, be decided in the absence of Albania. Albanian rights and Albanian wrongdoing were integral to its very substance. The judgment on this point was unanimous.

The decision on the second claim, though also soundly based on legal principle, could perhaps be differentiated in the sense that, though the competing claims here were between Italy and the United Kingdom, the United Kingdom claim against Albania was already res judicata in terms of the judgment of this Court in the Corfu Channel case. Albania's judgment debt to the United Kingdom, being res judicata, did not need to be proved afresh, and could not be contested by Albania. However, the fact that Italy too had claims upon the gold raised questions of priority (see ICJ Reports 1954, p. 33) which complicated the issue.

It may be noted, in passing, that judgment on the second point was not unanimous, for Judge Levi Carneiro registered a dissent, holding that the Court could, and should have, adjudicated upon the second submission of Italy, independently of the first, on the basis that the only States directly interested in the question of the priority issue, namely, Italy and the United Kingdom, were before the Court (ibid., p. 43, para. 7), and that it could be resolved simply in the light of legal rules (ibid., para. 8).

(v) The third party principle and the judicial duty to decide The opinion of Judge

Carneiro is significant in that it represented a concerned attempt to conserve the Court's jurisdiction without violating the third party rule. This points to an important concern, always before the Court, that, while the third party rule is important, and must at all times be respected, there is also another principle within which the Court functions, namely, the judicial duty to decide the cases brought before it within its jurisdictional competence.

As in many areas of the law, the dividing line between the operation of the two competing principles is not always discernible with clarity. There will in many cases be an area of doubt, in which the case could well fall within the operation of one principle or the other. In these areas, the Court is the judge of its own jurisdiction, - a position expressly accorded to it by Article 36(6) of its Statute.

A distinguished line of precedents, stretching back to the Alabama Arbitration (1872) and beyond[6], has established that:

"The fundamental principle of international law governing these aspects is that an international tribunal is master of its own jurisdiction." (Shabtai Rosenne, The Law and Practice of the International Court, 1985, p. 438.)

In exercising that jurisdiction, a tribunal will naturally not view the mere presence of a doubt, however slight, as a reason for declining jurisdiction.

It is by striking a balance between these principles that the Court's jurisdiction can be best developed, rather than by focusing attention upon the third-party principle, to the exclusion of the other. While the consensual principle must always furnish the basis of jurisdiction, "It is a matter of common sense that too rigid an attraction to that principle will paralyse any international tribunal" (Rosenne, ibid., p. 439). The inadequacies of Article 36 as it exists (ibid., p. 316), and the need for "a well-defined functional and teleological approach to questions of jurisdiction" (ibid.) justify such an approach to the problem[7]. It was thus for very good reason that, in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), the Court expressed a note of caution against undue extensions of Monetary Gold, in terms that its circumstances "probably represent the limit of the power of the Court to refuse to exercise its jurisdiction" (ICJ Reports 1984, p. 431, para. 88; see, also, Certain Phosphate Lands in Nauru, ICJ Reports 1992, p. 260, and Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, ICJ Reports 1990, p. 116, para. 56)[8].

As this Court observed in Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene: "it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case ..." (ICJ Reports 1984, p. 25, para. 40; emphasis added). This compelling obligation to decide the dispute before the Court distinguishes the judge, properly seised of jurisdiction, from many other functionaries, who are not charged by their office with the obligation to reach a decision on every contentious matter properly referred to them within the scope of their authority. Literature on the nature of the judicial function is replete with emphasis on the judicial duty to decide. The Statute of the Court itself gives expression to this concept in Article 38, which stipulates that the Court's "function is to decide in accordance with international law such disputes as are submitted to it" [9] (emphasis added). Indeed, that is the function of the Court, around which all the other provisions of the Statute are built[10].

If, therefore, too restrictive an interpretation be given to the Court's jurisdiction, in consequence of which the Court does not decide a dispute properly referred to it within its jurisdiction, there can be a non-performance of its express statutory obligation.

While it is important, then, that objections based on lack of third-party consent must receive the Court's most anxious scrutiny, there is to be weighed against it, in areas of doubt, the other consideration, equally important, of the Court's statutory duty to decide a dispute properly brought before it within its judicial authority. Too strict an application of the first principle can result in an infringement of the second. In the international judicial system, an applicant seeking relief from this Court has, in general, nowhere else to turn if the Court refuses to hear it, unlike in a domestic jurisdiction where, despite a refusal by one tribunal, there may well be other tribunals or authorities to whom the petitioner may resort.

As Fitzmaurice observes:

> "Since the national law will normally ensure that there is some domestic forum competent to hear and determine all cases involving breaches of that law, or the assertion of rights under it, it follows that domestic jurisdictional issues are of secondary importance, because a claimant who fails on jurisdictional grounds in one forum can start again in the correct one. Thus, as a general rule, there is no avoiding a determination on the merits if the claimant persists, and the defendant obtains no ultimate advantage by raising jurisdictional issues. It is far otherwise in the international field where a jurisdictional objection, if successful, will normally dispose of the case entirely, and rule out any further proceedings, not only before the tribunal rendering the jurisdictional decision, but before any other. In the international field therefore, such issues assume a far greater, and usually a fundamental importance." (Sir Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice, Vol. II, 1986, p. 438; emphasis in original.)

It is an important circumstance relating to all jurisdictional questions that this Court is the international system's place of ultimate resort for upholding the principles of international law, when all other instrumentalities fail.

(vi) The test of reasonableness

It is sought, in this case, to interpret Monetary Gold as meaning that the Court has no jurisdiction because it cannot determine the question before it, without first determining the legality or otherwise of Indonesia's presence in the Territory. In short, this proposition would mean that, where a claim by State A against State B cannot be made good without demonstrating, as a prerequisite, some wrongful conduct on the part of State C, State B can avoid an inquiry into its own conduct, however wrongful, by pointing to C's wrongdoing as a precondition to its own liability.

A time-honoured test of the soundness of a legal interpretation is whether it will lead to unreasonable, or indeed absurd, results. That this proposition could lead to manifestly unreasonable results will be evident from the following illustrations, in each of which A is the applicant State, B the respondent, and C the third party State, whose wrongdoing must be established as a precondition to the claim or the defence. In each illustration, B has subscribed to the Court's jurisdiction, but not C, for which reason C is not before the Court.

- After A and B enter into a mutual defence pact, C commits an act of aggression against A. B does not come to A's relief. In an action by A against B, it is necessary, preliminarily, for A to prove C's act of aggression[11]. Since C is not before the Court, A's claim must be dismissed.
- Between A and C, there lies a narrow corridor of B's territory. C discharges a large quantity of radioactive waste into B, whence it flows into A. A sues B. B seeks to prove that the matter is beyond its control, inasmuch as the noxious material has come from C and, once on its territory, could not be contained. Since it is necessary for B to prove this wrongful

conduct on the part of C, B's defence will be shut out.

- In furtherance of B's plans to gather military intelligence regarding A, B persuades a potential ally, C, to overfly A's territory for unlawful aerial surveillance. While overflying A's territory, C's plane crashes over a crowded city, causing immense damage and loss of life. A takes B to Court for damage caused. A is in possession of material proving B's instigation of C's unlawful act. B can have the claim dismissed for lack of jurisdiction, on the basis that a precondition to the claim is proof of C's unlawful act.
- C makes a raid against A and plunders, inter alia, a historic object belonging to A. B acquires the object from C. A sues B to recover it and needs, as a pre-requisite, to prove that it was the identical object taken away in the raid by C. A cannot maintain the action in the absence of C, for proof of C's wrongdoing is a pre-requisite to A's claim. (The example does not take into account any special treaty provisions relating to the return of cultural or historical treasures.)
- A State corporation owned by A runs an industrial establishment in the territory of C. C wrongfully confiscates its highly specialized plant and factory, and invites B, which commands special expertise in the relevant field, to participate in running it with C as a joint profit-sharing venture. B agrees and participates. A sues B, alleging the illegality of the whole enterprise. The claim must be rejected because the action is not maintainable without proof of the wrongful act of C.

Examples could be multiplied.

In each case a third party's wrongdoing must be established as a prerequisite to the claim or defence. In each case the rule excluding it produces manifest injustice and an unreasonable result. It is difficult to imagine that such a rule can truly represent a "well-established" principle of international law, built into the Statute of the Court - a principle on the basis of which the fundamental question of jurisdiction is decided, on which in turn depend the ultimate rights of parties in matters of great moment.

The conclusion is compelling that an interpretation of Monetary Gold to produce such a result clearly extends the decision far beyond its permissible limits. Indeed, such an interpretation seems contrary to the principle of individual responsibility of each State for its own acts. The mere allegation of a third party's wrongdoing as a prerequisite to the proof of one's own cannot deflect the course of justice and steer it away from the principle of a State's individual responsibility for its individual actions. (On this, see, further, section 3(ii) below.)

(vii) Prior jurisprudence

In Monetary Gold, the Court stated that:

> "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent." (ICJ Reports 1954, p. 32; emphasis added.)

It is noteworthy that there was no citation of precedent in Monetary Gold. It was a decision that formulated no new principle, and made no new advances. The decision made no greater claim than that it was applying a principle already embodied in the Court's Statute.

It would be helpful, therefore, to look at some prior cases.

a) Advisory Opinions

Two well known prior cases are Status of Eastern Carelia (P.C.I.J., Series B, No. 5) and Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, p. 65), both Advisory Opinions, where similarly strong statements were made in similar language.

In the first case, the Permanent Court found that it was "impossible" to give an opinion which bears on an actual dispute between Finland and Russia, as the Russian Government was not before the Court. Using the same expression later used in Monetary Gold (ICJ Reports 1954, p. 32), that case too described as "well established in international law" the principle that no State could, "without its consent, be compelled to submit its disputes ... to mediation or to arbitration" (P.C.I.J., Series B, No. 5, p. 27).

In Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, as well, the Court referred to the:

> "well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent" (op. cit., p. 71).

If these cases were a basis on which this Court described the third-party-rule as a "well-established" principle in international law, the point needs to be made that advisory opinions rest upon a different judicial basis from contentious proceedings. The Court's decision as to whether to proceed with a matter is clearly taken on different bases in advisory proceedings, where the Statute may perhaps give the Court somewhat more discretion as to whether it will render an opinion (Statute, Art. 65). Precedents deriving from advisory opinions, where the Court declines to give an opinion in consequence of third party involvement, are not therefore of direct applicability to jurisdictional decisions in contentious proceedings.

It is significant moreover that in Status of Eastern Carelia, the Court described it as "very inexpedient that the Court should attempt to deal with the present question" (op. cit., p. 28; emphasis added) and again stated "it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy" (ibid.; emphasis added).

The jurisprudence on this matter deriving from advisory opinions can thus be distinguished[12]. Whether or not considerations of "expediency" can be taken into account in advisory opinions, they have no place in contentious litigation where the Court must reach a decision one way or the other (see section (v) above[13].

b) Contentious cases

As for the jurisprudence deriving from contentious proceedings, the manner in which the Court handled the Corfu Channel case, just a few years earlier, is not in line with the general proposition formulated in Monetary Gold.

In that case, the United Kingdom claimed that the minefield which caused damage to its shipping was laid by Albania. As an alternative argument it claimed that the minefield was laid by Yugoslavia, with the connivance of the Albanian government. As the Court observed:

"This would imply collusion between the Albanian and the Yugoslav Governments, consisting either of a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines." (ICJ Reports 1949, p. 16.)

In so far as concerned this alternative argument, the principal wrongdoer was Yugoslavia. Yugoslavian wrongdoing was the prerequisite to the alleged Albanian wrongdoing, very much in the manner of Indonesian wrongdoing being the prerequisite to alleged Australian wrongdoing, as argued by Australia.

In proof of this collusion the United Kingdom Government placed evidence before the Court and, in the Court's own words:

> "The Court gave much attention to this evidence and to the documentary information supplied by the Parties. It supplemented and checked all this information by sending two experts appointed by it to Sibenik: Commodore S.A. Forshell and Lieutenant-Commander S.J.W. Elfferich." (Ibid.)

> "Apart from Kovacic's evidence, the United Kingdom Government endeavoured to prove collusion between Albania and Yugoslavia by certain presumptions of fact, or circumstantial evidence, such as possession, at the time, by Yugoslavia, and by no other neighbouring State, of GY mines, and by the bond of close political and military alliance between Albania and Yugoslavia, resulting from the Treaty of friendship and mutual assistance signed by those two States on July 9th, 1946." (Ibid., p. 17; emphasis added.)

The Yugoslav Government was not a party to the proceedings but it authorized the Albanian government to produce certain Yugoslav documents.

Sir Hartley Shawcross for the United Kingdom made the following statements, among others, implicating Yugoslavia, not merely peripherally, but indeed, in this part of the case, as the principal participant in the international wrongdoing alleged:

> (a) that it was well known that, at the relevant time, there was the closest association and collaboration between Albania and Yugoslavia (ICJ Pleadings, Corfu Channel, Vol. III, 239);
>
> (b) that members of the Albanian Forces were sent to Yugoslavia for training (ibid., p. 240);
>
> (c) that Yugoslavia, under a decree contained in the Yugoslav Official Gazette, was given "a virtual monopolistic position in regard to coastal traffic between the two countries" (ibid.);
>
> (d) that Yugoslavia conducted practically the whole of Albania's foreign relations and "had naval, military and air-force missions in Albania guiding the organization of the military arrangements of that country" (ibid.);
>
> (e) that Yugoslavia had the relevant GY type of German mines, which were laid in the Corfu Channel (ibid.);
>
> (f) that the suspicion that Yugoslav ships laid these mines is "converted into certainty" by the evidence of Lieutenant Commander Kovacic, formerly of the Yugoslav navy (ibid.);
>
> (g) that the mines were hurriedly loaded onto two Yugoslav ships which "silently steamed away" during the night to lay them in Albanian waters (ibid., p. 243);
>
> (h) that there was a stock of GY mines at Sibenik and the mines loaded on the vessels came from that stock (ibid.);
>
> (i) that the ships were seen again 4 days later, but the mines were not upon them (ibid., pp. 243-244); and
>
> (j) that there was evidence that the duty carried out by the ships was to lay a field of mines in Albanian territorial waters (ibid., p. 244). The Court did not dismiss these suggestions as beyond its jurisdiction to investigate, but in fact, by its Order of 17 January 1949 (ICJ Reports 1949, p. 151), instructed naval experts nominated by it to carry out investigations on the spot at Sibenik, Yugoslavia, and in the Corfu Channel area. For two days, at Sibenik, the Experts inspected the actual geographical layout of the spot where Kovacic testified he had seen the two Yugoslav minelayers being loaded with mines[14].

Clearly this was a very specific allegation of an internationally wrongful act by a third State not before the Court. Indeed, it provoked a strong response from Albania in the following terms:

> "How could the Court decide on the facts of alleged complicity and on the demand for reparations against the accomplice without having given a decision against the principal offender accused arbitrarily and without proof by the British Government?" [15]

The Court held, in fact, that "the authors of the minelaying remain unknown" (ICJ Reports 1949, p. 17). Had the Court accepted the United Kingdom's submissions, it would have been making a clear finding of the commission of an illegality by Yugoslavia. The fact that such a wrongful act was alleged against a third party did not deter the Court from considering the alternative argument placed before it.

The Corfu Channel case was thus a stronger instance of third-party involvement than the present case. It may even be characterized as a case which went to the very edge of the principle, or even, conceivably, somewhat beyond it, but it does not support the suggestion in Monetary Gold of a steady stream of prior authority.

If the proposition be correct that an application should be dismissed where the illegal act of a third party State lies at the very foundation of the claim, the Court would have indicated to the United Kingdom that this alternative claim was unsustainable in the absence of Yugoslavia and would have dismissed this aspect of the case in limine.

If, far from taking such a course, the Court "gave much attention" to the evidence, checked the documentary information and sent experts to investigate it, it was not governing itself by the principle which Australia argues is fundamental and well established. It even permitted the United Kingdom Government to attempt to prove collusion with the absent third State, to the extent not only of possession of the mines, but also of a military alliance resulting from a treaty of friendship and mutual alliance. The attitude of the Court in Corfu Channel is thus in sharp contrast to the Court's decision in the present case.

The Ambatielos case (ICJ Reports 1953, p. 10) may also be mentioned as an instance where the position of third parties not before the Court was likely to be affected by the decision the Court was invited to make.

In the merits phase of that case, the Greek government, in a case between itself and the United Kingdom, invited the Court to consider certain articles of treaties between the United Kingdom and Denmark, the United Kingdom and Sweden and the United Kingdom and Bolivia. The United Kingdom government, without objecting to the reference to those treaties, questioned the correctness of the English translations of certain of the provisions invoked. The Court was invited to place a construction upon these treaties which would have helped the Government of Greece in the interpretation it sought to place upon its treaty with the United Kingdom. No exception seems to have been taken to the reference to these treaties[16].

(viii) Subsequent jurisprudence

A substantial jurisprudence has built up over the years in which, although the principle in Monetary Gold has been invoked as a bar to jurisdiction, the Court has held the principle within its proper confines, refusing to allow it to be unduly extended. This accords with the Court's view, already cited, that Monetary Gold had gone to "the limit of the power of the Court to refuse to exercise its jurisdiction" (Military and Paramilitary Activities in and against Nicaragua, ICJ Reports 1984, p. 431, para. 88).

Among the cases so decided by the Court are Military and Paramilitary Activities in and against Nicaragua, Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Continental Shelf (Libyan Arab Jamahiriya/Malta, Frontier Dispute (Burkina Faso/Republic of Mali) and Certain Phosphate Lands in Nauru (Nauru v. Australia).

Principles that have received elaboration in the Court's developing jurisprudence on this point are that it did not suffice that a third party was affected (Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), ICJ Reports 1990, pp. 115-116, para. 55); that the interests of the third State must be a part of "the very subject-matter of the decision" (ibid., pp. 121-122, paras. 72 and 73); that the "test is not merely one of sameness of subject-matter but also of whether, in relation to the same subject-matter, the Court is making a judicial determination of the responsibility of a non-

party State" (Nauru, ICJ Reports 1992, p. 296, Judge Shahabuddeen, separate opinion); that joint wrongdoers may be individually sued (ibid., pp. 258-259; and that the circumstance that a third party would be affected by the judgment is not by itself sufficient to bring Monetary Gold into operation (ibid., pp. 261-262).

Particular reference should be made to Certain Phosphate Lands in Nauru (ICJ Reports 1992, p. 240), which is in a sense closest to the principle involved in the present case. In that case, although the administration of Nauru was entrusted jointly to three trustee Powers - Australia, New Zealand and the United Kingdom - and any finding of breach of trust by Australia would, it was alleged, necessarily mean a finding against its partners as well, the Court was not deterred from dismissing that objection and setting the case down for hearing on the merits. The Court held that the interests of New Zealand and the United Kingdom did not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application. The Court rejected Australia's contention that there would be a simultaneous determination of the responsibility of all three States and that, so far as concerns New Zealand and the United Kingdom, such a determination would be precluded by the fundamental reasons underlying Monetary Gold (ICJ Reports 1992, p. 261, para. 55). The fact that the Court's judgment would clearly affect third parties not before the Court does not thus deter the Court from adjudicating upon the dispute between the parties who are in fact before it[17].

The undoubtedly necessary and unimpeachable principle enunciated in Monetary Gold has thus been kept within the ambit of its rationale by a steadily developing body of jurisprudence of this Court. With the greatest respect to the Court's decision in this case, it would appear that it will step back from that stream of development and, in so doing, both expand the limited principle of that case, and diminish the area of the Court's jurisdiction. The Monetary Gold principle, thus applied, would be discharging a function very different to what it did in the case in which it was formulated.

3. Other relevant factors

(i) Third party safeguards

In Military and Paramilitary Activities in and against Nicaragua, the Court observed that, in appropriate circumstances, it would decline, as in Monetary Gold, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision (ICJ Reports 1954, p. 32)" (ICJ Reports 1984, p. 431, para. 88).

Thereafter the Court went on to note the safeguards available to third parties in the following terms:

> "Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated ... other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention." (Ibid.)

Third party protection, which follows also from the general principles of international law, is entrenched, so far as the Court's jurisdiction is concerned, by Article 59 of its Statute.

Indeed, this concern for the protection of third States is carried even further by Article 62 which ensures that, should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may request that it be permitted to intervene. When the Court's Statute was designed, it was no doubt clearly foreseen that a judgment of the Court could well make an impact on the rights of third parties. The Statute therefore embodied these carefully structured safeguards protecting the interests of third party States which may be affected by a decision - a structure which both protects them and enables them to intervene. Monetary Gold did no more than give effect to these statutory provisions. It was scarcely meant to be erected into an independent principle in its own right, constituting a third and further protection, travelling even beyond the Statute itself.

It is to be remembered, moreover, that, while in domestic jurisdictions where the doctrine of stare decisis applies, the other parties in transactions of an identical nature may find themselves bound by a principle of law laid down in a case to which they are not parties, in international law, third parties have the further safeguard of the absence of a doctrine of stare decisis.

(ii) The principle of individual State responsibility

Principles of State responsibility, based on the autonomous and individual nature of each State, require that where two States are accessory to a wrongful act, each State must bear international responsibility for its own internationally wrongful act.

This principle was well formulated by Portugal at the oral hearings: "the security and the smooth running of the Organization are collective under the Charter, because each member has duties that it owes to the others and to the Organization itself, inasmuch as it constitutes their corporate union. In other words, it is because the system is universal that, within it, each member retains individual responsibility for its acts and a duty to respect the principles common to all. It follows that none of the members can shelter behind the fact that a situation has been created by another in order to avoid itself reacting to that situation in pursuance of the rules of law enshrined in the common Charter." (CR 95/5, p. 72.)

In the Seventh report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, that distinguished rapporteur treated as axiomatic the proposition that a breach of international responsibility by a State would engage that State's responsibility, irrespective of another State's participation in the act. The report observed:

> "It need hardly be said that, if the actions constituting participation by a State in the commission of an internationally wrongful act by another State constituted a breach of an international obligation in themselves, they would on that account already engage the international responsibility of the State which performed those actions, irrespective of any consequences that might follow from the part taken in the internationally wrongful act of another State." (Ch. IV, "Implication of a State in the internationally wrongful act of another State," Yearbook of the International Law Commission, 1978, Vol. II (Part One), A/CN.4/307 and Add. 1&2, para. 52, fn. 99; Reply, Vol. I, pp. 220-221; see, also, Ian Brownlie, State Responsibility (Part I), 1983, p. 190.)

On these principles, the Respondent State must answer separately for its own acts.

This separation of responsibility was illustrated also in this Court's decision in Nauru, where, although the mandate and trusteeship in question were given to the same three governments "jointly," the Court permitted the case to proceed against one of the three trustees, despite the implications this might have had upon the liability of others. The Court there pointed out that it was not precluded from adjudicating upon the claims submitted to it:

> "provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to

act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court, which provides that, 'The decision of the Court has no binding force except between the parties and in respect of that particular case.'" (ICJ Reports 1992, p. 261.)

It would be even more inappropriate that a State which has not accepted the Court's jurisdiction can use the very fact of its non-acceptance as a means of preventing States that have accepted jurisdiction from settling their disputes according to law.

Australia's submission that its responsibility "could at all events be no more than consequential, derived from the responsibility of Indonesia" (CR 95/8, p. 8) does not accord with basic principles of State responsibility, for, to use again the language of the same Rapporteur:

> "One of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law." (Ago, Yearbook of the International Law Commission, 1971, Vol. II (Part One), p. 205, para. 30.)

Even if the responsibility of Indonesia is the prime source, from which Australia's responsibility derives as a consequence, Australia cannot divert responsibility from itself by pointing to that primary responsibility.

(iii) Rights erga omnes

Australia has very rightly stated that it "does not dispute that the right to self-determination is an erga omnes principle" (Rejoinder, p. 42, para. 78). This position has been many times repeated in the oral submissions. The concept of rights and obligations erga omnes is further discussed in Part D.

An erga omnes right is, needless to say, a series of separate rights erga singulum, including inter alia, a separate right erga singulum against Australia, and a separate right erga singulum against Indonesia. These rights are in no way dependent one upon the other. With the violation by any State of the obligation so lying upon it, the rights enjoyed erga omnes become opposable erga singulum to the State so acting.

To suggest that Indonesia is a necessary party to the adjudication of that breach of obligation by Australia is to hamper the practical operation of the erga omnes doctrine. It would mean, very much along the lines of the illustrations in section 2(vi) above, that Indonesia could protect any country that has dealings with it in regard to East Timor, from being impleaded before this Court, by Indonesia itself not consenting to the Court's jurisdiction. In the judicial forum, the right erga omnes could to that extent be substantially deprived of its effectiveness.

Moreover, in any event, Indonesia would be protected against any suggestion of res judicata against it. The right erga omnes, when asserted against Australia, becomes a right erga singulum which, in turn, becomes a res judicata erga singulum against Australia, in the event of the success of the claim. It would have no adjudicatory quality against Indonesia, thus preventing the "Monetary Gold principle" from operating to bar the action against Australia.

(iv) Increasingly multilateral nature of modern international obligations

Reference has already been made to the fact that the multilateral aspect of obligations is gaining increasing significance in modern international law. Any instrumentality charged with administering international law in this context needs to take account of this aspect so as not to restrict the development of international law in keeping with this trend. Foremost among the sources of multilateral obligations is the UN Charter, under which all States alike are vested with rights and responsibilities which all others must recognize.

In this network of interlocking international relationships, each State which is impugned by another for failure to abide by its international obligations must answer for itself, in accordance with the principle of individual responsibility already outlined. It cannot plead another State's responsibility as an excuse for its own failure to discharge its own responsibility. That other State will answer for itself when the appropriate situation arises and may perhaps be affected by the judgment the Court renders in the case before it.

If, for example, the Court held with Portugal in this case, this finding would have repercussions on many other States which may or may not have acted in accordance with their individual obligations to recognize the rights of East Timor. This Court cannot concern itself with all those ramifications of a finding which it delivers in accordance with binding norms of international law. The Court cannot anticipate them all, in a world order of criss-crossing multilateral obligations.

As Judge Shahabuddeen observed in his separate opinion in Certain Phosphate Lands in Nauru:

> "It has been correctly pointed out that '[a]s inter-State relationships become more complex, it is increasingly unlikely that any particular dispute will be strictly bilateral in character' (L.F. Damrosch, "Multilateral Disputes," in L.F. Damrosch (ed.), The International Court of Justice at a Crossroads, 1987, p. 376)." (ICJ Reports 1992, p. 298.)

(v) The distinction between a treaty and the unilateral acts from which it results

It is self-evident that while a treaty is a bilateral or multilateral instrument, it comes into existence through the fusion of two or more unilateral acts, as the case may be. What the Court is invited to consider in this case is not the unlawfulness of the bilateral treaty, but the unlawfulness of the Respondent's unilateral actions which went into the making of that Treaty.

It is a clear principle in the domestic law of obligations that the unlawfulness of a contract and the unlawfulness of the conduct of the parties to it are different concepts. A similar principle is to be found in the law of treaties, where there could, for example, be a valid treaty even though one party acts unlawfully by its domestic law in entering into it (Vienna Convention, Art. 46), or when a representative acts in violation of a specific restriction validly placed upon him by his State (Art. 47). The treaty is nevertheless binding.

The Court is not called upon to pronounce upon the unlawfulness or otherwise of the Treaty, or upon the unlawfulness or otherwise of Indonesia's conduct, but upon the unlawfulness or otherwise of Australia's unilateral act in entering into it. What are the legal obligations of a particular party, what are its acts, to what extent do those acts contravene its obligations - those are the questions bearing upon the unilateral conduct of one party, which the Court is called upon to decide. The invalidity of the Treaty, or of the other Party's conduct, is not the precondition, as Australia suggests, for the Court's finding on the unlawfulness of Australia's conduct.

The acts of a contracting State, such as the decision to sign, the decision to accord de jure recognition, the decision to ratify, the decision to implement, the decision to legislate, are all unilateral acts upon which the Court can adjudicate.

(vi) Has the wrong party been sued?

Australia's position is that the true respondent in this case is Indonesia. According to this submission, Portugal's real opponent is Indonesia, Portugal's grievance is against Indonesia and Portugal's true cause of action is only against Indonesia.

At the oral hearings, Australia summarized its case in this regard in the following terms:

"- on the one hand, Australia heartily subscribes to the legal settlement of international disputes which lend themselves to it; but it also subscribes to the principle of consent to jurisdiction (at least, until a consensus in favour of the universal, compulsory jurisdiction of the Court has been achieved); and it considers that this forum should not be diverted to ends not properly its own; as a sovereign State, Indonesia has chosen not to accept the optional clause; that is its business;

"on the other hand, Australia does not mean to be used as a scapegoat, whose principal function would be to salve the conscience of Portugal which, being unable to join issue with Indonesia, is attacking a State which, in reality, can do nothing about the matter and whose alleged responsibility - a complete fabrication for the purposes of the case - could at all events be no more than consequential, derived from the responsibility of Indonesia." [18] (CR 95/8, p. 8).

If Indonesia had in fact been before this Court, one could see that Portugal would probably have pleaded its case against Indonesia in very different terms from its claim against Australia. A larger segment of factual material pertinent only to Indonesia may have been placed before this Court, which is not germane to the case against Australia. It may even be said that, had both Indonesia and Australia been available as respondents, Portugal's claim against Indonesia may have been the more important of the two.

Another way of approaching the submission that the wrong party has been sued is perhaps as follows:

If Indonesia had been a party before the Court, Portugal's case against Indonesia would either be the identical case, namely, that it too acted unlawfully in entering into the identical treaty, or it would be a more substantial case, involving other items of alleged illegal conduct against Indonesia. In case of the first alternative, if it were the identical case, the situation would be directly covered by the Nauru decision where the claim against absent parties would have been identical, had they been sued, to the claim actually before the Court. On the clear jurisprudence of this Court, the Court would have jurisdiction. In case of the second alternative, the case against Indonesia would be one of a different order, involving a different range of evidence and a different set of issues. The case against Australia depends upon Australia's obligations and their violation by entering into the Treaty. The case against Indonesia would relate to the circumstances of Indonesia's entry into East Timor, the political and administrative arrangements that have followed, and numerous other details pertinent to alleged unlawful conduct by Indonesia. It would, in short, be a totally different case. Such a situation would run directly contrary to the Australian contention that the case brought against Australia is in reality a case against Indonesia, brought against the wrong Respondent.

All that this Court is concerned with is whether a legally supportable claim has been made against Australia. If this be so, it matters little whether or not a more important or substantial claim could have been made against Indonesia had Indonesia consented to the jurisdiction.

The answer therefore to the contention that the wrong party has been sued is that the Court needs only to go so far as to find that there is a legally sustainable claim against the party that has in fact been sued.

(vii) Historical background

As a postscript to this discussion, it would not be out of place to look back upon the deliberations at the League of Nations regarding the particular clause of the Court's Statute upon which this entire case has turned.

In regard to consulting travaux preparatoires regarding certain important provisions of the Covenant of the League of Nations, Judge Jessup observed:

"In my opinion, it is not necessary - as some utterances of the two international courts might suggest - to apologize for resorting to travaux preparatoires as an aid to interpretation. In many instances the historical record is valuable evidence to be taken into account in interpreting a treaty." (South West Africa, ICJ Reports 1966, p. 352; dissenting opinion.)

The First Assembly of the League, on December 13th, 1920, the day of adoption of the Statute, was discussing the optional jurisdiction principle, embodied in Article 36, paragraph 2, of the Statute of the Permanent Court, which, subject to minor variations, became Article 36(2) of the Statute of this Court. What were the expectations attending the adoption of this clause, and how was it expected to work?

Some delegates criticized the principle of consent as a basis of the Court's jurisdiction - for example, Mr. Tamayo (Bolivia) observed that this was unstable and perishable material out of which to build the edifice of justice[19].

Others saw the Statute, and the principle of consent on which jurisdiction was based, as an instrument which, through the experience of their operation, would enable the new concept of international adjudication, never in previous history available for universal recourse[20], to grow in usefulness and international service. That background of lofty purpose always attends the work of this Court.

Developing further the principle of progressive development, Mr. Balfour stated:

"if these things are to be successful they must be allowed to grow. If they are to achieve all that their framers desire for them, they must be allowed to pursue that natural development which is the secret of all permanent success in human affairs ..." [21]

The inadequacy of Article 36 was recognized in 1945 as well, when the Statute for the present Court came under discussion, but no agreement was possible as to how to rewrite it (Rosenne, op. cit., p. 316). Three quarters of a century have passed since the adoption of the provision under discussion. This period has been rich in the experience out of which this Court and its predecessor have been fashioning an interpretation harmonious with the needs which the Statute intended it to serve. Observing that "the very notion of a more broadly based conception of the jurisdiction of the Court is gaining ground" (ibid.), and that: "[t]he principle that the jurisdiction of an international tribunal derives from the consent of the parties has long been subject to a process of refinement" (ibid.), Rosenne goes on to observe: "The result is that the application of the principle is less rigid than may be inferred from the manner in which it is enunciated." (Ibid., p. 317.)

As shown in section 2(viii) above, the jurisprudence of this Court in relation to absent third parties has indeed been growing along the path of the gradual and steady development envisaged at the time of the adoption of the principle of consent as a basis of jurisdiction.

A continuous thread that runs through the jurisprudence that has evolved around the "Monetary Gold principle" is the Court's concern, while giving due weight to the interests of third parties, at the same time, to prevent an extended application of that principle from hampering it in the legitimate and proper exercise of its jurisdiction. Consistent with this approach, and for the reasons already discussed, the Court should, in my respectful view, have proceeded to adjudicate upon this case. I am of the view, again expressed with the greatest respect for the contrary opinion of the Court, that the present Judgment represents a break in the course of steady development that has thus far elucidated and refined the application of the "Monetary Gold principle."

(viii) Conclusion

In the result, the Australian objections based on the contentions that the Monetary Gold principle stands in the way of the Court's competence, that the Court would be required to make an adjudication on the conduct of Indonesia, and that the wrong party has been sued should all be rejected. The reasons for these conclusions have been sufficiently set out. Australia's obligations under international law and Australia's actions such as negotiating, concluding, and initiating performance of the Treaty, taking internal legislative measures for the application thereof, and continuing to negotiate with the State party to that Treaty are justiciable on the basis of Australia's legal position viewed alone and Australia's actions viewed alone.

PART B. THE IUS STANDI OF PORTUGAL

If the Court has jurisdiction to hear this case, as indicated in Part A of this opinion, the matter cannot proceed further without a consideration of the important Australian objection that Portugal lacks the necessary legal status to act on behalf of East Timor.

(i) The respective positions of the Parties

Australia challenges the locus standi of Portugal to bring this action. It asserts that since Portugal has lost control over the territory several years ago, and another Power, namely Indonesia, has during all those years been in effective control, Portugal lacks the status to act on behalf of the Territory.

Moreover, with specific reference to its treaty-making powers, Australia submits that Portugal totally lacks the capacity to implement any treaty it may make relating to East Timor. Lacking this capacity, it lacks the ability to enter into any meaningful treaty regarding the territory, or to complain that a treaty has been entered into without reference to it by another Power which is in effective control.

In support of this position, Australia points to the absence of any General Assembly resolution recognizing the status of Portugal since 1982, and the absence likewise of any resolution of the Security Council since 1976. Australia consequently argues that, even if resolutions before these dates validly recognized such a status at one stage, they have since fallen into desuetude and been overtaken by the force of events. Australia points, moreover, to the fact that successive votes in the General Assembly in relation to East Timor have revealed a decreasing proportion of UN membership in favour of the resolutions recognizing the position of Portugal.

Portugal argues, on the other hand, that, although it has physically left the territory and no longer controls it, it is nonetheless the administering Power, charged with all the responsibility flowing from the provisions of Chapter XI of the United Nations Charter, and has been recognized as such by a series of General Assembly and Security Council resolutions. It submits further that there has been no revocation at any stage of Portugal's authority as administering Power, no limitation placed upon it, and no recognition of any other power as having authority over East Timor.

(ii) Structure of UN Charter provisions regarding dependent territories

A discussion of the status of Portugal to maintain this action necessitates a brief overview of the structure of the UN Charter provisions framed for the protection of dependent territories.

The Charter was so structured that the interests of territories not able to speak for themselves in international forums were to be looked after by a Member of the United Nations entrusted with their welfare, who would have the necessary authority for this purpose. In other words, its underlying philosophy in regard to dependent territories was to avoid leaving them defenceless and voiceless in a world order which had not yet accorded them an independent status.

This is not to be wondered at when one has regard to the high idealism which is the essential spirit of the Charter - an idealism which spoke in terms of a "sacred trust" lying upon the powers assuming responsibilities for their administration, an idealism which stipulated that the interests of their inhabitants were paramount. Translating this idealism into practical terms, the Charter provided for United Nations supervision of the responsible authorities through a requirement of regular transmission of information to the Secretary-General (Art. 73(e)). They were further required to ensure the political, economic, social and educational advancement, just treatment and protection against abuses of the inhabitants thus placed under their care.

It is against the background of such an overall scheme that the Australian submissions in this case need to be tested. The submission under examination is no less than that an administering Power's loss of physical control deprives it of the status and functions of an administering authority, and that the protective and reporting structure, so carefully fashioned by the United Nations Charter can thus be brushed aside.

This is a proposition to be viewed with great concern. It means that, whatever the reason for the administering Power's loss of control, that loss of control brings in its wake a loss of legal status.

The proposition can be tested by taking an extreme example, at a purely hypothetical level, of a non-self-governing territory being militarily overrun by a third Power, anxious to ensure not the "political, economic, social and educational advancement" of the people, but anxious rather to use it as a military or industrial base. Suppose, in this hypothetical example, that this invading power completely displaces the legal authority of the duly recognized administering Power. If the administering Power cannot then speak for the territory that has been overrun and the people of the territory themselves have no right of audience before an international forum, that people would be denied access to the international community, whether directly, in their own right, or indirectly, through their administering Power. The deep concern for their welfare, which is a primary object of Chapter XI of the Charter, and the "sacred trust" notion which is its highest conceptual expression, would then be reduced to futility; and the protective structure, so carefully built upon these concepts, would disintegrate, in the presence of the most untenable of reasons - the use of force. In that event, the use of force, which is outlawed by the entire scheme of the UN Charter, would have won its victory, and would indeed have won it over some of the loftiest concepts enshrined in the Charter. It is difficult to subscribe to a view that thus encourages and, indeed, rewards the use of force.

This example, offered at a purely hypothetical level, has been aimed at testing the practical efficacy of a legal proposition that seems to run counter to the entire scheme of the UN Charter. As so often in the law, the hypothetical example assists in the understanding of the practical rule.

Grave reservations must be registered regarding any interpretation of the Charter which leaves open so serious a gap in its scheme of protection and so undermines the central tenets which are its very foundation.

Three major legal concerns arise from this argument. The first concern, already referred to, is that it seems to concede that whatever the means through which that control has been lost, the important factor is the physical loss of control. This is a dangerous proposition which international law cannot endorse.

Secondly, the precedents in the matter do not lend support to the Australian argument. An instance that comes to mind is the case of Rhodesia, in respect of which it was nowhere suggested that loss of United Kingdom physical control over the territory meant a loss of United Kingdom legal authority in respect of the territory. United Nations action was based entirely on the assumption of the continuing status of United Kingdom authority.

Thirdly, there is more to the status of administering Power than mere physical control. An administering Power is charged with many duties relating to the welfare of the people of the territory. It may lose physical control but, with that loss of physical control, its duties do not fade away. The administrative Power is still obliged to extend such protections as are still available to it for the welfare of the people and the preservation of their assets and rights. The conservation of the territory's right to permanent sovereignty over its natural resources is thus a major responsibility of the administering Power, including particularly the preservation of its major economic asset, in the face of its possible extinction for all time. Such legal responsibilities remain the solemn duty of the administering Power, even though physical control may have been lost.

(iii) Is the UN a substitute for a displaced administering Power?

In answer to such a line of reasoning, it may perhaps be suggested that the General Assembly and the Security Council can, in such an event, take over the responsibilities of the administering Power.

It is true indeed that the General Assembly and the Security Council, in all their plenitude of power, preside over the great task of decolonization and protection of dependent peoples. Yet, with all respect, they are no substitutes for the particular attention to the needs of each territory which the Charter clearly intended to achieve. Protection from internal exploitation and external harm, day-to-day administration, development of human rights, promotion of economic interests and well-being, recovery of wrongful loss, fostering of self-government, representation in world forums, including this Court - all these require particular attention from a Power specifically charged with responsibility in that regard. Moreover, the supervision of the United Nations depends also on transmission of information under Article 73(e) and, in the absence of an administering Power, there would be a total neglect of that function and hence an impairment of UN supervision. The Charter scarcely envisaged that a dependent people should be left to fend for themselves, denied all this assistance. Least of all can it be envisaged that the use of force could deprive them of these rights. The basic protective scheme of the Charter cannot thus be negated.

(iv) The right of representation

Australia's contention that Portugal, by having lost control over the territory for a period of years, has lost the right to represent the people of East Timor is untenable for the same reasons. Any other view would result in the anomalous situation of the current international system leaving a territory and a people, who admittedly have important rights opposable to all the world, defenceless and voiceless precisely when those rights are sought to be threatened or violated. Indeed, Counsel for Portugal put this well in describing the nexus provided by the administering Power as "the umbilical cord" which ties East Timor to the international community.

While recognizing that Portugal has not in this case sought to base its locus standi on any footing other than that of an administering Power, this anomaly can also be illustrated in another way. In South West Africa, Second Phase (ICJ Reports 1966, p. 6), two States which had no direct connection with the Territory in question sought to bring before the Court various allegations of contraventions by South Africa of the League of Nations Mandate. There was no direct nexus between these States and South West Africa. Their locus standi was based solely on their membership of the community of nations and their right as such to take legal action in vindication of a public interest.

The present case is one where the applicant State has a direct nexus with the Territory and has in fact been recognized by both the General Assembly and the Security Council as the administering Power.

This case has similarities with South West Africa in that there is here, as there, a Territory not in a position to speak for itself. There is here, as there, a Power which is in occupation by a process other than one that is legally recognized. There is here, as there, another State which is seeking to make representations on the Territory's behalf to the Court. There is here, as there, an objection taken to the locus standi of the Applicant.

A vital difference is that here, unlike there, the applicant State has a direct nexus with the Territory and enjoys direct recognition by the United Nations of its particular status vis-à-vis the Territory. The position of the applicant State is thus stronger in the present case than the position of the States whose locus standi was accepted by half the judges of the Court in the South West Africa Judgment (ibid.), and, indeed, by the majority of the judges in the earlier phase of that case (South West Africa, Preliminary Objections, ICJ Reports 1962, p. 319).

(v) Resolutions recognizing Portugal's status as administering Power

The Court is called upon to decide, in regard to these resolutions, whether the General Assembly resolutions are devoid of legal effect. As a prelude to a discussion of this legal question, the content of these resolutions is briefly set out.

The resolutions of the General Assembly are the following: 3485(XXX), 31/53, 32/34, 33/39, 34/40, 35/27, 36/50 and 37/30. Some of these resolutions expressly recognize the status of Portugal as the administering Power (resolutions 3485(XXX), 34/40, 35/27, 36/50 and 37/30) and not one of them recognizes a legal status in Indonesia. Rather, some of them (31/53, 32/34, 33/39) reaffirm the Security Council resolutions and draw the attention of the Security Council to the critical situation in East Timor, and recommend that it take all effective steps for the implementation of its resolutions, with a view to securing the full exercise by the people of East Timor of their right to self-determination. Some of them request the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to keep the situation in East Timor under active consideration (resolutions 31/53 and 32/34 of 28 November 1977); reject the claim that East Timor has been integrated into Indonesia inasmuch as the people of the territory have not been able to exercise freely their right to self-determination and independence (resolution 32/34 of 28 November 1977); declare that the people of East Timor must be enabled to determine freely their own future within the framework of the United Nations (resolution 35/27 of 11 November 1980); welcome the diplomatic initiative taken by the Government of Portugal as the first step towards the free exercise by the people of East Timor of their right to self-determination and independence (ibid.); urge all parties directly concerned to co-operate fully with a view to creating the conditions necessary for the speedy implementation of General Assembly resolution 1514(XV) (ibid.); declare that the people of East Timor must be enabled freely to determine their own future on the basis of the relevant General Assembly resolutions and internationally accepted procedures (resolution 36/50 of 24 November 1981) and invite Portugal as the administering Power to continue its efforts with a view to ensuring the proper exercise of the right to self-determination and independence by the people of East Timor (ibid.). Since there is no diminution in any of the resolutions of Portugal's status as administering Power, one must therefore regard Portugal as continuing to be vested with all the normal responsibilities and powers of an administering authority. It is to be stressed, of course, that whatever powers an administering Power is vested with are powers given to it solely for the benefit of the territory and the people under its care and not for the benefit in any way of the administering Power. This is a truism and is mentioned

here only because some suggestions were made in the oral submissions that Portugal has instituted this case for reasons other than a desire to conserve the interests of the territory and people of East Timor.

Not only will any success Portugal may achieve from this case be held strictly for the benefit of the people of East Timor, but it will be held strictly under UN supervision. The Australian argument that Chapter XI of the UN Charter "is not a colonial charter intended legally to entrench the rights of the former colonial State ..." (CR 95/10, p. 65) loses its thrust in such a context.

Australia submits that Portugal not only has a poor colonial record but, in fact, abandoned the people of East Timor. Whatever may have been the facts regarding these aspects, they were not unknown to the General Assembly, which nevertheless invited Portugal to continue its efforts. The body best able to assess Portugal's conduct having decided, notwithstanding all the information at its disposal, to issue such an invitation, this Court must respect that decision. It is to be observed further that, in extending that invitation, the General Assembly placed no restrictions on Portugal's status as administering Power, nor has it done so since then. It is significant also that, in resolution 384 (1975), the Security Council in fact censured Portugal for its failure to discharge its responsibilities fully as administering Power, but yet continued to recognize Portugal as the administering Power.

The resolutions of the Security Council, resolution 384 (1975) and resolution 389 (1976), have been quoted earlier in this opinion. Recognizing and reaffirming the inalienable right of the people of East Timor to self-determination, the Security Council, in both resolutions, calls upon all States to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination, and urges all States and other parties concerned to cooperate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the Territory.

These two resolutions of the Security Council have not at any stage been revoked, nor have they been superseded by later resolutions rendering them inapplicable.

Security Council resolution 384 expressly referred to Portugal as the administering Power and specifically imposed upon it the duty of co- operating fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination. The resolution thus contained a clear indication to Portugal of its duties in safeguarding this right of the East Timorese people. Since economic sovereignty is an important element of the concept of sovereignty, there was thus imposed upon Portugal, by Security Council resolution, apart from Charter provisions, the duty to safeguard the Territory's most valuable economic asset until the right to self-determination was freely exercised.

As with the General Assembly, so also with the Security Council, Portugal's prior colonial conduct did not prevent it from giving to Portugal the status it did and imposing upon it the duties that went with that status.

That status thus recognized by the Security Council receives repeated recognition in later resolutions of the General Assembly (see resolutions 35/27 (1980), 36/50 (1981) and 37/30 (1982)).

After these general observations, it is necessary to examine the legal effects of the relevant resolutions in greater detail.

(vi) Legal force of the resolutions

1. General Assembly resolutions

Very early in the history of the United Nations, the General Assembly's competence in regard to non-self-governing territories was recognized. Thus Kelsen refers to:

"the competence the General Assembly has with respect to non-self-governing territories not under trusteeship in accordance with Article 10 and (together with the Security Council) under Article 6" (The Law of the United Nations, 1950, p. 553, fn. 1)

and suggests that the General Assembly may discuss the non-fulfilment by a Member of its obligations under Chapter XI, leading even to the imposition of sanctions, along with the Security Council, under Article 6 (see, also, 48 American Journal of International Law (1954), p. 103).

After the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the General Assembly in 1960, it established a committee to follow up the implementation of the Declaration, thus "bringing all non-self-governing territories under a form of international supervision comparable to that of the trusteeship system" [22]. So much are all aspects of self-determination regarded by the General Assembly as pertaining to its sphere of authority that there has been a tendency "to consider that no aspect of 'colonialism' should be treated as a matter falling 'essentially' within the domestic jurisdiction of a State" (Goodrich, Hambro and Simons, ibid.).

The Assembly maintains a vigilant eye over all aspects relating to non-self-governing territories through the Fourth or Decolonization Committee[23] and the Committee of Twenty-four. Questions of the termination of dependent territory status upon the exercise of the right of self-determination have thus long been matters recognized as being within the scope of the General Assembly's authority. In resolution 1541(XV) of 15 December 1960, it specifically addressed (in Principle VI) the question whether a Non-self-Governing Territory can be said to have reached a full measure of self-government.

When, therefore, the General Assembly determines that a particular dependent territory has not exercised the right of self-determination or that a particular State is recognized as the Administering Power over a dependent territory, the Assembly is making a determination within the area of its competence, and upon a review of a vast range of material available to it. Legal consequences follow from these determinations.

Of course there are resolutions of the General Assembly which are of an entirely hortatory character. Many resolutions of the General Assembly are. But a resolution containing a decision within its proper sphere of competence may well be productive of legal consequences. As this Court observed in Namibia, the General Assembly is not "debarred from adopting, ... within the framework of its competence, resolutions which make determinations or have operative design" (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, p. 50, para. 105).

Even more is this so when those resolutions have been expressly accepted and endorsed by the Security Council, which is the case in relation to the resolutions on the status of Portugal as administering Power.

Thus resolutions of the General Assembly which expressly reject the claim that East Timor has been integrated into Indonesia (32/34 of 28 November 1977) declare that the people of East Timor must be enabled to determine their own future freely within the framework of the United Nations (35/27 of 11 November 1980) and expressly recognize Portugal as the administering Power (3485(XXX), 34/40, 35/27, 36/50 and 37/30) are resolutions which are productive of legal effects.

Article 18 of the Charter makes it clear that, on "important questions," the General Assembly may make "[d]ecisions." Adverting to this provision, this Court has observed:

"Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with 'decisions' of

the General Assembly 'on important questions.' These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect." (Certain Expenses of the United Nations, Advisory Opinion, ICJ Reports 1962, p. 163; emphasis in original.)

Waldock, in his General Course (Recueil des cours de l'Academie de droit international, 1962, vol. 106, p. 26), referring to this judicial pronouncement, stressed the General Assembly's competence to make decisions having dispositive force and effect[24].

In more than one of its resolutions, the General Assembly has referred to its competence

> "to decide whether a Non-Self-Governing Territory has or has not attained a full measure of self-government as referred to in Chapter XI of the Charter" (resolution 748(VIII) of 27 November 1953, relating to Puerto Rico; and resolution 849(IX) of 22 November 1954, relating to Greenland; emphasis added).

The General Assembly has also asserted this power in relation to Surinam and the Netherlands Antilles, Alaska and Hawaii (see Goodrich, Hambro and Simons, op. cit., pp. 460-461, and the references therein cited to the relevant resolutions). The General Assembly has not hesitated to use this power as, for example, when Portugal and Spain, following their admission to UN membership, asserted that they did not administer any territories covered by Chapter XI. In 1960, the Assembly declared that the territories of Portugal were non-self-governing "within the meaning of Chapter XI of the Charter" (General Assembly resolution 1542(XV) of 15 December 1960). It asserted its powers in this regard even more strongly the following year, condemning Portugal for "continuing non-compliance" with its obligations under Chapter XI and for its refusal to co-operate with the Committee on Information from Non-Self-Governing Territories, and established a special committee authorized to receive petitions and hear petitioners on this matter (General Assembly resolution 1699(XVI) of 19 December 1961). United Nations practice has not questioned the General Assembly's competence so to act as the appropriate UN organ for determining whether a non-self-governing territory has or has not achieved self-determination.

In a treatise on Legal Effects of United Nations Resolutions, Castaneda makes a juristic analysis of this power, observing that a General Assembly resolution does not express a duty, but rather establishes in a definite manner the hypothesis or condition from which flows a legal consequence, which makes possible the application of a rule of law.

> "By its nature, this consequence may be an order to act or not to act, an authorization, or the granting or denial of legal competence to an organ." (Jorge Castaneda, The Legal Effects of UN Resolutions, 1969, p. 121.)

The foregoing observations have a bearing on the definitive effects of General Assembly resolutions regarding Portugal's status, East Timor's status as a non-self-governing territory, and East Timor's right to self-determination. Additionally, since the General Assembly is the appropriate body for recognition of the Power holding authority over a non-self-governing territory, the absence of any General Assembly resolution recognizing Indonesia's authority over East Timor is also a circumstance from which a legal inference may be drawn. The General Assembly resolutions also have a bearing on the responsibility of all nations to co-operate fully in the achievement of self-determination by East Timor. The various resolutions of the General Assembly relating to this right in general terms, which have helped shape public international law, and are an important material source of customary international law in this regard (Simma, op cit., p. 240), are specifically strengthened so far as concerns the situation in East Timor, by the particular resolutions relating to that territory.

2. Security Council resolutions

These resolutions are also confirmatory of the status of Portugal. They are dealt with in Part D in the context of the substantive obligations of Australia.

(vii) Does Portugal need prior UN authorization to maintain this action?

Portugal's authority as administering Power has not been subject to any limitation by the UN in the resolutions recognizing Portugal's status. Australia's submission that Portugal needs UN authority to bring this action (Rejoinder, paras. 136, 144) suggests a limitation on an administering Power's authority which does not seem to be envisaged in the UN Charter.

There is another aspect as well to be considered, namely, that it is the duty of an administering Power to conserve the interests of the people of the territory. As part of their fiduciary duties, administering Powers recognize in terms of Article 73 of the Charter "the obligation to promote to the utmost ... the well-being of the inhabitants of these territories" and, to that end, "to ensure ... their ... economic ... advancement" (Art. 73(a); emphasis added) and "to promote constructive measures of development" (Art. 73(d)). Such obligations necessitate the most careful protection of the economic resources of the territory. Such a duty cannot be fulfilled without a legal ability on the part of the administering Power to take the necessary action for protecting those interests. If the administering Power receives information that the economic interests of the territory are being dealt with by other entities, to the possible prejudice of the interests of the territory's people, it is the administering Power's duty to intervene in defence of those rights. Indeed, failure to do so would be culpable. To suggest that the Charter would impose these heavy responsibilities upon administering Powers and, at the same time, deny them the right of representation on behalf of the territory, is to deprive these Charter provisions of a workable meaning. Such a restrictive interpretation of the authority of an administering Power receives no support, so far as I am aware, from UN practice or from the relevant literature.

Supervision of the administering Power is amply provided for in the Charter and it is difficult to see any warrant in law or in principle for further fettering a fiduciary Power in the proper and effective discharge of its duties under the Charter.

Further, the power given by the Charter under Chapter XI is clearly the power of a trustee. The power derives expressly from the concept of "a sacred trust," thus underlining its fiduciary character. The very concept of trusteeship carries with it the power of representation, whether one looks at the common law concept of trusteeship or the civil law concept of tutela. A trustee, once appointed, always carries out his or her duties under supervision, but is not required to seek afresh the right of representation each time it is to be exercised, for that is part and parcel of the concept of trusteeship itself.

(viii) Are the resolutions affected by diminishing UN support?

One of Australia's contentions was that the progressively lessening vote in favour of the General Assembly resolutions cited by Portugal showed that those resolutions were of a diminishing level of authority. This suggestion in effect calls upon this Court to venture into the uncertain area of the political history of resolutions of the General Assembly and to indulge in a vote-counting exercise to assess the strength of a particular resolution. Speculation on the possible meaning of voting procedures in the General Assembly is not the province of this Court. Rather the Court's concern is whether that General Assembly resolution has been duly passed by that principal organ of the United Nations within the ambit of its legal authority. Once thus passed, it commands recognition and it is part of the courtesy due by

one principal organ of the United Nations to another to respect that resolution, irrespective of its political history or the voting strength it reflects.

As Judge Lauterpacht has observed:

> "Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a resolution of the General Assembly." (Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, ICJ Reports 1955; Judge Lauterpacht, separate opinion, p. 120; emphasis added.)

Indeed, this Australian submission has grave implications in the circumstances of this case, for the resolutions which Australia would have the Court ignore are resolutions affirming the important principle of self-determination which is a well-established principle of customary international law. A heavy burden would lie upon a party contending that the validity of such a resolution has been affected by declining support for it in the United Nations.

(ix) Have the resolutions lapsed through desuetude?

Another Australian submission which was strenuously advanced is the suggestion that a long period of years during which similar resolutions are not passed discounts in some way the value and obligatory nature of such resolutions. Resolutions of the General Assembly or of the Security Council do not have to be repeated to retain their validity. Once these resolutions are duly passed, it is to be presumed that they would retain their validity until duly revoked or superseded by some later resolution.

The proposition that lapse of time wears down the binding force of resolutions needs to be viewed with great caution. In cases where resolutions in fact impose obligations at international law, this Court would then, in effect, be nullifying obligations which the appropriate organ of the United Nations, properly seised of that matter, has chosen to impose. More especially is caution required from the Court in regard to resolutions dealing with obligations erga omnes and rights such as self-determination which are fundamental to the international legal system. The Court would, in the absence of compelling reasons to the contrary, show due respect for the valid resolutions duly passed by its sister organs.

It is to be noted that Australia's argument that the resolutions of the Security Council have fallen into desuetude cannot be accepted for a further reason.

The argument of desuetude breaks down before the fact that the Committee of Twenty-four, which is the General Assembly's organ for overseeing the matter of decolonization, has kept the East Timor question alive on its agenda year after year. Moreover, the Committee has in its report to the General Assembly referred to this in successive years. The Committee would not be expected to keep this matter on their books if it is, as Australia has suggested, a dead issue.

The Secretary-General's progress reports to the General Assembly continue to this date. In his Report of 11 September 1992 (A/47/435, para. 1; Reply, Vol. II, p. 59), he refers to the search for "a comprehensive and internationally acceptable solution to the question of East Timor," and, in his most recent annual report of 2 September 1994, he states:

> "I have continued to provide my good offices in the search for a just, comprehensive and internationally acceptable solution to the question of East Timor." (A/49/1, 2 September 1994, para. 505.)

The General Assembly's action in keeping this item on its agenda from year to year is also a clear indication that the situation has not thus far proved acceptable to the international community.

The argument of desuetude, implying as it does that the matter is a dead issue, cannot succeed if the United Nations itself elects to treat the issue as live[25].

(x) Have the resolutions been nullified by supervening events?

Similar considerations apply to this submission of Australia. If supervening events have nullified duly passed resolutions of the Security Council or the General Assembly, it is for those bodies to take note of the altered situation and to act accordingly. Those bodies do not appear, as stated already, to have treated the issues as dead.

(xi) Is Portugal's colonial record relevant?

Australia has suggested that Portugal's colonial record has been such as to disentitle it to maintain this action. The past colonial record of Portugal leaves much indeed to be desired and, Portugal's counsel have freely conceded no less. One recalls that, in Namibia, it was noted that, when the General Assembly passed its resolutions against apartheid, these resolutions received the unanimous support of the entire Assembly, with only two exceptions - Portugal and South Africa (ICJ Reports 1971, p. 79; Judge Ammoun, separate opinion). Further comment is scarcely necessary regarding the past colonial attitudes of Portugal.

However, when the status at law of an administering Power has been duly recognized as such by the appropriate political authority, this Court cannot take it upon itself to grant or withhold that status, depending on whether it had a good or bad colonial record. Most colonial Powers would fail to qualify on such a test, which could make the system of administering Powers unworkable. The legal question for this Court is whether, in law, it enjoys that status.

At the commencement of this opinion, reference was made to the change that has occurred since 1974 in regard to Portugal's attitude towards self-determination of its colonies[26].

It bears re-emphasizing that the question at issue is the protection of the rights of the people of East Timor, and not the question of Portugal's record of conduct. The contention seems untenable that a protected people or territory, blameless in this respect, should be denied representation or relief owing to the fault of its administering Power.

Such a contention contradicts basic principles of trusteeship and tutelage, which always accord paramount importance to the interests of entities under fiduciary or tutelary care. This is so in international, no less than in domestic, law.

The several grounds on which Australia sought to impugn Portugal's status to maintain this action seem thus, on examination, to be unsustainable. Charter principles combine with well established fiduciary principles and principles of tutelage to underline the paramount importance of the interests of the non-self-governing territory over all other interests. That priority of interest is not easily defeated. It is the function of the administering Power to watch over it, and the function of international law to ensure its protection.

It does not serve the Territory's interest that an administrator, duly recognized by the United Nations, and legally accountable to it, should be viewed as having been displaced by another Power, neither recognized by the United Nations, nor legally accountable to it. Power over a non-self-governing people, without accountability to the international community, is a contradiction of the Charter principle of protection.

PART C. THE RIGHTS OF EAST TIMOR

The central principle around which this case revolves is the principle of self-determination, and its ancillary, the principle of permanent sovereignty over natural

resources. From those principles stem whatever rights are claimed for East Timor in this case.

(i) East Timor is a territory unquestionably entitled to self-determination

The Court is not in this case confronted with the difficulty of entering into the much discussed area of defining which are the entities or peoples entitled to self-determination. Australia has at all times admitted that East Timor was and is a non-self-governing territory[27]. It was specifically mentioned in the list of non-self-governing territories, within the meaning of Chapter XI of the Charter, contained in General Assembly resolution 1542(XV) of 15 December 1960 (Memorial, Vol. II, p. 30[28]). One must therefore address the question of self-determination in this case from the firm foundation of a territory unquestionably entitled to self-determination. The question for examination is what consequences follow from that fact.

(ii) The principle of self-determination

The Judgment of the Court (para. 29) has categorically reaffirmed the principle of self-determination, pointing out that it has evolved from the Charter and from United Nations practice, and observing further that the normative status of the right of the people of East Timor to self-determination is not in dispute. This opinion sets out, from that base, to examine the manner in which practical effect is to be given to the principle of self-determination, in the circumstances of the present case.

Australia has accepted the existence of the principle, but placed a somewhat limited view upon the State obligations which follow.

For example, it has advanced the argument, at the oral hearings, that: "There is in the United Nations Charter no express obligation on States individually to promote self-determination in relation to territories over which they individually have no control. The general obligation of solidarity contained in Article 2, paragraph 5, of the Charter extends only to assistance to the United Nations 'in any action it takes in accordance with the present Charter.'" (CR 95/9, p. 64.)

In its pleadings, it has taken up such positions as that there is no independent basis for a duty of non-recognition which would prevent the conclusion of the Timor Gap Treaty (Counter-Memorial, paras. 360-367); that there has been no criticism by the international community of States (including Australia) which have recognized or dealt with Indonesia in respect of East Timor (ibid., paras. 368-372); and that, in concluding the Timor Gap Treaty, Australia did not impede any act of self-determination by the people of East Timor that might result from such negotiations (ibid., 373-375). Although it has recognized East Timor as a province of Indonesia in the Treaty, Australia contends that, "By concluding the Timor Gap Treaty with Indonesia, Australia did nothing to affect the ability of the people of East Timor to make a future act of self-determination." (Ibid., para. 375.)

All of these submissions make it important to note briefly the central nature of this right in contemporary international law, the steady development of the concept, and the wide acceptance it has commanded internationally. Against that background, any interpretations of that right which give it less than a full and effective content of meaning would need careful scrutiny.

In the first place, the principle receives confirmation from all the sources of international law, whether they be international conventions (as with the International Conventions on Civil and Political Rights and Economic and Social Rights), customary international law, the general principles of law, judicial decisions, or the teachings of publicists. From each of these sources, cogent authority can be collected supportive of the right, details of which it is not necessary to recapitulate here.

Secondly, it occupies a central place in the structure of the United Nations Charter, receiving mention from it in more than one context.

Enshrined in Article 1(2) is the principle that friendly relations among nations must be developed by the United Nations on the basis of equal rights and self-determination. Developing such friendly relations is one of the Purposes of the United Nations - central to its existence and mission. There is thus an inseparable link between a major Purpose of the United Nations and the concept of self-determination. The same conceptual structure is repeated in Article 55, which observes that respect for equal rights and self-determination is the basis on which are built the ideal of peaceful and friendly relations among nations.

Article 55 proceeds to translate this conceptual structure into practical terms. It recognizes that peaceful and friendly relations, though based on the principle of equal rights and self-determination, need conditions of stability and well-being, among which conditions of economic progress and development are specified.

Since the development of friendly relations among nations is central to the Charter, and since equal rights and self-determination are stated to be the basis of friendly relations, the principle of self-determination can itself be described as central to the Charter.

The Charter spells out its concern regarding self-determination with more particularity in Chapter XI. Dealing specifically with the economic aspect of self-determination, it stresses, in Article 55, that stability and well-being are necessary for peaceful and friendly relations, which are in their turn based on respect for the principle of equal rights and self-determination. With a view to the creation of these conditions of stability and well-being, the United Nations is under a duty to promote, inter alia, conditions of economic progress and development (emphasis added).

This is followed by Article 56 which contains an express pledge by every Member "to take joint and separate action, in co-operation with the Organization for the achievement of the purposes set forth in Article 55." This is a solemn contractual duty, expressly and separately assumed by every Member State to promote conditions of economic progress and development, based upon respect for the principle of self-determination.

With specific reference to non-self-governing territories, Article 73 of the UN Charter sets out one of the objects of the administration of non-self-governing territories as being:

> "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions ..." (Art. 73(b)). This responsibility is imposed upon the administering power under the principle that the interests of the inhabitants of these territories are paramount. The solemn nature of this responsibility is highlighted in its description as a "sacred trust."

The central importance of the concept, and the desire to translate it into practical terms, are thus built into the law of the United Nations. Its Charter is instinct with the spirit of co-operation among nations towards the achievement of the Purposes it has set before itself. Integral to those Purposes, and providing a basis on which they stand, is the principle of self-determination.

Thirdly, the basic provisions of the Charter have provided the foundation upon which, through the continuing efforts of the United Nations, a superstructure has been built which again aims at practical implementation of the theoretical concept. Through its practical contribution to the liberty of nations, the world community has demonstrated its resolve to translate its conceptual content into reality.

Indeed, the General Assembly's special concern to translate this legal concept into practical terms has been unwavering and

continuous, as reflected in its appointment of the Committee on Information from Non-self-governing Territories and the conversion of the Committee into a semi-permanent organ as a result of a General Assembly resolution of December 1961. The Special Committee (the Committee of Twenty-four) on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples keeps this concern alive as a successor to the Committee of Information. That Committee has consistently retained the case of East Timor on its list of matters awaiting a satisfactory solution.

Landmark declarations of the United Nations on this matter have strengthened the international community's acceptance of this principle. The Declaration on the granting of independence to colonial countries and peoples (General Assembly resolution 1514(XV) of 20 December 1960), and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625(XXV) of 24 October 1970) are among these Declarations. The International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), constitute an unequivocal acceptance by treaty of the obligation to recognize this right.

The importance accorded to this right by all sections of the international community was well reflected in the discussions in the United Nations which preceded the acceptance of the Declaration of Friendly Relations. A recent study of these discussions (V.S. Mani, Basic Principles of Modern International Law, 1993, p. 224) collects these sentiments in a form which reflects the central importance universally accorded to this principle. As that study observes, the principle was variously characterized at those discussions as "one of the most important principles embodied in the Charter" (Japan); "one of the foundation stones upon which the United Nations was built" (Burma); "basic to the United Nations Charter" (Canada); "one of the basic ideals constituting the raison d'être of the Organization" (France); "the most significant example of the vitality of the Charter and its capacity to respond to the changing conditions of international life" (Czechoslovakia); "a universally recognized principle of contemporary international law" (Cameroon); "one of the fundamental norms of contemporary international law" (Yugoslavia); "a fundamental principle of contemporary international law binding on all States" (Poland); "one of paramount importance in the present era of decolonization" (Kenya); and "indispensable for the existence of [the] community of nations" (USA).

Reference should be made finally to this Court's contribution, which has itself played a significant role in the establishment of the concept on a firm juridical basis (Namibia, Advisory Opinion, ICJ Reports 1971, p. 16; Western Sahara, ICJ Reports 1975, p. 12).

Such is the central principle on which this case is built. In adjudging between the two interpretations of this right presented to the Court by the two Parties, this brief survey of its centrality to contemporary international law is not without significance.

On the one hand, there is an interpretation of this right which claims that it is not violated in the absence of violation of an express provision of a United Nations resolution. It is pointed out, in this connection, that there are no UN resolutions prohibiting or criticizing the recognition of East Timor as a province of Indonesia. On the other hand, it is argued that being party to an agreement which recognizes the incorporation of a non-self-governing territory in another State and deals with the principal non-renewable asset of a people admittedly entitled to self-determination, before they have exercised their right to self-determination, and without their consent, does in fact constitute such a violation. The history of the right, and of its development and universal acceptance make it clear that the second interpretation is more in consonance with the content and spirit of the right than the first.

Against this background, it is difficult to accept that, in regard to so important a right, the duty of States rests only at the level of assistance to the United Nations in such specific actions as it may take, but lies dormant otherwise.

(iii) The principle of permanent sovereignty over natural resources

As the General Assembly has stressed, the right to permanent sovereignty over natural resources is "a basic constituent of the right to self-determination" (resolution 1803(XVII) of 14 December 1962). So, also, in resolution 1515(XV) of 15 December 1960, the General Assembly recommended that "the sovereign right of every State to dispose of its wealth and its natural resources should be respected."

Sovereignty over their economic resources is, for any people, an important component of the totality of their sovereignty. For a fledgling nation, this is particularly so. This is the wisdom underlying the doctrine of permanent sovereignty over natural resources, and the wisdom which underlies the protection of this resource for a non-self-governing people until they achieve self-determination.

In the present case, it is impossible to venture a prediction as to how long it will be before the East Timorese people achieve self-determination. It may be a very brief period or it may take many years. The matter has remained unresolved already for nearly twenty years, since the Indonesian military intervention.

Should a period of years elapse until such time, and the Treaty is in full operation in the meantime, a substantial segment of this invaluable resource may well be lost to East Timor for all time. This would be a loss of a significant segment of the sovereignty of the people.

This is not a situation which international law, in its present state of development, can contemplate with equanimity.

At such time as the East Timorese people exercise their right to self-determination, they would become entitled as a component of their sovereign right, to determine how their wealth and natural resources should be disposed of. Any action prior to that date which may in effect deprive them of this right must thus fall clearly within the category of acts which infringe on their right to self-determination, and their future sovereignty, if indeed full and independent sovereignty be their choice. This right is described by the General Assembly, in its resolution on Permanent Sovereignty over Natural Resources, as "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests ..." (General Assembly resolution 1803(XVII)). The same resolution notes that strengthening permanent sovereignty over natural resources reinforces the economic independence of States.

Resolution 1803(XVII) is even more explicit in that it stresses that:

> "The exploration, development and disposition of such resources ... should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities." (Art. 2; emphasis added.)

The exploration, development and disposition of the resources of the Timor Gap, for which the Timor Gap Treaty provides a detailed specification, has most certainly not been worked out in accordance with the principle that the people of East Timor should "freely consider" these matters, in regard to their "authorization, restriction or prohibition."

The Timor Gap Treaty, to the extent that it deals with East Timorese resources prior to the achievement of self-determination by

the East Timorese people, is thus in clear violation of this principle.

Further, resolution 1803(XVII) states:

> "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations ..." (Para. 7.)

Australia has submitted (Counter-Memorial, p. 168, paras. 379-380) that, even assuming that in exercising their right to self-determination the people of East Timor become in the future an independent State, it would be for the new State to decide whether or not to reject the Treaty. The Court has been referred in this connection to the observation of the Arbitration Tribunal in the dispute between Guinea- Bissau and Senegal to the effect that a "newly independent State enjoys a total and absolute freedom" to accept or reject treaties concluded by the colonial power after the initiation of the process of national liberation (83 International Law Reports (1989), p. 26, para. 44).

While this proposition is incontrovertible, it seems purely academic in the present context as it loses sight of three facts. In the first place, it may be many years before East Timor exercises the right of self-determination. Secondly, the treaty is set to last for an initial period of forty years, and thirdly the resources dealt with are of a non-renewable nature. By the time the East Timorese people achieve this right, those resources or some part of them could well have been lost to them irretrievably. Had the resources dealt with been renewable resources, it might have been arguable that a temporary use of the resource would not amount to a permanent deprivation to the owners of the resource which is rightfully theirs. That argument is not available in the present case.

When, against this firm background of legal obligation, a treaty is entered into which expressly describes East Timor as an Indonesian province, and proceeds without the consent of its people to deal with the natural resources of East Timor in a manner which may have the effect of compromising or alienating them, there can be no doubt that any nation that claims rights under that treaty to what may be the resources of East Timor is in breach of obligations imposed upon it by general principles of international law.

A further consideration is that with the increasing international recognition of the right to development, any action that may hinder the free exercise of this right assumes more importance now than in the past.

(iv) The relevance of UN resolutions on self-determination

The various resolutions cited provide more than sufficient reason, both in express terms and by implication, for the Court to proceed on the basis that the right of self-determination has not been exercised. It is a corollary to that proposition that the right of permanent sovereignty over natural resources has, likewise, not been exercised, for self-determination includes by very definition the right of permanent sovereignty over natural resources. Any act dealing with those resources, otherwise than by the East Timorese people or their duly constituted representative, thus points inexorably to a violation of a fundamental principle, both of general international law and of the UN Charter.

(v) Australia's position in relation to self-determination

The Australian position in regard to self-determination is that Australia fully recognizes this right in the people of East Timor and continues to support that right. Australia has drawn the Court's attention in this regard to the prominent role played by Australia at the San Francisco Conference in relation to the inclusion of Chapter XI in the Charter (Rejoinder, pp. 81-82, fn. 209) and to Australia's strong affirmation that the advancement of all colonial peoples was a matter of international concern. This valuable contribution by Australia to the concept of self-determination has no doubt played a significant role in elevating the doctrine to its current status. In those early days, when this concept was as yet in its formative stage, the conceptual and political support thus given to them was crucial.

In full accordance with the high recognition accorded to self-determination in international law, Australia continues to express support for the continuing rights of the people of East Timor to self-determination. Implicit in this Australian stance is a recognition that, for whatever reason, the people of East Timor have not thus far exercised that right in the manner contemplated by international law and the UN Charter.

At the oral hearings, Australia submitted that:

> "before and after 1975 Australia repeatedly, and strongly, supported the right of the East Timorese to an informed act of self-determination. Australia's position was put bluntly to Indonesia, was clearly stated at the United Nations, and was repeated by Australian Prime Ministers and Foreign Ministers, and elsewhere as public statements of Australia's policy." (CR 95/14, p. 12.)

In contrast with this unimpeachable position there is the fact that Australia has accorded de facto recognition to the annexation of East Timor by Indonesia and, indeed, gone beyond that to what appears to be an unreserved de jure recognition of Indonesia's rights over East Timor. The explicit statement in that Treaty, which presumably represents the common ground of both parties, is that East Timor is an "Indonesian Province." Indeed, the preamble to the Treaty recites that Australia and the Republic of Indonesia are "Determined to cooperate further for the mutual benefit of their peoples in the development of the resources of the area of the continental shelf." The people of East Timor are not included among those for whose benefit the Treaty is entered into.

(vi) The incompatibility between recognition of Indonesian sovereignty over East Timor and the recognition of East Timor as a non-self-governing territory

The inconsistency between Australia's stated position and its practical actions is, in the submission of Portugal, so fundamental as to negative Australia's recognition of the East Timorese right to self-determination. There is an inconsistency here which has not been adequately explained, either in the pleadings or in the oral submissions. As Portugal pointed out, it is not possible to meet the obligation of respecting the territorial integrity of East Timor by merely so asserting, while, in fact, recognizing it as annexed by Indonesia (CR 95/4, p. 29).

Australia has stated (Rejoinder, p. 150, para. 267) that recognition of Indonesian sovereignty over East Timor does not involve a denial of its status as a non-self-governing territory. It has also stated (ibid., p. 146, para. 263) that, while noting that Indonesia has incorporated East Timor into the Republic of Indonesia, the Australian Government has expressed deep concern that an internationally recognized act of self-determination has not taken place in East Timor. Australia further submits that recognition of Indonesian sovereignty over East Timor does not by logical necessity signify that Australia no longer recognizes East Timor as a non-self-governing territory or its people as having a right to self-determination (ibid., p. 147, para. 264). I must confess to some difficulty in understanding these positions.

Such submissions seem moreover to overlook the distinction between the nature of the authority exercised by an administering Power and the nature of the authority of Indonesia, implicit in the recognition of East Timor as a province. The character of Portugal's authority was clearly distinguishable in at least three major respects:

(a) the authority of Portugal was entirely of a fiduciary or tutelary nature;

(b) the authority of Portugal was under the supervision of the United Nations; and

(c) the authority of Portugal was by its very nature coterminous with its fiduciary or tutelary status.

These distinctions are further affirmed by the relevant UN resolutions discussed in this opinion.

It may be noted also in this context that Australia, in the course of its oral arguments, submitted that, "In 1975 the people of East Timor involuntarily exchanged Portuguese 'domination' ... for the control of Indonesia." (CR 95/9, p. 49, para. 59; emphasis added.) What this means is unclear, but it is manifestly in contradiction of the voluntariness which is a central feature of self-determination.

Portugal has also referred the Court to some variations in the positions taken up by Australia at the United Nations when resolutions on East Timor came before the General Assembly. In 1975, though with some initial reservations, it voted for the resolution calling upon Indonesia to desist from further violation of the territorial integrity of East Timor and to withdraw its forces without delay to enable the people to exercise their right of self-determination (resolution 3485 (XXX) of 12 December 1975). In 1976, it abstained from voting on General Assembly resolution 31/53, rejecting the Indonesian claim of annexation. It abstained again in 1977, but in 1979, voted against the resolution that "the people of East Timor must be enabled freely to determine their own future, under the auspices of the United Nations" (Res. 34/40). It repeated its contrary vote in 1980, 1981 and 1982.

However this may be, the central issue before the Court is whether the acceptance of this right of East Timor accords with the conclusion of a Treaty recognizing East Timor as a province of Indonesia, and whether that act of concluding the Treaty militates against such rights as East Timor may enjoy to the natural resources that are dealt with by the Treaty. There is no qualification anywhere in that Treaty of the recognition it accords to Indonesian sovereignty, such as appears in the statements of Australia made outside the Treaty.

Upon the basis of the averments in the Treaty, it would seem therefore that Portugal's assertion of an incompatibility between Australia's action in entering into the Timor Gap Treaty, and Australia's recognition of the principle of self-determination, raises issues requiring close consideration.

If self-determination is a right assertible erga omnes, and is thus a right opposable to Australia, and if Australia's action in entering into the Treaty is incompatible with that right, Australia's individual action, quite apart from any conduct of Indonesia, would not appear to be in conformity with the duties it owes to East Timor under international law.

(vii) The suggested clash between the rights of the people of East Timor and the rights of the people of Australia

Australia has submitted that Australia too enjoys the right of permanent sovereignty over its natural resources and that what is involved in this case is "'peremptory norm versus peremptory norm,' 'permanent sovereignty of Australia versus sovereign rights of Portugal'" (CR 95/11, p. 29). The undeniable rights of Australia cannot, of course, be matched by the purely fiduciary rights of Portugal, for Portugal has no sovereign rights, save in its capacity as custodian of the rights of the East Timorese people. More properly stated, the suggestion is then of a clash between the peremptory norm of Australia's permanent sovereignty over its natural resources and the peremptory norm of East Timor's permanent sovereignty over its natural resources.

It cannot be said that Australia enjoys an absolute right to permanent sovereignty over its natural resources in the Timor Gap which can be delineated independently of the rights of East Timor. With only 430 kilometres of ocean space between them (Judgment, para. 11), the extent of Australia's entitlement is obviously determined, inter alia, by the claims of East Timor - hence the need for a treaty. Since Australia's rights cannot be considered independently of East Timor, Australia's claim to deal with no more than its own entitlement is unsustainable.

Competing interests to a limited ocean space can only be resolved by the consent of parties or by some equitable external determination in a manner recognized by law. An agreement that does not embody the consent of the East Timorese people does not fall within the first category and a determination by Indonesia as to how much it is equitable to give to Australia does not fall within the second. It is not such a determination as would bring it within the means of resolution indicated by the Court's case-law and Article 83, read with Part XV, of the Montego Bay Convention.

It is not within the ambit of this case or within the Court's competence to determine whether the division of resources between Australia and Indonesia is indeed an equitable one from the point of view of the East Timorese people. This is simply not a matter before the Court, and must await determination at the proper time and in the proper manner. All that arises for decision is whether a treaty has been entered into which deals with the natural resources of the East Timorese people without their consent or the consent of the administering Power recognized by the United Nations.

It may be that the Treaty obtains for Australia exactly its equitable rights, or it may be that it obtains for the Australian people even less than their proper entitlement. Portugal's claim is that a treaty not entered into in the manner recognized by international law may sign away in perpetuity certain non-renewable resources of the East Timorese people. If this is the case, and if the authority charged by the United Nations with administering the affairs of the East Timorese people brings up the matter in the form of an East Timorese right which is opposable to Australia, that complaint deserves the closest attention.

Portugal contends that Australia, inasmuch as it has negotiated, concluded and initiated performance of the agreement of 11 December 1989, and has taken internal legislative measures for the application thereof, has thus infringed the right of the people of East Timor to self-determination and permanent sovereignty over its natural wealth and resources. If this is so, Australia, through its individual conduct, is in breach of the obligation to respect that right.

The Australian argument that there was no option available to Australia but to enter into this Treaty opens up an important issue of international law relating to recognition. Where a territory has been acquired in a manner which leaves open the question whether legal sovereignty has been duly acquired, countries entering into treaty relations in respect of that territory have a range of options stretching all the way from de facto recognition through many variations to the highest level of recognition - de jure recognition.

It is to be observed that, in this Treaty, Australia has made no qualification whatever of its recognition of Indonesia's sovereignty over East Timor. Indeed, the very title of the Treaty is "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and northern Australia." The description of East Timor as a province of Indonesia is more than once repeated in the text of the Treaty. Such an unreserved recognition of Indonesia's sovereignty over East Timor in an important Treaty is perhaps one of the highest forms of de jure recognition.

This high form of recognition focuses attention more sharply on the alleged incompatibility of the Australian action with East Timor's rights of self-determination and permanent sovereignty.

In the result, I would reaffirm the importance of the right of the people of East Timor to self-determination and to permanent sovereignty over natural resources, and would stress that, in regard to rights so important to contemporary international law, the duty of respect for them extends beyond mere recognition, to a duty to abstain from any State action which is incompatible with those rights or which would impair or nullify them. By this standard, Australia's action in entering into the Timor Gap Treaty may well be incompatible with the rights of the people of East Timor.

PART D. THE OBLIGATIONS OF AUSTRALIA

The preceding Part of this opinion has examined the central importance of the rights of self-determination and permanent sovereignty over natural resources of the people of East Timor. It has also considered to what extent Australia's action in entering into the Timor Gap Treaty is compatible with the rights enjoyed in this regard by the people of East Timor.

This Part concentrates on the duties that result from those rights.

A) Obligations under general international law

(i) Obligations stemming from the general sources of international law

The multiplicity of sources of international law which support the right of self-determination have been dealt with in Part C of this opinion. Corresponding to the rights so generated, which are enjoyed by the people of East Timor, there are corresponding duties lying upon the members of the community of nations. Just as the rights associated with the concept of self-determination can be supported from every one of the sources of international law, so also can the duties, for a right without a corresponding duty is no right at all.

It suffices for present purposes to draw attention to this multiplicity of sources and to the fact that they concur in recognizing those rights as existing erga omnes. It is not necessary for the purposes of this opinion to explore them all. Australia, in common with all other nations, would, under general international law, be obliged to recognize the obligations stemming from these rights. Australia unhesitatingly acknowledges the right. Its acceptance of the corresponding duties does not clearly appear from its submissions.

(ii) Obligations expressly undertaken by treaty

It is pertinent to note at least three significant occasions on which the Respondent, in common with other States, has solemnly undertaken by treaty the duty to act in furtherance of these rights. These have been referred to in Part C, and it will suffice here to draw attention to these treaty commitments - under the Charter and under the two International Human Rights Covenants of 1966. The Charter provisions on self-determination have been outlined earlier. Under the two Covenants, every party accepts the obligation to promote the realization of the right to self-determination and to respect that right (Arts. 1 and 2 of each Covenant).

These references are sufficient to place the duty to respect self-determination on a firm foundation of treaty obligation.

B) Obligations under UN resolutions

It is not proposed to enter here into a discussion of the broad question of the binding nature of Security Council decisions. It is more to the purpose to consider whether, having regard to the particular circumstances of this case, the Security Council resolutions which reaffirm principles of general international law may be considered to give added force to them.

As observed earlier, there was no suggestion at any stage in this case that the General Assembly or the Security Council had acted outside their province or beyond the scope of their legitimate authority in regard to any of the resolutions on East Timor which were discussed in this case. The objections to their binding effect were rather on the basis of other considerations, such as declining majorities and desuetude. These have already been considered. In relation to the Security Council resolutions, the technical consideration was urged as to whether in the resolutions the Security Council spoke in the language of decision or exhortation.

Resolution 384 "urges all States ... to cooperate fully with ... the United Nations ... to facilitate the decolonization of the Territory" and resolution 389 "calls upon all States" to do likewise.

Each resolution also calls upon all States "to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514(XV)" (emphasis added in all quotations).

Words such as urges and calls upon are not necessarily of a purely hortatory nature. As with all documents that come under legal analysis, the totality of the document, rather than any particular words, must be the guide to its overall import. In this case, one can treat them as imposing no obligation, if one takes the words "urges" and "calls upon" in isolation, but not in the context of the overall construction of the document. That is not the method of legal construction and it is not a method I would employ.

We have here two documents which state categorically the Security Council's position that self-determination was an imperative and that it had not yet taken place. They urge all States to co-operate, and call upon all States to respect the territorial integrity of East Timor. Does a Member State faced with such resolutions, reaffirming a cardinal rule of international law, have the freedom to disregard the need for self-determination at its will and pleasure? In the face of the Security Council's considered assertion that self-determination has not taken place, is it open to an individual State to recognize de jure the annexation of a non-self-governing territory by another State, and to enter into treaty relations with that State regarding the assets of the territory? The overall circumstances of this case would point to a negative answer to these questions.

Without any attempt at an exhaustive survey of this matter, it may be noted that the lack of phraseology such as "decides" and "determines" does not appear in the past to have prevented Security Council resolutions from being considered as decisions (see Goodrich, Hambro and Simons, op. cit., p. 210). For example, Security Council resolution 145(1960) of 22 July 1960, in relation to the Congo, nowhere uses such words as "decides" or "determines," but "calls upon" the Government of Belgium to implement speedily Security Council resolution 143(1960) on the withdrawal of its troops. It "requests" all States to refrain from any action which might tend to impede the restoration of law and order and the exercise by the Government of the Congo of its authority and also to refrain from any action which might undermine the territorial integrity and the political independence of the Republic of the Congo. Is this language merely hortatory or is it the language of a decision?

After this resolution was passed, the Secretary-General drew the attention of the Council to the obligations of members under Articles 25 and 49. The Secretary-General's observations were made on the basis that the resolution was binding under Articles 25 and 49. Having cited these two sections, the Secretary-General observed to the Council:

> "Could there be a more explicit basis for my hope that we may now count on active support, in the ways which emerge from what I have said, from the Governments directly concerned?" (United Nations, Official Records of the Security Council, Fifteenth Year, 884th Meeting, 8 August 1960, para. 23.)

Thereafter, resolution 146 (1960) of 9 August 1960 was passed. That resolution,

which still lacked the phraseology of decision and determination, "Calls upon the Government of Belgium to withdraw immediately its troops from the province of Katanga ..." and again:

> "Calls upon all Member States, in accordance with Articles 25 and 49 of the Charter of the United Nations, to accept and carry out the decisions of the Security Council and to afford mutual assistance in carrying out measures decided upon by the Council." (Emphasis added.)

There is here a clear indication by the Security Council itself that its earlier resolution was a decision.

In this context, mention should also be made of resolution 143(1960) of 14 July 1960 which "Calls upon the Government of Belgium to withdraw its troops from the territory of the Republic of the Congo" and "Decides to authorize the Secretary-General to take the necessary steps ... to provide the Government with such military assistance as may be necessary ...."

Thereafter the General Assembly made a "request" to all Member States to accept and carry out the decisions of the Security Council, this resolution again carrying the implication that the Security Council resolutions constituted decisions and imposed obligations.

Secretary-General Hammerskjöld stressed, in his intervention, that if the co-operation needed to make the Charter a living reality were not to be achieved, "this would spell the end of the possibilities of the Organization to grow into what the Charter indicates as the clear intention of the founders. The words of Hammarskjold assume particular significance in the context of resolutions dealing with such rights as those relating to self-determination and permanent sovereignty over natural resources.

The resolutions of the Security Council involved in this case, (resolutions 384 and 389), use phraseology similar to that of the first resolution cited above relating to the Congo. Each of these resolutions calls upon all States to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514(XV).

Each resolution likewise "calls upon" the Government of Indonesia to withdraw without further delay all its forces from the Territory.

Thus, on United Nations precedent, it would appear that the absence of words of determination or decision does not necessarily relegate Security Council resolutions to the level of mere hortatory declarations. Against the background of the Security Council reaffirming a right admittedly of fundamental importance, and admittedly enjoyed erga omnes, it seems academic to examine its obligatory nature in terms of the precise phraseology used. Especially is this so when one has regard to the fact that the resolutions were made after hearing Australia, and were in line with the Australian submissions made to the Council.

C) Some juristic perspectives

(i) The correlativity of rights and duties

This section surveys the obligations under examination, from what may be described as a jurisprudential or conceptual angle. While the right to self-determination has attracted much attention in modern international law, the notion of duties corresponding to that right has not received the same degree of analysis. This is well illustrated in the present case, where the concept of self-determination is freely accepted, but not the corresponding duties. A conceptual examination of the question will underscore the importance of duties in the context of this case.

The existence of a right is juristically incompatible with the absence of a corresponding duty. The correlativity of rights and duties, well established in law as in logic (see, especially, Hohfeld, Fundamental Legal Conceptions, 1923), means that if the people of East Timor have a right erga omnes to self-determination, there is a duty lying upon all Member States to recognize that right. To argue otherwise is to empty the right of its essential content and, thereby, to contradict the existence of the right itself. It is too late in the day, having regard to the entrenched nature of the rights of self-determination and permanent sovereignty over natural resources in modern international law, for the accompanying duties to be kept at a level of non-recognition or semi-recognition.

(ii) Is duty limited to compliance with specific directions and prohibitions?

An important submission made to the Court by Australia needs now to be addressed. It has juristic implications transcending this particular case.

This argument was summarized by Australia in the penultimate paragraph of its Counter-Memorial in terms that:

> "By entering into the Treaty in December 1989, Australia did not contravene any direction of the United Nations with respect to East Timor, for none had been made." (Counter-Memorial, p. 178, para. 412.)

This point was further emphasized at the oral hearings in terms that:

> "The Security Council has not spelt out or imposed a single legal obligation on Australia or any other Member State which would preclude Australia from entering into the Timor Gap Treaty with Indonesia." (CR 95/10, p. 31.)

Again, it was submitted that:

> "Neither resolution calls on Australia or Member States generally to negotiate only with Portugal. Neither resolution calls on Australia not to deal with Indonesia. And neither resolution condemns Australia for any violation of the United Nations Charter or of international law." (Ibid., p. 26; see, also, Counter-Memorial, paras. 328-346.)

This argument suggests that obligations owed by States in relation to self-determination are confined to compliance with express directions or prohibitions.

A further development of this argument was that there are no sanctions laid down by the United Nations of which Australia is in breach.

In the first place, the obligation exists under customary international law which, by its very nature, consists of general principles and norms rather than specific directions and prohibitions. In the analogy of a domestic setting, customary or common law (as opposed to specific legislation) provides the guiding norms and principles in the light of which the specific instance is judged.

So it is with international law, making due allowance, of course, for the differences in its sources. Customary law provides the general principles, while other sources, such as treaties and binding resolutions, may deal with specifics.

Thus conduct which merely avoids violations of express directions or prohibitions is not necessarily in conformity with the international obligations lying upon a State in terms of customary international law. The obligations to respect self-determination and the right to permanent sovereignty over natural resources are among these and extend far further than mere compliance with specific rules or directions and the avoidance of prohibited conduct.

If further elucidation be necessary, one can approach the question also from the standpoint of analytical jurisprudence.

Reference needs to be made in this connection to the major jurisprudential discussions that have in recent years explored the nature of legal obligations. While it is self-evident that legal obligations consist not only of obedience to specific directions and prohibitions, but also of adherence to norms or principles of conduct, this distinction has been much illuminated by recent discussions in this department of juristic literature.

To take the analogy of domestic law, the corpus of law on which conduct according to law is based consists not only of com-

mands and prohibitions, but of norms, principles and standards of conduct. Commands and prohibitions cover only a very small area of the vast spectrum of obligations. Quite clearly, duties under international law, like duties under domestic law, are dependent not only on specific directions and prohibitions but also on norms and principles.

Indeed, the extension of obligations beyond mere obedience to specific directions and prohibitions, if true of domestic law, must apply a fortiori in the field of international law which grew out of the broad principles of natural law and has no specific rule-making authority in the manner so familiar in domestic jurisdictions. The dependence of international law for its development and effectiveness on principles, norms and standards needs no elaboration.

If rights are to be taken seriously, one cannot ignore the principles on which they are based[31]. If the right of self-determination is to be taken seriously, attention must focus on the underlying principles implicit in the right, rather than on the itemization of specified incidents of direction and prohibition which, useful so far as they go, are not a complete statement of the duties that follow from the right. It is impossible to define in terms of specific directions and prohibitions the numerous duties these impose. As Australia itself has observed, "the obligation to promote self-determination is an example of an obligation where no particular means are prescribed" (CR 95/10, p. 21).

Juristically analysed, it is not appropriate to view self-determination as though the totality of the duties it entails consist only in obedience to specific directions of the United Nations. Performance of duties and obligations must be tested against the basic underlying norms and principles, rather than against such specific directions or prohibitions as might have been prescribed. Quite clearly, an obligation cannot cease to exist merely because specific means of compliance are not prescribed, nor is its underlying general principle exhausted by the enumeration of particular itemized duties. The duty of respect and compliance extends beyond the letter of specific command and prohibition.

To illustrate from domestic law, such a general principle as that under which a manufacturer of motor cars "is under a special obligation in connection with the construction ... of his cars" (Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 (1960)), is one which "does not even purport to define the specific duties such a special obligation entails" (Dworkin, supra., p. 26, citing Henningsen v. Bloomfield Motors, Inc. (supra.). Yet the obligation applies in the particular unspecified eventualities which might occur. When a claim arises from a breach of some specific duty within the general principle, the manufacturer cannot avoid the principle on the ground that it does not specify the particular duty. The argument that no breach of duty has occurred because the respondent's conduct violates no specific direction can be answered in much the same manner, because the conduct required by law consists not only of compliance with specified directions or prohibitions, but of compliance with a principle of conduct.

The jurisprudential discussions referred to have not passed unnoticed in the literature of modern international law (see, for example, Kratochwil, Rules, Norms, and Decisions, 1989).

In the circumstances of this case, the act of being party to the Timor Gap Treaty would appear to be incompatible with recognition of and respect for the principle of East Timor's rights to self-determination and permanent sovereignty over natural resources inasmuch as, inter alia, the Treaty:

1) expressly recognizes East Timor as a province of Indonesia without its people exercising their right;

2) deals with non-renewable natural resources that may well belong to that territory;

3) makes no mention of the rights of the people of East Timor, but only of the mutual benefit of the peoples of Australia and Indonesia in the development of the resources of the area (Preamble, para. 6);

4) makes no provision for the event of the East Timorese people deciding to repudiate the Treaty upon the exercise of their right to self-determination;

5) specifies an initial period of operation of forty years, with possible renewals for successive terms of twenty years; and

6) creates a real possibility of the exhaustion of this resource before it can be enjoyed by the people of East Timor.

These aspects, all prima facie contradictory of the essence of self-determination and permanent sovereignty over natural resources, do not cease to have that character because treaty-making with Indonesia has not been expressly prohibited.

Attention was also drawn to the aspect of sanctions. It was pointed out, for example, that issues such as arms supplies, oil supplies and new investments in South Africa were singled out for condemnation when sanctions were imposed on South Africa. On this basis, Australia submitted that the General Assembly has shown willingness, when appropriate, to condemn particular actions or recommend and urge others. It was submitted that the United Nations has issued no such specific directions requiring States to abstain from dealings with a State involved in a self-determination dispute (CR 95/9, p. 78), and that there has been no specific pronouncement on the Timor Gap Treaty.

Sanctions may point to an obligation, but they are clearly not the only source of obligations. Indeed, Oscar Schachter, in a study of the bases of obligation in international law, lists thirteen possible items, of which sanctions is only one (Oscar Schachter, "Towards a Theory of International Obligation," 8 Virginia Journal of International Law (1968), p. 301).

Further,

"The most thorough research, in both domestic and international law, shows that in reality, compulsion is neither an integral nor a constitutive part of legal rule, but that it represents a distinct element added to the rule to perfect it. Sanction does not represent a condition for the existence of obligation but only for its enforcement." (Mohammed Bedjaoui, Towards a New International Economic Order, 1979, p. 179.)

International law in its present stage of development, serving the needs of an integrated world community, demands a broader view of international obligations than that which is implicit in the Australian submissions.

Security Council resolutions 384 and 389 clearly formulate certain principles of conduct in relation to self-determination and permanent sovereignty. Those principles were already well recognized and entrenched in international law before being applied by those resolutions to the specific case of East Timor. Australia is, in my view, in violation of those principles, contradicting by its conduct its obligation to respect the right of self-determination of the people of East Timor and their right to permanent sovereignty over their natural resources. The plea that Australia did not contravene any direction of the United Nations does not exempt it from responsibility.

(iii) Obligations stemming from the erga omnes concept

The Court has found that "Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an erga omnes character, is irreproachable" (Judgment, para. 29).

This section bases itself upon that finding. It is a position, moreover, which has been accepted by Australia and assumed throughout the hearings.

The Court's jurisprudence has played a significant role in the evolution of the erga omnes concept.

In Barcelona Traction, Light and Power Company, Limited, Second Phase (ICJ Reports 1970, p. 3), this Court, drawing a

distinction between obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection, observed:

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character." (ICJ Reports 1970, p. 32, para. 34.)

In paragraph 35, the Court followed this principle through by observing that in obligations of this category, unlike the obligation which is the subject of diplomatic protection, "all States have a legal interest in its observance" (emphasis added). In Barcelona Traction, the Court was, of course, dealing with obligations that are owed erga omnes.

In that case, the Court was spelling out that, where a State has an obligation towards all other States, each of those other States has a legal interest in its observance. If, therefore, Australia has a obligation erga omnes towards all States to respect the right of self-determination, Portugal (as the administering Power of East Timor) and East Timor would have a legal interest in the observance of that duty.

Other cases in which this Court was confronted with erga omnes obligations were Northern Cameroons (ICJ Reports 1963, p. 15); the South West Africa cases, Preliminary Objections (ICJ Reports 1962, p. 319) and Second Phase (ICJ Reports 1966, p. 6); Nuclear Tests (Australia v. France) (ICJ Reports 1974, p. 253) and Nuclear Tests (New Zealand v. France) (ibid., p. 457); United States Diplomatic and Consular Staff in Tehran (ICJ Reports 1980, p. 3); and Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility (ICJ Reports 1988, p. 69).

Although in this fashion the erga omnes principle has played an apparently frequent role in the Court's recent jurisprudence, it has not yet drawn a definitive decision from the Court in relation to the manner in which the principle will operate in case of breach. For example, in Northern Cameroons, the question whether a Member State has a right of action consequent upon an erga omnes breach was left undecided as the case was dismissed on grounds of judicial propriety. The dismissal of the South West Africa case in the merits phase, in 1966, left no scope for any conclusions regarding erga omnes obligations. The Nuclear Tests cases did not pronounce on the erga omnes character of the rights of all States to be free from atmospheric nuclear tests.

It has thus happened that no Judgment of this Court thus far has addressed the consequences of violation of an erga omnes obligation. The present case, had it passed the jurisdictional stage, would have been just such a case where the doctrine's practical effects would have been considered. Since this opinion proceeds on the basis that the merits must be considered, it must advert to the consequences of violation of an erga omnes obligation.

All the prior cases before this Court raised the question of duties owed erga omnes. That aspect is present in this case as well, for every State has an erga omnes duty to recognize self-determination and, to that extent, if Portugal's claim is correct, Australia is in breach of that general erga omnes duty towards East Timor.

However, this case has stressed the obverse aspect of rights opposable erga omnes - namely, the right erga omnes of the people of East Timor to the recognition of their self-determination and permanent sovereignty over their natural resources. The claim is based on the opposability of the right to Australia.

In Barcelona Traction, the Court's observations regarding obligations owed to the international community as a whole were not necessary to the case before it. Yet, though its observations were obiter, the notion of obligations erga omnes developed apace thereafter.

The present case is one where quite clearly the consequences of the erga omnes principle follow through to their logical conclusion - that the obligation which is a corollary of the right may well have been contravened. This would lead, in my view, to the grant of judicial relief for the violation of the right.

I am conscious, in reaching this conclusion, that the violation of an erga omnes right has not thus far been the basis of judicial relief before this Court. Yet the principles are clear, and the need is manifest for a recognition that the right, like all rights, begets corresponding duties.

The erga omnes concept has been at the door of this Court for many years. A disregard of erga omnes obligations makes a serious tear in the web of international obligations, and the current state of international law requires that violations of the concept be followed through to their logical and legal conclusion.

Partly because the erga omnes obligation has not thus far been the subject of judicial determination, it has been said that: "Viewed realistically, the world of obligations erga omnes is still the world of the 'ought' rather than the 'is.'" (Simma, "Violations of Obligations erga omnes?," op. cit., p. 126.) This case raises issues which bridge that gap.

I would end this section as it began, by adopting the Court's pronouncement on the erga omnes character of East Timor's right, and I would follow that principle through to what I have indicated to be its logical and legal conclusion.

In the result, the obligations of Australia towards East Timor can be shown to stem from a multiplicity of sources and juristic considerations. Any one of them by itself would be sufficient to sustain these obligations in law. Cumulatively, their weight is compelling.

PART E. AUSTRALIA'S OBJECTIONS BASED ON JUDICIAL PROPRIETY

Australia has submitted that there are reasons of judicial propriety, in consideration of which the Court should not decide this case (Counter-Memorial, para. 306).

Among the supportive reasons adduced are

(i) that there is no justiciable dispute in this case (ibid., paras. 315-316);

(ii) that these proceedings are a misuse of the processes of the Court (ibid., paras. 306-316);

(iii) that the proceedings have an illegitimate object (Rejoinder, paras. 155-166);

(iv) that the Judgment would serve no useful purpose in that it would not promote the interests allegedly requiring protection (Counter-Memorial, p. 122, paras. 271-278);

(v) that the Court should not, in any event, give a judgment which the Court has no authority or ability to satisfy (Rejoinder, paras. 160-166);

and

(vi) that the Court is an inappropriate forum for the resolution of the dispute (Rejoinder, paras. 167-169) inasmuch as other UN organs have assumed responsibility for negotiating a settlement of the East Timor question (Counter-Memorial, paras. 288-297).

(i) Absence of a justiciable dispute

The Court has held that there is in fact a justiciable dispute in this case and I respectfully concur in that finding.

(ii) Misuse of the process of the Court

Australia has argued that this case is:

> "a sham - a blatant artifice, by which, under the guise of attacking Australia's capacity to conclude the

Treaty, in reality Portugal seeks to deprive Indonesia of the benefits of its control over East Timor" (CR 95/11, pp. 47-48).

This contention is linked to Australia's submission that there is in reality no dispute in this case. If there is indeed a justiciable dispute, as the Court has held, the resort to the processes of the Court for resolution is right and proper, for it is for the resolution of justiciable disputes that the Court exists.

Moreover, if the expression "administering Power" has any meaning, it means a commitment to the solemn duties associated with the "sacred trust" on behalf of the people of East Timor. As pointed out earlier in this opinion, Portugal would be in violation of that basic obligation if, while being the administering Power, and while claiming to be such, it has failed to take such action as was available to it in law for protecting the rights of the people of East Timor in relation to their rights which are dealt with under the Treaty. This case involves no less than the assertion, on behalf of a territory that has no locus standi before the Court, of the denial of two rights which are considered fundamental under modern international law. Whatever be the result, this is eminently a justiciable dispute, brought before an appropriate forum.

(iii) that the Judgment would not serve any legitimate object

Under this head, Australia argues that a judgment in Portugal's favour cannot fulfil any legitimate object inasmuch as the Court cannot require Australia to breach valid treaty obligations owed to third States, and judgment for Portugal would deny Australia's ability to protect its sovereign rights (Counter-Memorial, paras. 269-286).

These have been sufficiently answered in the course of this opinion. It was also suggested at various stages of the case that Portugal's objectives included the gaining of benefits for itself as the former colonial power. It has been indicated elsewhere in this opinion that whatever Portugal gains from these proceedings will be held strictly for the benefit of the people of East Timor, and under United Nations supervision.

(iv) that the Judgment would serve no useful purpose in that it would not promote the interests of East Timor

Portugal has submitted that a Judgment in Portugal's favour would serve the useful purpose of conserving the rights of the people of East Timor.

Australia submits, on the other hand, that:

> "Faced with a situation such as postulated by Portugal, both Australia and Indonesia are likely unilaterally to exploit the area, without the Treaty, avoiding jurisdictional conflicts on a purely pragmatic basis." (Rejoinder, p. 72, para. 160.)

Australia also submits that the Treaty is potentially more beneficial to the people of East Timor, "provided Indonesia passes on an equitable part of the benefits to the people" (ibid.). The qualification introduced to this proposition goes to the crux of the matter. One does not know whether, when or how this will occur.

To dismiss this claim on the basis that, in any event, an equitable part of the benefits derived by a third country will somehow be passed on to the people does not answer the concerns which lie at the root of the principles of self-determination and permanent sovereignty.

In its Rejoinder, Australia states:

> "No matter how hard Portugal emphasises its alleged formal status and responsibilities, it gives no indication of how a judgment in its favour will make one iota of difference to the rights of the East Timorese over their offshore resources. Those rights, as well as Australia's, will continue. No judgment of this Court can affect them, given the limited issue which Portugal asks the Court to adjudge." (Para. 162; emphasis in original.)

It is somewhat difficult to understand this passage, for the judgment sought by Portugal is not merely a judgment affirming the rights of East Timor to self-determination and permanent sovereignty over its natural resources, but one which holds, in relation to those rights, that they are opposable to Australia, and that they have been infringed by Australia in entering into the Timor Gap Treaty. Such a judgment, had it been obtained, would not have been without legal consequences.

In Northern Cameroons, the adjudication sought would have been devoid of any purpose. It concerned a dispute about the interpretation and application of a treaty which was no longer in force and in which there could be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render (ICJ Reports 1963, p. 37). In that case, if the Court made a declaration after the termination of the trusteeship agreement, it would have no continuing applicability. In the words of a recent treatise, the distinction between Northern Cameroons and the present case was noted as follows:

> "In Northern Cameroons the Court did not proceed to the merits of the case because its judgment could have had no practical effect and would have had no impact upon existing legal rights or obligations. To give a judgment under the circumstances would not have accorded with the judicial function; Case Concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, 1963 ICJ Rep. 15, (Judgment of 2 Dec. 1963). In the East Timor case this limitation does not appear to apply." (C. Chinkin, Third Parties in International Law, 1993, p. 211, fn. 105.)

The judgment sought here is in respect not of a defunct treaty but of two basic international obligations which are very much a part of current law. It cannot be said that there will be no opportunities for any future application of those principles to the rights of the East Timorese people. The Cameroons case is thus clearly distinguishable.

(v) that the Court should not give a judgment which it has no authority or ability to satisfy

The Court, by its very constitution, lacks the means of enforcement and is not to be deterred from pronouncing upon the proper legal determination of a dispute it would otherwise have decided, merely because, for political or other reasons, that determination is unlikely to be implemented. The raison d'être of the Court's jurisdiction is adjudication and clarification of the law, not enforcement and implementation. The very fact that a justiciable dispute has been duly determined judicially can itself have a practical value which cannot be anticipated, and the consequences of which may well reach into the area of practicalities. Those are matters beyond the purview of the Court, which must discharge its proper judicial functions irrespective of questions of enforceability and execution, which are not its province.

(vi) Is the Court an inappropriate forum?

The fact that other United Nations organs are seised of the same matter and may be considering it is no basis for a suggestion that the Court should not consider that matter to the extent that is proper within the limits of its jurisdiction. This matter does not need elaboration in view of the extensive case-law upon the subject. Each organ of the United Nations has its own allotted responsibility in its appropriate area. A matter for adjudication under the judicial function of the Court within its proper sphere of competence is not to be considered extraneous to the Court's concerns merely because political results may flow from it or because another organ of the United Nations is examining it from the standpoint of its own area of authority. As the late Judge Lachs observed with his customary clarity in the Lockerbie case, the Court is:

> "the guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction." (Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Provisional Measures, ICJ Reports 1992; separate opinion, p. 138.)

The Australian submission that other organs of the United Nations have assumed responsibility for negotiating a settlement of the East Timor question (Counter-Memorial, p. 128, para. 288, et. seq.) does not absolve the Court of its own responsibility within its own allotted area.

Moreover, this is not a case, as indicated earlier in this opinion, which opens out a full range of inquiry into all the military, diplomatic and political nuances of the East Timor situation. Since this is not so, the Australian submission that the case is unsuitable for adjudication in these proceedings (see Counter-Memorial, paras. 298-300) must fail.

The complementarity of the various organs of the United Nations, all pursuing in their different ways the Purposes of the Organization to which they belong, requires each organ, within its appropriate and legitimate sphere of authority, to further those Purposes in the manner appropriate to its constitution. This Court, properly seised of a justiciable dispute within its legitimate sphere of authority, does not abdicate its judicial responsibilities merely because of the pendency of the matter in another forum.

CONCLUSION

A. I concur in the Court's finding that there is a justiciable dispute between the Parties.

B. I concur with the Court in its reaffirmation of the importance of the principle of self-determination.

C. The Applicant has the necessary jus standi to maintain this action, and is under a duty under international law to take necessary steps to conserve the rights of the people of East Timor. Any benefits obtained by such action will be held strictly for the people of East Timor.

D. The various objections based on judicial propriety must be rejected.

E. This Application is maintainable in the absence of a third State for the following reasons:

(i) East Timor is a non-self-governing territory recognized as such by the General Assembly and the Security Council, and acknowledged by the Respondent to be still of that status.

(ii) Since East Timor is a non-self-governing territory, its people are unquestionably entitled to the right to self-determination.

(iii) The right to self-determination constitutes a fundamental norm of contemporary international law, binding on all States.

(iv) The right to permanent sovereignty over natural resources is a basic constituent of the right to self-determination.

(v) The rights to self-determination and permanent sovereignty over natural resources are recognized as rights erga omnes, under well-established principles of international law, and are recognized as such by the Respondent.

(vi) An erga omnes right generates a corresponding duty in all States, which duty, in case of non-compliance or breach, can be the subject of a claim for redress against the State so acting.

(vii) The duty thus generated in all States includes the duty to recognize and respect those rights. Implicit in such recognition and respect is the duty not to act in any manner that will in effect deny those rights or impair their exercise.

(viii) The duty to recognize and respect those rights is an overarching general duty, binding upon all States, and is not restricted to particular or specific directions or prohibitions issued by the United Nations.

(ix) The Respondent has entered into a treaty with another State, dealing with a valuable, non-renewable natural resource of East Timor for an initial period of forty years, subject to twenty year extensions.

(x) The Respondent has in the Treaty expressly acknowledged and accepted East Timor's incorporation in that other State as a province of that State.

(xi) That other State has at no time been recognized by the United Nations as having any authority over the non-self-governing territory of East Timor, or as having displaced the administering Power duly recognized by the General Assembly and the Security Council.

(xii) The Treaty thus entered into has the potential to deplete or even exhaust this non-renewable and valuable resource of East Timor.

(xiii) The Treaty makes no provision conserving the rights of the people of East Timor, or providing for the eventuality that, after exercising their right to self-determination, the people of East Timor may choose to repudiate the Treaty.

(xiv) Neither the people of that territory, nor their duly recognized administering Power have been consulted in regard to the said Treaty.

(xv) The Treaty has been entered into by the Respondent and another State "for the mutual benefit of their peoples in the development of the resources of the area" with no mention of any benefits for the people of East Timor from the valuable natural resource belonging to them.

(xvi) the Respondent's individual actions:

(a) in entering into the said treaty;

(b) in expressly acknowledging the incorporation of East Timor into another State;

(c) in being party to an arrangement dealing with the non- renewable resources of East Timor in a manner likely to cause their serious depletion or exhaustion;

(d) in being party to an arrangement dealing with the non- renewable resources of East Timor without consultation with the people of East Timor, or their duly recognized representative;

(e) in being party to an arrangement which makes no mention of the rights of the people of East Timor, but only of the peoples of Australia and Indonesia; and

(f) in taking steps for the implementation of the treaty raise substantial doubts regarding their compatibility with

(a) The rights of the people of East Timor to self-determination and permanent sovereignty over their natural resources

(b) the Respondent's express acknowledgment of those rights

(c) the Respondent's obligations, correlative to East Timor's rights, to recognize and respect those rights, and not to act in such a manner as to impair those rights

(d) the Respondent's obligations under relevant resolutions of the General Assembly and the Security Council

(xvii) The circumstance that a Judgment of this Court against a Party may have effects upon an absent State does not by itself, according to the settled jurisprudence of this Court, deprive the Court of jurisdiction to make an order against a Party which is in fact present before it.

(xviii) The claim against the Respondent can be determined on the basis of:

(i) the Respondent's individual obligations under international law;

(ii) the Respondent's individual actions; and

(iii) the principle of a State's individual responsibility under international law for its individual actions without any need for an examination of the conduct of another State.

F. Since the conclusions set out above can be reached upon the basis of the unilateral acts of the Respondent, without any necessity to investigate or pronounce upon the conduct of a third State, the case of Monetary Gold is not relevant to a determination of this case.

G. Were it necessary to consider the case of Monetary Gold, the facts of that case are clearly distinguishable from those in the present case. Consequently, that decision is inapplicable.

* * *

My conclusion therefore is that the Application before the Court is within the Court's competence to determine, and that the objection based upon the absence of a third State should have been overruled and the case proceeded with to a final determination. The materials necessary for that determination were before the Court, as they were inextricably linked with the preliminary issue of jurisdiction.

Christopher Gregory WEERAMANTRY

DISSENTING OPINION OF JUDGE SKUBISZEWSKI

1. I am unable to concur with the Judgment of the Court which finds that "it cannot in the present case exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic" (Judgment, para. 38). Nor am I able to agree with the reasons upon which this finding is based.

2. On the other hand, I concur with the dismissal by the Court of Australia's objection that "there is in reality no dispute" between it and Portugal (Judgment, paras. 21 and 22). I agree with the Court when in the reasons for the Judgment it takes note that, "for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination" (Judgment, para. 37). It might be said that the narrowing down of the relevancy of the status of the Territory and of the said right to the position of the Parties constitutes the absolute minimum. However, this approach is rather a matter of method than substance: the Court itself subscribes to the continued legal existence of the status of East Timor as a non-self-governing territory and the applicability of the principle of self-determination. I am convinced that this re-statement of the law by the Court is important for the stand Portugal took in the present proceedings and is taking beyond them. The re-statement in the Judgment is significant for an equitable settlement of the question of East Timor. I think that everybody who has the purposes and the principles of the United Nations at heart must commend the Court for this dictum.

SECTION I: BASIC FACTS ON EAST TIMOR

3. In paragraphs 11-18 the Judgment succinctly recalls those facts on East Timor of which a knowledge is necessary for an understanding of the dispute. This section is in the nature of a supplement to the description found in the Judgment.

Historical Background

4. The Portuguese and, subsequently, the Dutch navigators reached the island of Timor in the 16th century. In the process of colonial conquest the eastern part of the island was subjected to Portuguese and the western part to Dutch sovereignty. The boundary was delimited in 1859 by virtue of a Treaty concluded by the two States. The Convention and Declaration of 1893 and another Convention of 1904 also dealt with the frontier. In 1914 The Netherlands and Portugal were parties to an arbitration concerning part of the boundary. In 1941-1942 Dutch and Australian forces entered Portuguese Timor to defend it against Japanese invasion. They were not successful and the island remained under Japanese occupation until the end the Second World War. The Portuguese authorities then came back to East Timor. On the other hand, following Indonesia's independence and recognition as a State, Dutch sovereignty over western Timor was terminated and the area became part of Indonesian territory.

Portuguese Constitutional Law and Policies relating to its Colonies, including East Timor, Prior to the Democratic Revolution of 1974

5. Under Portuguese constitutional law East Timor was a colony or dependency of Portugal and, consequently, part of Portuguese territory. It was described either as a "colony" or "overseas province." The Constitution of 1933 chose the latter term. There was a legal concept in it: these areas would be part of the Unitary State of Portugal and their populations part of the Portuguese nation. At that time the Head of State defined the constitutional position in the following words: "the overseas provinces are already independent through the independence of the Nation as a whole" (Memorial, para. 1.07). But the Constitution maintained the notion of the "parent country," which concept was in formal contradiction to the interpretation quoted. Thus the constitutional law of Portugal excluded self-determination by colonial peoples and, eo ipso, prevented the acquisition of independence by the colonies. Article I of the Constitution of 1933 prohibited alienation of any part of national territory; East Timor, together with all the other colonies, was a constituent element of that territory. Consequently, when admitted to the United Nations (1955), Portugal opposed the application of Chapter XI of the Charter to its overseas possessions, including East Timor. For a few years the Government in Lisbon succeeded in stopping the Organization from subjecting the Portuguese colonies to the regime of that Chapter, but since 1960 East Timor has been classified by the United Nations as a non-self-governing territory (General Assembly resolution 1542 (XV)).

6. In 1971 the overseas provinces were categorized, in Portuguese law, as "regions possessing political and administrative autonomy, able to assume the name of States" (Memorial, para. 1.07). However, this new classification did not bring about any change either in the treatment of East Timor (and the other colonies) in the internal affairs of the State or in the Portuguese

attitude towards the application of Chapter XI of the Charter. Moreover, how could it, once they remained part of the Unitary State? The breakthrough came three years later with the introduction of democracy in Portugal.

Action by the United Nations Prior to 1974

7. The United Nations was at pains to bring about, in regard to the Portuguese colonies, a state of affairs that would conform to the Charter.

8. In resolution 180 (1963), the Security Council called upon Portugal to implement "the immediate recognition of the right of the peoples of the Territories under its administration to self-determination and independence" (para. 5 (a)) and affirmed that "the policies of Portugal in claiming the Territories under its administration as 'overseas territories' and as integral parts of metropolitan Portugal [were] contrary to the principles of the Charter and the relevant resolutions of the General Assembly and of the Security Council" (para. 2).

The Council repeated its calls and affirmations in resolutions 183 (1963) and 218 (1965). In resolution 312 (1972), the Security Council reaffirmed "the inalienable right of the peoples of Angola, Mozambique and Guinea (Bissau) to self-determination and independence" and recognized "the legitimacy of their struggle to achieve that right" (para. 1). The same position is reflected by Council resolution 322 (1972) and by General Assembly resolutions 2270(XXII), 2395(XXIII) and 2507(XXIV).

9. The United Nations also decided to take steps which went further than mere calls and affirmations. In resolution 180 (1963) the Security Council requested that "all States should refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the peoples of the Territories under its administration, and take all measures to prevent the sale and supply of arms and military equipment for this purpose to the Portuguese Government" (para. 6). Similar requests and calls were made in Security Council resolutions 218 (1965) and 312 (1972) as well as in General Assembly resolutions 2270(XXII), 2395(XXIII) and 2507(XXIV). In resolution 2507(XXIV) the General Assembly further called upon all States, United Nations specialized agencies and other international organizations to "increase ... their moral and material assistance to the peoples of the Territories under Portuguese domination who are struggling for their freedom and independence" (para. 11). Change in Portugal's Stand (1974)

10. It was not surprising that the Armed Forces Movement (MFA) which triggered off the Democratic Revolution of 25 April 1974 (known as the "Carnation Revolution"), laid emphasis on a political solution of the colonial problem, in contradistinction to military action. The colonial war which pre-1974 Portugal waged in Africa (viz., in Angola, Guinea-Bissau and Mozambique) was the direct cause of the Revolution. The first Provisional Government spoke of self-determination of the colonies. That policy found expression in decree-law 203/74. Another legislative act, viz., constitutional law 7/74 provides in Article I that

> "the solution to the overseas wars is political and not military ... [and] implies, in accordance with the United Nations Charter, the recognition by Portugal of the right of the peoples to self-determination" and in Article 2 that
>
> "the recognition of the right to self-determination, with all that it implies, includes the acceptance of the independence of the overseas territories and exemption from the corresponding part of Article 1 of the Political Constitution of 1933."

11. By resolution 3294 (XXIX) the UN General Assembly welcomed the new policy of Portugal. That policy conformed to the Charter.

12. Constitutional law 7/75 reaffirmed "the right of the people of Timor to self-determination ... in conformity with the relevant resolutions of the United Nations Organization ..." (Art. I). It may be added that Article 307 of the Portuguese Constitution of 1976 safeguarded East Timor's "right to independence," while Article 293 of the Constitution of 1989 (now in force) is broader as it refers to "the right to self-determination and independence."

Developments in East Timor 1974-1975, Including Indonesian Invasion and Occupation

13. In contrast with other Portuguese colonies there was, in East Timor, no liberation movement or armed struggle, though there were sporadic riots or other manifestations of unrest. In 1974 three political associations were formed: the União Democrática Timorense (UDT) which first supported gradual autonomy, and subsequently the granting of independence after a period of association with Portugal, but finally opted for union with Indonesia; the Frente Revolucionària de Timor-Leste Independente (FRETILIN; this movement initially bore a different name), which advocated independence; and the Associacao Popular Democrática Timorense (APODETI) which favoured integration with Indonesia. Later, the UDT joined a group of pro-Indonesian parties collectively known as the Anti-Communist Movement (MAC).

14. In 1975 Portugal engaged in consultations with these organizations on the future of the Territory. The choice was between independence, integration into a State other than Portugal (which in practice meant Indonesia), or association with Portugal. The Government in Lisbon made preparations for a general election on the island. The plan was to set up a Popular Assembly. In the meantime local elections took place. But immediately following them the UDT launched a coup d'état. The FRETILIN responded by staging a counter-coup. The capital of the Territory, Dili, found itself in the hands of the FRETILIN. The fighting involved the various political movements. The Portuguese authorities emphasized that they did not side with any of them. For reasons of safety the authorities left the capital on 26/27 August 1975 and established themselves on the island of Atauro which was part of the Territory.

15. While the East Timorese political organizations continued to pursue their conflicting policies regarding the Territory's future, Portugal made preparations for further talks with and among them. But the situation became yet more complex when in November 1975 the MAC proclaimed the integration of East Timor with Indonesia and on 28 November 1975 the FRETILIN, for its part, proclaimed the Democratic Republic of East Timor (RDTL). The United Nations did not regard these proclamations as implementing East Timor's right to self-determination (in 1984 the FRETILIN itself abandoned its position on the alleged existence of the RDTL).

16. The situation was under discussion in the United Nations General Assembly when, on 7 December 1975, Indonesian armed forces invaded East Timor and occupied it. On 8 December 1975 the Portuguese authorities left the Territory.

Reaction by the United Nations

17. In paragraphs 14-16 the Judgment describes the stand taken by the United Nations, in particular in the light of the resolutions adopted by the Security Council (1975-1976) and the General Assembly (1975-1982) after Indonesian invasion and occupation. I shall limit myself to a few additional points.

18. First, apart from calling upon "the Government of Indonesia to withdraw without delay all its forces from the Territory" the Security Council also deplored "the intervention" of these forces in East Timor and expressed its grave concern "at the deterioration of the situation in East Timor," including "the loss of life" there (resolution 384 (1975), seventh, eighth and ninth preambular paragraphs; that resolution

was subsequently recalled in resolution 389 (1976)). Equally, the General Assembly "[s]trongly deplore[d] the military intervention" (resolution 3485 (XXX), para. 4). In its subsequent resolution (31/53, para. 4) the Assembly reiterated the same strong regret in view of "the persistent refusal of the Government of Indonesia to comply with the provisions" of the foregoing resolutions. The Assembly reaffirmed this attitude in its resolutions 32/34 (para. 2) and 33/39 (para. 2). The Assembly was also "[d]eeply concerned at the critical situation in the Territory" (later described as the "continuing critical situation") resulting from the intervention and, as stated in subsequent resolutions, from "the persistent refusal on the part of the Government of Indonesia to comply with the provisions of the resolutions of the General Assembly and the Security Council" (resolutions cited and resolution 33/39).

19. Second, in 1980 the General Assembly welcomed "the diplomatic initiative taken by the Government of Portugal as a first step towards the free exercise by the people of East Timor of their right to self-determination and independence" (resolution 35/27, para. 3). In 1981 the Assembly noted "the initiative taken by the Government of Portugal, as stated in the communiqué of the Council of Ministers of Portugal issued on 12 September 1980, and invite[d] the administering Power to continue its efforts with a view to ensuring the proper exercise of the right to self-determination and independence by the people of East Timor, in accordance with General Assembly resolution 1514 (XV), and to report to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples on the progress of its initiative" (resolution 36/50, para. 4).

It may be observed that there is a link between the efforts of Portugal and the institution of the present Geneva "consultations" conducted under the auspices of the Secretary-General of the United Nations with "all parties directly concerned" (resolution 37/30, para. 1), namely "Portugal, as the administering Power, and the representatives of the East Timorese people, as well as Indonesia" (resolution 36/50, para. 3).

20. Third, as long as these "consultations" continue, there is practically no room or need for any of the principal political organs of the United Nations to vote on any resolution on East Timor.

21. Fourth, the Judgment enumerates those United Nations resolutions "which did not specifically refer to Portugal as the administering Power" but which, at the same time, "recalled another resolution or other resolutions which so referred to it" (Judgment, para. 15). Thus such non-reference is without significance. It may be added that the silence of three resolutions is more apparent than real. For they speak of statements by Portugal; now these statements were made by it solely in its capacity as administering Power (Security Council resolution 389 (1976); General Assembly resolutions 31/53 and 32/34). In effect, only one resolution, viz., General Assembly resolution 33/39 of 1978, makes no allusion to Portugal. Nevertheless it recalls resolutions which contain a reference to Portugal.

22. Fifth, the wording of the resolutions referred to in paragraphs 17-21 above is silent on human rights. However, in its resolutions (1975-1982) the General Assembly points to the principles of the Charter and of the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)). Some of these principles specifically protect human rights. Each year the Assembly stated that it had examined the relevant chapter of the report of the Committee of Twenty-Four. Again, concern with human rights in the colonies has always been part of the work of that organ. In resolution 37/30 the Assembly took note of both the report by the Secretary-General and of resolution 1982/20 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The name of the Sub-Commission speaks for itself. Thus the human rights factor is also present, albeit indirectly, and it is relevant to the evaluation of the East Timor situation. There is also a direct link: the 1993 resolution of the Commission on Human Rights on the violation of human rights and fundamental freedoms in East Timor (United Nations document E/CN.4/1993/L.81/Rev.1).

Attitude Towards Indonesian Rule in East Timor

23. On 31 May 1976 a Popular Assembly meeting in the East Timorese capital Dili under Indonesian occupation petitioned Indonesia for integration (United Nations document S/12097, Annex II). Official observers from India, Indonesia, Iran, Malaysia, New Zealand, Nigeria, Saudi Arabia and Thailand were present. In the reports on these events there were references to the "wishes of the people" which were subsequently "verified" by a fact-finding team from the National Parliament of Indonesia. Some foreign diplomatic observers accompanied that team. The United Nations was not represented during any of these activities. The Indonesian Parliament incorporated East Timor into Indonesia on 16 July 1976. Under Indonesian law East Timor became a part of the territory of Indonesia as that country's twenty-seventh province.

24. The United Nations clearly refused and still continues to refuse to acknowledge the situation created in East Timor by Indonesian invasion, occupation and annexation. In 1976, in resolution 31/53, paragraph 5, the General Assembly

> "Rejects the claim that East Timor has been integrated into Indonesia, inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence."

A similar rejection is found in paragraph 3 of resolution 32/34.

25. The Judgment points out that Australia recognized the incorporation of East Timor into Indonesia (Judgment, para. 17).

26. Other States have also granted their recognition, in one way or another, sometimes de facto only and without committing themselves to confirming that self-determination took place. According to information in the Counter-Memorial and Rejoinder of Australia (paras. 175 and 45-48, respectively), they include, in alphabetical order, Bangladesh, India, Iran, Iraq, Jordan, Malaysia, Morocco, Papua New Guinea, Philippines, Singapore, Suriname, Sweden, Thailand and the United States of America. I have not listed all the States referred to by Australia as "accepting the incorporation of East Timor" (Counter-Memorial, title of paragraph 175) or recognizing the "reality of Indonesian control" (Rejoinder, para. 44). The reason for the omission of some States (included by Australia) is that, having examined their statements, I doubt whether they could be classified under the rubric of recognition (e.g., New Zealand, Rejoinder, para. 48). And what is more, there is room for hesitation with regard to some of the States enumerated above. In all, the group of recognizing States is small.

27. Whether territorial clauses in some of the tax treaties concluded by various other States with Indonesia imply recognition of the latter's sovereignty over East Timor is considered in paragraph 122 below. Timor Gap Treaty

28. Submissions (2) to (5) presented by Portugal (Judgment, para. 10) assert several claims in connection with the conclusion by Australia of that Treaty.

29. Australian-Indonesian Agreements of 18 May 1971 and 9 October 1972 on their respective rights to the continental shelf in the areas of the Arafura and Timor Seas left outside the delimitation the shelf facing the coast of East Timor. Thus a kind of gap was left in the delimitation of the continental shelf in those Seas, the "Timor Gap." This name was soon extended to the whole area between East Timor and Australia. The lines recorded by these Agreements identify the

whole boundary of the continental shelf between Australia and Indonesia. No boundary was established in the area between Australia and East Timor. In the opinion of Portugal (Memorial, para. 2.01)

> "the 1971 and 1972 Agreements, and particularly the latter, signify an acknowledgement by Australia that the question of rights over the continental shelf between territories whose coasts face one another and the question of the 'frontal' delimitation of the shelf in the area referred to as the Timor Gap, in other words, in the area opposite East Timor, was a matter for Australia and this Territory alone. Moreover, such an acknowledgement is fully borne out by the contacts established between Australia and Portugal, between 1970 and 1974, concerning the formal opening of negotiations for the delimitation of the shelf in the area in question, as well as by the dispute which arose between them as a result, among other things, of the concession granted by Portugal to the Oceanic Exploration Company Ltd."

30. The attitude of Australia changed after Indonesia took over actual control of East Timor. In 1979 Australia and Indonesia started negotiations concerning the exploration, exploitation and delimitation of the continental shelf in the area of the Timor Gap. The two States agreed not to fish in an area which included the Timor Gap (Memorandum of Understanding of 1981). Pending the delimitation of the continental shelf in the Timor Gap they signed, on 11 December 1989, the Treaty on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia (which was to be known as the Timor Gap Treaty). This Zone serves to enable the exploration and exploitation of the petroleum resources of the continental shelf in the Timor Gap. The "Zone of Co-operation," covering some 67,800 km^2, is divided into three "areas": Area A in the centre (the largest, at approximately 62,000 km^2), Area B in the south and Area C in the north. Areas B and C are areas of exploration, exploitation and jurisdiction of Australia and Indonesia, respectively. However, each State is entitled to certain notifications on the other Area and to part of the revenue collected there. Area A is destined for joint exploration, exploitation and jurisdiction. For this purpose, the two States have set up a bilateral Joint Authority under the control of a bilateral Ministerial Council.

31. Since 1985, in its capacity of administering Power, Portugal has been protesting to Australia first against the latter's negotiations with Indonesia and subsequently against the conclusion of the Treaty itself. Australia has excluded any negotiations with Portugal on the Timor Gap.

32. The available information points to very rich oil and natural gas deposits in the Timor Gap area.

SECTION II: EXISTENCE OF THE DISPUTE

33. While I dissent from the Court's decision on jurisdiction, and this is the heart of the matter, I obviously concur with the Court on the issue of the existence of a dispute between the Parties. Hence in this section my opinion is not a dissenting but a separate one.

The Dispute before the Court

34. The Court rightly dismisses Australia's objection that in this case there is no "dispute" between itself and Portugal (Judgment, para. 22).

35. Clarification whether there is a dispute is, obviously, the first step. In the absence of a dispute the questions of jurisdiction and admissibility would, by definition, not arise. Australia has introduced the distinction between the "alleged" dispute and the "real" dispute (Counter-Memorial, paras. 4-17) and has asserted the "abstract and unreal character of the 'dispute' presented by Portugal" (Rejoinder, para. 34). She has occasionally put the actual word itself in quotation-marks (as exemplified by the preceding reference) and has used the phrase "if there is a dispute" (Counter-Memorial, para. 2). However, the purported non-existence of the dispute has not been presented in any systematic or exhaustive manner. The Respondent State did not seem to go to the lengths of definitely rejecting any notion of a dispute between itself and the Applicant State. It devoted much attention to arguing the inadmissibility of the claims, which fact implies the existence of a dispute.

36. The Court recalls its jurisprudence and that of its predecessor (Judgment, para. 22). Let me quote Judge Sir Gerald Fitzmaurice. Sharing the views expressed by Judge Morelli in the South West Africa cases, Preliminary Objections (ICJ Reports 1962, pp. 566-568) the learned Judge defined the minimum required to establish the existence of "a dispute capable of engaging the judicial function of the Court" (Northern Cameroons, ICJ Reports 1963, pp. 109 and 110, respectively).

> "This minimum is that the one party should be making, or should have made, a complaint, claim, or protest about an act, omission or course of conduct, present or past, of the other party, which the latter refutes, rejects, or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded."

Quoting the definition of a legal dispute given by the United Kingdom (which, as he put it, he "slightly emend[ed]") the learned Judge stated: "there exists, properly speaking, a legal dispute (such as a court of law can take account of, and which will engage its judicial function), only if its outcome or result, in the form of a decision of the Court, is capable of affecting the legal interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to a still subsisting legal situation."

37. A perusal of the Application instituting proceedings and of the pleadings shows that the dispute submitted to the Court fulfils the criteria of the foregoing definitions. The case of East Timor is a dispute which falls under Article 36, paragraph 2, of the Court's Statute. The dispute is a legal one within the meaning of that provision and the Court's practice.

38. From any vantage point, including (it seems) that of the East Timorese people, the dispute brought before the Court is a different one from a potential or existing dispute between Portugal and Indonesia, even though some questions at issue are or may be identical.

The Question before the Political Organs

39. The specific dispute before the Court should not be confused or identified with the broader problem which in the United Nations bore the name "The Question of Territories under Portuguese Administration" (General Assembly) or that of "The Situation in Timor" (Security Council) and is now called "The Question of East Timor." By using in its resolutions the expressions "all interested parties" (resolution 36/50) and "all parties directly concerned" (resolution 37/30) - and these expressions cover Indonesia - the General Assembly identified those concerned with the "Question of East Timor," and not the parties to a future Court case, whatever its ramifications. The "Question of East Timor" involves the United Nations, Portugal, the representatives of the East Timorese people and Indonesia. But this does not mean that according to the Assembly resolutions the settlement of any issue concerning East Timor must always include all these participants, and especially Indonesia, and that the consultations are the only road to a solution. The holding of consultations among the interested parties does not exclude the re-

course to other means of settlement. A specific dispute embracing, as parties to it, only one of the States taking part in the consultations and a third State is not by definition artificial. Certainly it is not so with regard to Australia. Among the countries recognizing the incorporation of East Timor into Indonesia Australia went furthest in the consequences of her act of recognition: Australia concluded the Timor Gap Treaty, which deals with East Timorese interests regarding continental shelf and maritime resources. This is a domain of the highest importance to any State or to a non-State territorial entity such as East Timor.

SECTION III: JURISDICTION, ADMISSIBILITY, PROPRIETY

A. Jurisdiction

40. As indicated in paragraph 1, I dissent from the Court's finding on jurisdiction and from the reasons behind this finding. I assume that what the Court means is that it is without jurisdiction to decide the case. It is true that the Court uses different words, saying that "it cannot ... exercise the jurisdiction conferred upon it" (Judgment, para. 38). The Court arrives at this conclusion after having examined "Australia's principal objection to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia" (Judgment, para. 23). In the written pleadings Australia presented this objection under the rubric of inadmissibility, but the submissions referred, first of all, to lack of jurisdiction and only then to inadmissibility (Rejoinder, para. 288). In its final submissions Australia took the same position: "the Court should ... adjudge and declare that the Court lacks jurisdiction to decide the Portuguese claims or that the Portuguese claims are inadmissible" (CR 95/15, p. 56, 16 February 1995, Mr. Griffith, Agent and counsel; Judgment, para. 10).

41. According to the Judgment (paras. 33 and 34) the reason for not exercising jurisdiction in this case is the impossibility for the Court to adjudicate on the lawfulness of Indonesia's conduct without its consent. Such adjudication is, in the opinion of the Court, a prerequisite for deciding on the alleged responsibility of Australia. The Judgment relies on the decision in Monetary Gold (ICJ Reports 1954, p. 19). Consequently, in explaining my dissent I concentrate on the significance to be ascribed to Indonesia's absence from the proceedings in the present case and on the meaning and relevance of Monetary Gold. But at the outset I discuss the broader ramifications of the issue of jurisdiction and the special problem with regard to the first submission of Portugal.

Law and Justice

42. Undoubtedly, as Dr. Shabtai Rosenne has put it, the Court possesses "a measure of discretion ... to decline to decide a case"; but it should be "sparingly used" [1].

43. With respect, I submit that the Court should have resolved the dispute between Portugal and Australia not only on the basis of the rules governing jurisdiction and/or admissibility (these rules have to be applied), but also in accordance with the demands of justice. The dichotomy between law and justice is perennial. The Court has constantly been looking for an answer to it. The search for a solution becomes difficult, and the contours of the dichotomy gain in sharpness, when too narrow an interpretation of the principles governing competence restrains justice. I am, therefore, also concerned with the possibility that the Judgment might revive past fears regarding a restrictive concept of the Court's function. The problem cannot be reduced to legal correctness alone. This is especially so whenever the Court is confronted with certain basic elements of the constitution of the Organization and with certain fundamental principles of international law. There is a real interest in maintaining and strengthening the Court's role in what Judge Sette Camara described as "the institutionalization of the rule of law among nations" [2].

44. A few years ago President Bedjaoui wrote that "it is through an awareness of the lines of force of [international] society, and of their articulations, that we can gain a better understanding ... of [international law's] possible future conquests." In the opinion of the President the present phase of international law is that of a transition "[f]rom a law of co-ordination to a law of finalities." And the learned commentator states that "one of the essential finalities" is development, "true development, of a kind which will restore dignity to [the] peoples [of "new States"] and put an end to relationships of domination" [3].

45. Does the Judgment give sufficient expression to the law so understood? The subject matter of the dispute and its wider ramifications would justify the adoption of the President's approach. East Timor has not been well served by the traditional interests and sovereignties of the strong, hence the importance of the Court's position on the Territory and the rights of its people (para. 2 above). But that position would be of more consequence if the holding was not silent on self-determination and on the status of the Territory. It is a telling silence, because it is coupled with a quasi-total rejection of the Portuguese claims. Was the Court not too cautious?

46. And yet, I think, this Court has had its great moments and was most faithful to its function when, without abandoning the domain of positive law, it remained in touch with the great currents of contemporary development. A court of justice need not be and, indeed, should not be an exponent of the law-making opinion of "yesterday" or still worse - to use Albert V. Dicey's expression - "the opinion of the day before yesterday" [4]. The Court should and can look ahead. Otherwise there would not be decisions such as the one in the Reparations case.

47. I think that what Judge ad hoc Lauterpacht said in the Application of Genocide Convention, Further Requests for the Indication of Provisional Measures (ICJ Reports 1993, p. 408, para. 3) is applicable to the present case:

> "the Court should approach it with anything other than its traditional impartiality and firm adherence to legal standards. At the same time, the circumstances call for a high degree of understanding of, and sensitivity to, the situation and must exclude any narrow or overly technical approach to the problems involved. While the demands of legal principle cannot be ignored, it has to be recalled that the rigid maintenance of principle is not an end in itself but only an element - albeit one of the greatest importance - in the constructive application of law to the needs of the ultimate beneficiaries of the legal system, individuals no less than the political structures in which they are organized."

48. There is a certain lack of balance in the dispositif: it is all too positive for Australia, all too negative for Portugal; but it still remains to be seen whether the real winner is not a third State. This is an effect the Court wishes to avoid, for it might easily frustrate the Court's undoubted concern not to have any third State in the picture.
Portugal's First Submission

49. For all these reasons, I think that the Court should deal with the first submission of Portugal. In this submission Portugal requests the Court

> "(1) To adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources and, secondly, the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia, which is under an obligation not to disregard them, but to respect them."

50. The heart of the matter is that the Court cannot limit itself to saying that it has no jurisdiction in questions pertaining to the Timor Gap Treaty. The substance of the case is broader and goes deeper than that Treaty. In a nutshell, the Court should deal extensively with the principles covered by the first submission of Portugal. The present treatment of them in the reasons, though important, is too short. It is also insufficient in the sense that the subject, in my view, belongs equally to the dispositif.

51. Though the Court says that its "conclusion applies to all the claims" (para. 35) the Judgment does not actually deal with the first submission. Nor was its admissibility questioned. Consequently, one should apply the rule repeated in the Request for interpretation of the Judgment of 20 November 1950 in the Asylum Case (ICJ Reports 1950, p. 402) that "it is the duty of the Court ... to reply to the questions as stated in the final submissions of the parties ..." [5]. In the present case there is no conflict between that duty and judicial self-restraint, if the latter were to arise at all, which I do not think it would.

52. In this connection it is convenient to include a word of comment on the observation that, during the proceedings, both Parties invoked the interests of the East Timorese people, but they presented us with little or no evidence of what the actual wishes of that people were. Be this as it may, I think that the Court can base itself on certain elementary assumptions: the interests of the people are enhanced when recourse is made to peaceful mechanisms, not to military intervention; when there is free choice, not incorporation into another State brought about essentially by use the of force; when the active participation of the people is guaranteed, in contradistinction to arrangements arrived at by some States alone with the exclusion of the people and/or the United Nations Member who accepted "the sacred trust" under Chapter XI of the Charter. The Court could have examined these and related problems without changing its present holding on lack of competence with regard to Portuguese submissions 2 to 5. For these problems are part of self-determination. They belong also to submission 1. To reiterate, it is not clear to me why the Judgment preferred to remain silent on that submission.

53. The statements (in the reasons for the Judgment) on the status of East Timor and on self-determination might have been elaborated upon. The status of non-self-government obviously implies the "integrity" of the Territory. Here the Judgment limits itself to quoting the Security Council resolutions (para. 31). There is nothing on the application of the right of self-determination to the present situation of the East Timorese people and on the view of each Party regarding the implementation of that right. The Judgment is silent on permanent sovereignty over natural wealth and resources. The Parties differ on the position of Portugal: another issue to be resolved by the Court. There is a lot that is in dispute between the Parties under the first submission, irrespective of the Timor Gap Treaty. The first submission cannot be reduced to the issue of treaty-making power, especially regarding the delimitation of maritime areas.

54. The first submission of Portugal is couched in such terms that by addressing the merits of it the Court runs no danger of dealing with Indonesia's rights, duties or position. The rule of consent (repeated in Monetary Gold) will be fully observed.

55. There is no justification for Indonesia to see in the Judgment an implicit legalization or legitimization of the annexation of East Timor. Nonetheless, I am concerned with the present operative clause, where there is no reference to the principles enumerated in the first submission. It should be emphasized that this submission differs considerably from the other ones (2-5). The latter centre on the Timor Gap Treaty and problems of responsibility, the former asks the Court to state the law and the duty of Australia to respect that law. What could be the difficulty in accepting that submission, wholly or in part?

56. I am prepared to agree with the proposition that the granting of the first submission constitutes the juridical (and also logical) prerequisite to the consideration and possible granting of the subsequent submissions. But not vice-versa. The link does not work the other way. The first submission can stand autonomously. The Court can and in fact, in its practice, did construe the submissions of the Parties. The Court could take up the first submission and resolve the relevant issue without going into the remaining claims.

57. The Court is not merely an organ of States which has with the function of adjudicating upon disputes between those of them willing to bestow upon it jurisdiction and to submit to that jurisdiction. The Court is primarily the "principal judicial organ of the United Nations." It is thus part of an international structure. Its judicial function, as defined in Chapter II of its Statute and especially in Article 36, must be exercised in accordance with the purposes and principles of the Organization. The Court has been contributing to the elucidation and growth of United Nations law. This case has created an opportunity for the continuation of this task. "The Question of East Timor" is still being dealt with by the political organs of the United Nations. Once regularly seised (hence the importance of elucidating Portugal's locus standi), the Court has its role to play, provided its independence and the limits of its participation in the activities of the Organization are respected. None of these requirements would be threatened, if the Court decided to take up the first submission. This submission is indeed separable from the issue of the Timor Gap Treaty. Portugal's first submission is no abuse of the Court.

58. To sum up, the operative clause of the Judgment could contain the following findings:

(1) The United Nations has continued to recognize the status of Portugal as administering Power of East Timor. Consequently, Portugal has the capacity to act before the Court in this case on behalf of East Timor.

(2) The status of the territory of East Timor as non-self-governing, and the right of the people of East Timor to self-determination, including its right to permanent sovereignty over wealth and natural resources, which are recognized by the United Nations, require observance by all Members of the United Nations. The Court takes note that in these proceedings Australia has placed on record that it regards East Timor as a non-self-governing Territory and that it acknowledges the right of its people to self-determination.

Distinction between Involvement of Interests and Determination of Rights or Duties

59. I shall start by recalling the distinction between, on the one hand, a legal interest or interests of a third State (here Indonesia) being possibly or actually involved in, or affected by, the case (but no more than that) and, on the other hand, the ruling by the Court on such an interest or interests. In the latter hypothesis the legal interest or interests "would not only be affected by a decision, but would form the very subject-matter of the decision" (Monetary Gold, ICJ Reports 1954, p. 32), and that decision (i.e., the decision on the responsibility of the third State) would become "a prerequisite" for the determination of the claim (cf. Certain Phosphate Lands in Nauru, ICJ Reports 1992, p. 261, para. 55; Judge Shahabuddeen, ibid., p. 296). The present case merely "affects" or in a different manner "involves" an interest or interests of Indonesia. The rule of consent, as embodied in Article 36 of the Statute, is maintained; had the Court assumed jurisdiction, it would not, and could not, pass on any rights and/or duties of Indonesia. That country is, in particular, protected by Article 59 of the Statute, whatever the possible broader effects of the Judgment.

60. The nature, extent or degree of the involvement of the legally protected interests, including the rights and duties, of a third State differ from case to case. The Court must see whether it can decide on the claim without ruling on the interests of a third State. The involvement of these interests cannot simply be equated with the determination of the rights and/or duties of a third State by the Court, or with any determination concerning that State's responsibility. If a decision on the claim can be separated from adjudicating with regard to a State which is not party to the litigation, the Court has jurisdiction on that claim. It is submitted that this is the position in the triangle Portugal-Australia-Indonesia. Here the said separation is not only possible, but already exists. Portugal did not put at issue the legal interests of a third State, i.e., Indonesia. The Court has jurisdiction.

61. In Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application for Permission to Intervene, the Chamber of the Court left no doubt as to the relevance of the distinction indicated in paragraphs 59 and 60 above. The Chamber interpreted the finding in the Monetary Gold: "while the presence in the Statute of Article 62 might impliedly authorize continuance of the proceedings in the absence of a State whose 'interests of a legal nature' might be 'affected,' this did not justify continuance of proceedings in the absence of a State whose international responsibility would be 'the very subject-matter of the decision.' The Court did not need to decide what the position would have been had Albania applied for permission to intervene under Article 62." (ICJ Reports 1990, pp. 115-116, para. 55.)

The Chamber then proceeded to explore whether there existed, on the part of the third State (Nicaragua), an "interest of a legal nature which [might] be affected by the decision," so as to justify an intervention, and then whether that interest might in fact form "the very subject-matter of the decision" (ibid., p. 116, para. 56). The Chamber found that there existed, on the part of that third State,

> "an interest of a legal nature which [might] be affected by its decision";

but it came to the conclusion that

> "that interest would not be the 'very subject-matter of the decision' in the way that the interests of Albania were in the case concerning the Monetary Gold removed from Rome in 1943" (ibid., pp. 121-122, paras. 72 and 73).

62. The criterion of the "very subject-matter of the decision" is conclusive in establishing the Court's jurisdiction when the interests of a third State are or seem to be at stake. As the Court said: "The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction;" otherwise, I think, there would be doubt whether the Court was fulfilling its task and mission: "it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of each case, unless of course" the factor of the subject-matter of the decision intervenes (Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, ICJ Reports 1984, p. 25, para. 40; emphasis added). The duty to fulfil its function is a primary one for the Court. Hence in its previous decisions the Court has adopted a reasonable interpretation of the Monetary Gold rule. One might even say: an interpretation which is not broad. This stance was adopted by the Court in Certain Phosphate Lands in Nauru, Preliminary Objections. In this case, where Nauru was claimant, the Court found that it had jurisdiction in spite of the fact that the Respondent State (Australia) was only one of three States (the other two being New Zealand and the United Kingdom) who jointly constituted the Administering Authority of Nauru under the Trusteeship Agreement. A decision on Australia's duties in that capacity would inevitably and at the same time be a decision on the identical duties of the remaining two States. In other words, though the "subject-matter" was the same, the Court could exercise its jurisdiction with regard to only one component State of the tripartite Administering Authority. The Court said: "In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claim against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (ICJ Reports 1992, pp. 261-262, para. 55.)

63. There is room for applying the concept inherent in the foregoing dictum in Nauru to the present case: no finding on Indonesia creates a necessary "basis" for the jurisdiction with regard to Portuguese claims against Australia, nor is there any necessary ("logical," ibid., p. 261, para. 55) link between the findings regarding Indonesia and those concerning Australia (the element of "a prerequisite").

64. But our problem is not limited to what results from applying the test of the distinction made by the Monetary Gold rule. The practice of the Court amply shows that it is competent to decide bilateral disputes on territorial titles (including titles to submarine areas), the delimitation of boundaries and the status of a territory or territorial entity. The latter subject is present in the case under consideration. What the Court decides on these and similar issues may be asserted with regard to all States. In spite of the dispute being one between two States such a decision of the Court is effective erga omnes. In the practice of the Court (and the same is true of the Permanent Court) the said category or categories of subject-matter did not, and could not, constitute a bar to the exercise of the jurisdiction in a dispute between two States only, though the effect of the decision went beyond the bilateral relationship. The latter circumstance was not regarded by the Court as preventing it from rendering judgments. Examples are the Fisheries, Minquiers and Ecrhos, and Temple of Preah Vihear cases, as well as the decisions on various continental shelves.

65. Jurisdiction (and/or admissibility) cannot be questioned (as was done in the present case) because the bringing of a claim against a State may have consequences which in fact go beyond that claim as would the decision of the Court were it to find in favour of the Claimant State. In similar or identical circumstances another State can reasonably expect a similar or identical decision by the Court. But here we are moving on the plane of a factual situation or factual possibilities. Such factual consequences of a claim and of a judgment in which the Court found in favour of the Claimant State are something other than that claim itself. These facts or factual possibilities do not turn the claim into a moot one, nor do they make a third State the only object of the claim. The claims put forward by Portugal are real and are addressed to the Respondent State; the non-participation in the proceedings of a third State (Indonesia) does not deprive the Court of jurisdiction, nor does it make the Portuguese claims inadmissible.

66. For in the present case the separation of the rights and/or duties of Australia and Indonesia is both possible and necessary. A judgment on the merits should and could have given expression to this separation. In this case the vital issues to be settled (to borrow an expression from the Monetary Gold case, ICJ Reports 1954, p. 33), do not concern the international responsibility of a third State, i.e., Indonesia.

67. The case, there can be no doubt, involves or affects some interests of Indonesia. But this fact is not a bar to the Court's jurisdiction, nor does it make the various claims inadmissible. The Court's practice, referred to above, corroborates this conclusion. The interests of Indonesia are sufficiently protected by the Statute of the Court. They do not constitute "the very subject-matter of the decision." Hence the

Monetary Gold rule excluding jurisdiction cannot be invoked in the present case: its premise is lacking in the East Timor controversy.

United Nations Law and the Question whether Indonesia is a Necessary Party

68. Contrary to what has been contended by Australia, Portugal has not chosen the "wrong opponent." In other words, this is the issue of the "prerequisite" in the sense of Monetary Gold (paras. 59 and 63 above). But in the present proceedings Portugal asserts claims against Australia only, and not against any absent State, i.e., Indonesia. The Court is not required to exercise jurisdiction over any such State. Australia is not the "wrong" opponent in the present proceedings, while Indonesia is not an opponent at all in them. The whole distinction in this case is both fictitious and not a genuine one.

69. In the Nicaragua case, Jurisdiction and Admissibility, the United States asserted that the adjudication of Nicaragua's claim would necessarily implicate the rights and obligations of some other Central American States, viz., Costa Rica, El Salvador and Honduras. While rejecting this assertion and pointing out that it had "in principle" merely to decide upon the submissions of the Applicant State, the Court said:

> "There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings." (ICJ Reports 1984, p. 431, para. 88.)

Mutatis mutandis, this dictum is helpful in resolving the issue of the "right" or "wrong" opponent. Let me explain that I regard the rule stated as sound. I am not expressing any opinion on whether there was room for its application in the Nicaragua case or whether it was correctly applied in the light of the existing evidence.

70. The basis for the decision on jurisdiction and admissibility and, further, on the merits is the status of East Timor. Under the law of the United Nations, East Timor was and, in spite of its incorporation into Indonesia, remains a non-self-governing territory in the sense of Chapter XI of the United Nations Charter. This issue, fundamental to the case, is governed by the law of the United Nations. Unless the Court finds that the Organization acted ultra vires, the Court's opinion cannot diverge from that law and from the implementation of the rules of that law in the practice of the Organization, especially as reflected in the relevant resolutions of the General Assembly and the Security Council[6].

71. Under the law and in the practice of the Organization the implementation of Chapter XI of the Charter is part and parcel of the functions of the General Assembly. In at least some issues falling under that Chapter Members States are not confronted with mere recommendations: the Assembly is competent to make binding determinations, including determinations on the continued classification of an area as a non-self-governing territory or on the administering Power.

72. The Court accepts that in some matters the General Assembly has the power to adopt binding resolutions. By resolution 2145 (XXI) the Assembly terminated the Mandate for South West Africa and stated that the Republic of South Africa had "no other right to administer the Territory." This was not a recommendation. In the Namibia case the Court explained (ICJ Reports 1971, p. 50, para. 105):

> "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design."

73. It is not clear why in the present case the Court seems in fact to look at the resolutions of the Assembly on colonial issues from a different angle. The Court neither denies nor confirms their binding force. The Court says (Judgment, para. 32):

> "Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as 'givens' which constitute a sufficient basis for determining the dispute between the Parties."

But in one, rather significant, instance the Court has recourse to a "given": it follows the United Nations resolutions and qualifies Indonesian action against and in East Timor as intervention (Judgment, paras. 13 and 14).

74. The words, quoted in paragraph 73 above, raise another question. Do they concern jurisdiction or merits? The whole paragraph 32 of the Judgment seems to deal with the merits. At the same time the Court reduces this paragraph to consideration of the problem of "an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor."

An examination limited to that problem obviously does not put the Court in a position enabling it to bring forward all the arguments which would justify its negative conclusion on the "givens." The latter constitute a wider problem, not restricted to the issue of who can treat with whom. Also, the conclusion at the end of the first subparagraph of paragraph 31 of the Judgment resolves an issue of merits.

75. The Court links the continuity of the status of the Territory, including the relevance of the principle of self-determination, first of all to the Parties' position (Judgment, paras. 31 and 37). But it is rather difficult to define the Court's stance because in the following passages the resolutions regain their autonomous significance. It is not clear why the Court, after having surveyed the United Nations acts, does not take up the problem of "the legal implications that flow from the reference to Portugal as administering Power in those texts" (Judgment, para. 31); instead, the Court concentrates on treaty-making. That question is not fully examined and yet the Court expresses some doubts regarding Portugal's claim to exclusivity in concluding agreements in and on behalf of East Timor. Again, incidentally, a problem of merits.

76. The Court's stance commented upon in paragraphs 74-75 is in some contrast with the Orders in Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (ICJ Reports 1992, pp. 3 and 114). These Orders respect the decision of the Security Council on the merits of the two cases, though that decision was adopted after the close of the hearings (ibid., pp. 14-15, paras. 34-42; and pp. 125-127, paras. 37-45) and the law, while leaving the Court some freedom of choice, could be understood as pointing to a different solution (see the dissenting opinions, ibid., pp. 33 et seq. and 143 et seq.). In regard to East Timor, the subject-matter is regulated by law and by resolutions which make binding determinations. One would think that the Court cannot avoid applying the relevant rules. But the Court prefers to maintain a certain distance.

77. By taking cognizance of the status of East Timor in United Nations law, resolutions included, the Court, would not be passing upon any Indonesian territorial or other rights, duties, jurisdiction or powers. In this case the Court would not require any proof of that status on the part of Portugal. Nor is any finding on Indonesian conduct and position necessary to adjudication upon Portuguese claims. Interestingly enough, the Judgment qualifies the Indonesian action as intervention (paras. 13 and 14). Will this have its effects? Intervention (particularly military) is by definition unlawful and produces no rights or title until there is a decision by the United Nations validating its

consequences or until there is universal recognition.

78. The law of the United Nations is binding on all Members States. The status of a territory, in view of its objective nature, is opposable not only to each of them but also to non-Members. This applies to the non-self-governing Territory of East Timor. Also, the right of the East Timorese people to freely determine their future and the position of the administering Power are opposable to every State (and this includes Australia). Therefore, in this context, it is erroneous to regard Australia as the "wrong" respondent and Indonesia as the "true" one. The present case does not justify such a contradistinction. Nor, as the Court explains, is it "relevant whether the 'real dispute' is between Portugal and Indonesia rather than Portugal and Australia" (para. 22). There is, no doubt, more than one dispute with regard to East Timor, but in this case the Court has been seised of a specific dispute which qualifies for being decided on the merits.

79. There is yet another reason why the presence of Indonesia, a country which has an interest in the case (although it made no request concerning its possible intervention), is not a precondition of adjudication. If the contrary were true, the Court would practically be barred from deciding whenever the application of the erga omnes rule or rules and the opposability of the legal situation so created were at stake; the Court's practice does not corroborate such a limitation (paras. 64 and 65 above). The presence of a third State in the proceedings before the Court (whether as party or intervening) is not necessary for that organ to apply and interpret the United Nations resolutions, in particular to take note of their effect.

80. Australia has presented itself to the Court as simply a third State which has responded to a situation brought about by Portugal and Indonesia. Without entering into the issue of the treatment of these two States on the same level of causation, the Court can examine and determine the lawfulness of Australia's response to the said situation. There is no essential requirement that, in the judicial proceedings devoted to that examination and determination, Indonesia be a party. It is enough for Portugal to prove her claim against Australia.

81. The conclusion is that Indonesia is not a necessary party, i.e., one without whose participation the Court would be prevented by its Statute from entertaining the Application. Nor is Indonesia the "true" party[7]. The dispute brought before the Court is one different from a potential or existing dispute between Portugal and Indonesia, even though some questions at issue are or may be identical.

Subject-matter of the Decision

82. The rights of Indonesia could not, need not and would not constitute any "formal" or "actual" subject-matter of the decision on the merits. The claims submitted by Portugal are distinct from the alleged rights, duties and powers of Indonesia. There is no difficulty in separating the subject-matter of the present case from that of a theoretical case between Portugal and Indonesia. The fact of the incorporation of East Timor is (or would be) the same for the two cases, the existing one and the imaginary one. But the rights and duties of Indonesia and Australia are not mutually interdependent; the contents of some of them are identical, yet this is irrelevant to the problem whether a specific State (Australia) conformed to rules of law governing East Timor. That problem can be decided by the Court without linking its decision to any prior or simultaneous finding on the conduct of another State (Indonesia) in the same matter. To exercise jurisdiction with regard to Australia it is not necessary for the Court to decide on the question of Indonesian duties concerning the Territory. 83. In the Nicaragua case (Judgment on Jurisdiction and Admissibility) the Court said:

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning Monetary Gold Removed from Rome in 1943, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings 'would not only be affected by a decision, but would form the very subject-matter of the decision' (ICJ Reports 1954, p. 32). Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. ... [O]ther States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention." (ICJ Reports 1984, p. 431, para. 88.)

Without there being any need to express an opinion on the issue of third States in the Nicaragua case (see para. 69 above), the approach exemplified by this dictum should have been followed in this case.

84. In the present case the judgment in Monetary Gold is fully relevant as a statement of the noncontroversial rule (or principle) of the consensual basis of jurisdiction. The Court has been corroborating this rule since the very outset of its activity (cf. Corfu Channel case, Preliminary Objection, ICJ Reports 1948, p. 27). It is a rule of its Statute, which fact is decisive. Further, there can be no doubt regarding the relevance of the distinction between legal interests of a third State which are merely affected by the decision and its legal interests which "would form the very subject-matter" of the decision (Monetary Gold, ICJ Reports 1954, p. 32). But the whole structure of the problem in Monetary Gold is different from that in East Timor. In the former the determination whether one country (Italy) was entitled to receive the property of another (Albanian gold) depended on a prior determination whether the other State (Albania) had committed an internationally wrongful act against the former (Italy) and was under an obligation to pay compensation to it. In the East Timor case the position of Indonesia cannot be compared to that of Albania in the Monetary Gold. In the present case we are dealing with the duties which the countries have by virtue of their obligation to respect the status of East Timor as determined by the United Nations. These duties are not interconnected: the obligation of any Member State of the United Nations to abide by the law governing East Timor is autonomous. In Monetary Gold one claim could be adjudicated only after a different claim to compensation was first granted. That is not the construction of the case now before the Court. With respect, I have the impression that in this case the Court has gone beyond the limit of the operation of Monetary Gold.

85. Moreover, the rule of Monetary Gold is one governing jurisdiction, and not one preventing the Court from basing itself on determinations made by the Security Council or the General Assembly with regard to a dispute or a situation, including the position or conduct of another State. By taking account of such "external" determinations the Court is not making any finding of its own on the interests of a non-party to the proceedings. The Court, as already indicated (para. 100 above), cannot ignore the law of the United Nations as applied by the Organization's other principal organs provided they act within their Charter powers. Thus it is not Portugal which, before the Court, challenges Indonesia's occupation of East Timor, its position as the proper State to represent the interests of the Territory, and generally the conformity of its actions with the self-determination of the East Timorese people. The challenge came much earlier from the United Nations[8]. By now taking judicial notice of the relevant United Nations decisions the Court does not adjudi-

cate on any claims of Indonesia nor does it turn the interests of that country into the "very subject-matter of the dispute."

86. The Court is competent, and this is shown by several judgments and advisory opinions, to interpret and apply the resolutions of the Organization. The Court is competent to make findings on their lawfulness, in particular whether they were intra vires. This competence follows from its function as the principal judicial organ of the United Nations. The decisions of the Organization (in the broad sense which this notion has under the Charter provisions on voting) are subject to scrutiny by the Court with regard to their legality, validity and effect. The pronouncements of the Court on these matters involve the interests of all Member States or at any rate those which are the addressees of the relevant resolutions. Yet these pronouncements remain within the limits of Monetary Gold. By assessing the various United Nations resolutions on East Timor in relation to the rights and duties of Australia the Court would not be breaking the rule of the consensual basis of its jurisdiction.

87. The Court has always been sensitive regarding the limits of its jurisdiction. In Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, the Court emphasized that "no conclusions or inferences may legitimately be drawn from [its] findings or [its] reasoning with respect to rights or claims of other States not parties to the case" (ICJ Reports 1981, p. 20, para. 35). Applied, as it was, in the quoted case to Malta, there is no doubt that this rule protects the interests of Indonesia in the present litigation.

88. One can also add that in all systems of law courts take judicial notice of matters of public knowledge. This category comprises, inter alia, historical events such as war, aggression, invasion and the incorporation of territory. Indonesia's action in regard of East Timor falls under this heading. Taking account of such facts and drawing conclusions on their basis is not a usurpation of jurisdiction.

Indonesian Control over East Timor

89. A decision on the legality of "the presence of Indonesia in East Timor" is not a prerequisite to a decision on Australia's responsibility. That is the difference as compared with Monetary Gold, especially as interpreted in Certain Phosphate Lands in Nauru (paras. 86 and 89 above). But the said decision is implicit in the description of the Indonesian conduct as intervention (Judgment, paras. 13 and 14).

90. In the present case there it is not necessarily implied that the Court should determine the status of Indonesia in East Timor. The Court need only refer to the status of East Timor in the law of the United Nations and its implementing resolutions. It is on Australia's own acts related to the latter status that Portugal rests its claim. It is also in that status alone that one would possibly find the answer to the question regarding which country is competent to conclude treaties concerning East Timorese interests. Contrary to what is stated in the Counter-Memorial (para. 212) the Court need not determine "the legal status of the Indonesian administration of East Timor at and since 11 December 1989, i.e., at the time of and since the making of the Timor Gap Treaty." The Court needs only to say what, under United Nations law and resolutions, the status of East Timor in the relevant period was and now is. Nor is a "decision on Indonesia's claim to sovereignty ... a prerequisite to any finding of Australian responsibility" (contra: ibid.). Again, the key to the problem is the status of the Territory under United Nations norms. To declare how these norms define that status the Court need not make any finding concerning Indonesia.

91. The link between the claims which Portugal makes vis-à-vis Australia and the claims Portugal has or might have made elsewhere against Indonesia (i.e., not before this Court) is of a factual nature. Both groups of claims concern the situation in East Timor. That link does not suffice to make the adjudication between Portugal and Australia dependent upon a prior or at least simultaneous decision on the (potential or existing) claims of Portugal against Indonesia. In contrast with the situation in the Monetary Gold case, the decision of the Court in the dispute between Portugal and Australia would not be based on the obligation and responsibility of Indonesia (cf. Judge Shahabuddeen in Certain Phosphate Lands in Nauru, ICJ Reports 1992, p. 297).

92. Australia's obligations resulting from the duty to respect the United Nations status of East Timor are identical with or similar to those of other Member States of the Organization. But that identity (or similarity) does not mean that Portugal needs to rely on this fact or that the Court must or needs to found its judgment on it. One might reiterate here what Judge Shahabuddeen said on the position of Australia in another case, viz., in Certain Phosphate Lands in Nauru:

> "That others had the same obligation does not lessen the fact that Australia had the obligation. It is only with Australia's obligation that the Court is concerned." (ICJ Reports 1992, p. 297.)

The Portuguese Application is directed towards certain Australian acts and their conformity, or otherwise, with the United Nations status of East Timor, not towards the acts of Indonesia. In this case a decision on the submissions of the Applicant State would not constitute a determination of the responsibility of the non-party (Indonesia), with all the legally dispositive effects such a determination would or might carry. Timor Gap Treaty

93. Let us begin by clarifying one point. The Court has no jurisdiction to make a finding on the invalidity of the Timor Gap Treaty: the Court must stop short of a determination to this effect. For the purpose of the present proceedings the Treaty remains valid. That validity prevents the Court from ordering any measures aimed at the non-performance of the Treaty. Its actual, possible or potential consequences of a harmful nature for the people of East Timor cannot be determined by the Court. A ruling on the validity, or otherwise, of the Treaty would require the participation of Indonesia in the present case. Both the Applicant and the Respondent (though in somewhat different contexts) quote the judgments of the Central American Court of Justice in Costa Rica v. Nicaragua (1916) and El Salvador v. Nicaragua (1917) (Counter-Memorial, para. 189; Reply, paras. 7.21 and 7.22). The validity of the Timor Gap Treaty is not a subject of the dispute. Portugal does not request the Court to declare the Treaty invalid.

94. But a finding on the lawfulness of some unilateral acts of Australia leading to the conclusion of the Treaty or constituting its application is another matter. Juridically speaking the negotiation, conclusion and performance of a treaty are acts in law (expressions of the will or intention of a legal person). To be effective in law, they must conform to the legal rules governing them. Several of these acts are unilateral in contradistinction to the treaty itself. If a case involves the lawfulness or validity of any of these acts, and this is a "question of international law" under Article 36, paragraph 2, of the Statute, the Court is competent to review the said conformity and, consequently, decide on the lawfulness or validity of the act. Historically and sociologically speaking the negotiation, conclusion and performance of a treaty are facts. And various facts are also subject to judicial review the extent of that review depending on the law of the country or, in international relations where there is no central judiciary, on the particular provisions of treaty law.

95. The Court is competent to make a finding on whether any of the unilateral acts of Australia conducive to the conclusion, entry into force and application of the Timor Gap Treaty constituted an international wrong. By concentrating exclusively on such acts the Court in no way deals with

any treaty-making acts of Indonesia. The Court remains within the limits of an assessment which is covered by its jurisdiction and which is admissible. The Court would fulfil its task by examining these acts in the light of Australia's duties under United Nations law and especially that body of its provisions which is being called the "law of decolonization."

96. In order to examine whether Australia's conduct leading to the conclusion of the Timor Gap Treaty was or was not wrongful, it is not necessary for the Court to determine the wrongfulness of Indonesia's control over East Timor. It is enough to test the Australian conduct against the duty Australia had and has to treat East Timor as a non-self-governing territory. While protecting her maritime rights and taking steps to preserve her natural resources, Australia had (in the circumstances) some obligations towards the Territory: she dealt not with the administering Power, but with Indonesia, a State which was not authorized by the United Nations to take over the administration of the Territory, and yet controlled it. Maritime and related interests of the Territory were also at stake, not only those of Australia. There is no question of equating the position of third States (one of them being Australia) to the responsibilities of States which, like Portugal, have been charged with the administration of a territory or territories under Chapter XI of the Charter. But the non-administrators also have some duties. Did Australia fulfil them? This question does not trigger the Monetary Gold rule; the Court is competent to answer it.

B. ADMISSIBILITY

General

97. Generally, the issue of admissibility has already been touched upon in some of the preceding paragraphs. In this case, before starting a discussion on admissibility, the Court had first to decide on its jurisdiction. In view of its conclusion, there was no room for considering admissibility. In the present case admissibility or otherwise can be resolved after the examination of the substance of the several claims submitted by Portugal. Indeed, Australia points to the inextricable link between the issue of admissibility and the merits (Counter-Memorial, para. 20).

98. It has already been noted that although it asked the Court to adjudge and declare that it lacked jurisdiction, Australia dealt with the case principally under the heading of admissibility, her "submissions on the merits [having] only a subsidiary character" (Counter-Memorial, para. 20; as to the admissibility, or rather inadmissibility, see ibid., Part II, and Rejoinder, Part I).

99. The emphasis on admissibility or otherwise has not been lessened, let alone eliminated, by what Australia alleged on the non-existence of the dispute in the present case (paras. 34-38 above).

Applicant State's jus standi

100. The present case does not "involve direct harm to the legal rights of the plaintiff State in a context of delict," but it is one in which the claim is grounded "either in a broad concept of legal interest or in special conditions which give the individual State locus standi in respect of legal interests of other entities" [9]. East Timor is such an entity.

101. In this case there is a conflict of legal interests between Portugal and Australia. Several times during the proceedings Australia admitted that Portugal was one of the States concerned. That admission was made in order to contrast it with the capacity to appear before the Court in this case, which Australia denied. However, to have jus standi before the Court it is enough to show direct concern in the outcome of the case. Portugal has amply shown that it has a claim for the protection of its powers which serve the interests of the people of East Timor.

102. It was said by a Co-Agent and counsel of Australia that "to have standing, Portugal must point to rights which it possesses" (CR 95/8, p. 80, Mr. Burmester). Portugal has standing because, in spite of all the factual changes in the area, she still remains the State which has responsibility for East Timor. This standing follows from the competence Portugal has in its capacity as administering Power. One of the basic elements of that competence is the maintenance and defence of the status of East Timor as a non-self-governing territory; this is the administering Power's duty. Portugal has the capacity to sue in defence of the right of the East Timorese people to self-determination. Portugal could also rely generally on the remaining attributes of its sovereignty over East Timor, such attributes being conducive to the fulfilment of the task under Chapter XI of the Charter. On the one hand, Portugal says that it does not raise any claim based on its own sovereign rights; in some contexts it even denies their existence (Memorial, paras. 3.08 and 5.41 and Reply, para. 4.57). On the other hand, Portugal invokes its "prerogatives in regard to sovereignty" (Reply, para. 4.54). At any rate, it is erroneous to argue that the departure from East Timor in 1975 of the Portuguese authorities resulted in bringing "to an end any capacity [Portugal] had to act as a coastal State in relation to the territory" (Counter-Memorial, para. 237). Such an opinion is contrary to both the law of belligerent or military occupation and the United Nations law on the position of the administering Power.

103. Portugal may be said not to have any interest of its own in the narrow sense of the term, i.e., a national interest, one of a myriad of interests which States have as individual members of the international community. However, Portugal received a "sacred trust" under Chapter XI of the Charter. It is taking care of interests which, it is true, are also its own, but primarily they are shared by all United Nations Members: the Members wish the tasks set down in Chapter XI to be accomplished. Australia also adopts the stance of favouring the implementation of Chapter XI. Yet there is a sharp difference between the two States on how to proceed in the complex question of

East Timor and what is lawful in the circumstances. That is a matter which should have been decided by the Court. However, through its decision on jurisdiction, this distinguished Court barred itself from that possibility. Had this not been the case, the Judgment would have eliminated a number of uncertainties from the legal relations between the Parties and, more generally, some uncertainties regarding a non- self-governing territory which has been incorporated into a State without the consent of the United Nations. At any rate, it is clear that an actual controversy exists. What doubt could there be regarding the locus standi?

104. I think that Portugal meets the rigid criteria laid down by President Winiarski with regard to having "a subjective right, a real and existing individual interest which is legally protected," (South West Africa, Preliminary Objections, ICJ Reports 1962, p. 455). In that case Ethiopia and Liberia asserted that they had "a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated." To this the learned Judge replied: "But such a legally protected interest has not been conferred on them by any international instrument ..." (ibid., p. 456). Portugal has the United Nations Charter behind it.

C. "JUDICIAL PROPRIETY"

General

105. There is no mention of the issue of propriety in the Judgment. But would it be going too far to say that, implicitly, the Court has admitted that at least entertaining this case was not, at the stage reached by the Court, contrary to "judicial propriety"? The Court might as well begin consideration of the case by examining the issue of propri-

ety. For, as Judge Sir Gerald Fitzmaurice has pointed out, that issue

> "is one which, if it arises, will exist irrespective of competence, and will make it unnecessary and undesirable for competence to be gone into, so that there will be no question of the Court deciding that it has jurisdiction but refusing to exercise it" (Northern Cameroons, ICJ Reports 1963, p. 106).

Neither in the Charter nor in the Statute is there any suggestion as to which legal disputes "might be regarded as prima facie suitable for judicial settlement ..." [10]. Here the question should be asked whether the political stratum and implications of the case (including those of a judgment on the merits) are of a nature to make the judicial process inappropriate.

106. Meanwhile it may be pointed out that Portugal "as administering Power" was called upon by the Security Council in its resolution 384 (1975) "to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination." The reference to co-operation with the Organization does not exclude individual actions by Portugal, i.e., actions not coordinated with the United Nations, which are or can be related to the task of self-determination. Portugal's Application instituting proceedings in the present case falls under this heading. General Assembly resolution 3485 (XXX) speaks of "the responsibility of the administering Power to undertake all efforts to create conditions enabling the people of Portuguese Timor to exercise freely their right to self-determination ...." The exercise of that responsibility, including the choice of means, is a matter to be decided by the administering Power acting alone or in conjunction with the United Nations.

107. In the present case the choice was between, on the one hand, entertaining the case upon the merits and, on the other, refusing to adjudicate. A policy of abstention does not seem a better solution. Considerations of public policy speak in favour of the pronouncement of the Court on the merits. Such a pronouncement is more likely to contribute to the settlement of the problems submitted to it. These problems, or at any rate some of them, are ripe for solution by the application of international law.

108. The legal components of a dispute resulting from the question of East Timor need not necessarily be submitted to the Court only by way of a request for an advisory opinion (as Australia asserted). Litigation is not excluded.

A Justiciable Dispute?

109. The resolution of the dispute between Portugal and Australia does not conflict with the Court's "duty to safeguard the judicial function" (Northern Cameroons, ICJ Reports 1963, p. 38). In other words, adjudication on the merits will be consistent with the Court's judicial function (cf. ibid., p. 37). The present dispute is justiciable.

110. The written and oral pleadings amply show that there is, in this case, "an actual controversy involving a conflict of legal interests between the parties." By addressing itself to the submissions of Portugal the Court and its judgment will affect the legal rights and obligations of the parties, "thus removing uncertainty from their legal relations." Consequently, the "essentials of the judicial function" could and, indeed, would be satisfied (Northern Cameroons, ICJ Reports 1963, p. 34). In this case there is a legal dispute between the two parties which the Court, if it wishes to be true to its function, cannot refuse to resolve. For a necessary consequence of the existence of any dispute, including the present one, is the party's (i.e., Portugal's) interest in securing a decision on the merits (here I am following the concept of dispute as explained by Judge Morelli, ibid., p. 133, para. 3). Portugal has shown sufficient interest for the Court to consider the case. That interest persists, and the controversy between the two States has not yet come to an end.

111. In the question of East Timor there are points of interpretation and application of law where recourse to the Court is useful. These points are not abstract, they are not "an issue remote from reality" (to use the expression employed in Northern Cameroons, ICJ Reports 1963, p. 33, and referred to in the oral pleadings, CR 95/9, p. 27, para. 17, 8 February 1995 and CR 95/15, p. 51, para. 9, 16 February 1995, Prof. Crawford; he expressed a contrary view). The pleadings have shown that there are legal issues between the parties which the Court could resolve without the participation in the case of any other State (i.e., Indonesia). Even if it is taken for granted that "the underlying dispute is only suitable for resolution by negotiation" (Counter-Memorial, para. 316), it is not true that the dispute submitted to the Court (which should be distinguished from the "underlying" one) is not suited to adjudication. Judge Sir Robert Jennings reminds us that

> "it could usefully be more generally realized that the adjudication method is not necessarily an independent one and can very well be used as a complement to others such as negotiation" [11].

The learned Judge gave the example of the North Sea Continental Shelf cases, but that model is not exclusive.

112. One can also look at our problem from a somewhat different angle: there are disputes where the settlement does not constitute a single operation. The settlement is or becomes a process. Such is the nature of the question of East Timor. Adjudication is part of the process and there is no reason for eliminating it.

SECTION IV: THE TERRITORY OF EAST TIMOR

A. STATUS

113. "The Court recalls ... that it has taken note in the present Judgment (para. 31) that, for the two Parties, the Territory of East Timor remains a non-self-governing territory ..." (Judgment, para. 37). And so it is, one may conclude on the basis of the decision, for the Court. It is a matter of regret that this important affirmation did not find its place in the dispositif.

No Change of Status

114. Since 1960 East Timor has continually appeared and still appears on the United Nations list of non-self-governing territories. The United Nations maintains that status of East Timor. Only the Organization can bring about a change. Rejection of the status by the original sovereign power; or the use of force by another country to gain control over the territory; or recognition by individual States of the factual consequences of the recourse to force - none of these unilateral acts can abolish or modify the status of non-self-government. That status has its basis in the law of the Organization and no unilateral act can prevail over that law.

115. It is true that over the years and in some respects, the language of the resolutions of the General Assembly has become less decisive and less definite and the majorities smaller. But this is a development of the political approach and the effect of the search for a solution through channels other than the Security Council or the General Assembly. The constitutional position under Chapter XI of the Charter has not changed. Nor have the Geneva consultations under General Assembly resolution 37/30, currently in progress, brought about any modification of the Territory's status.

116. Obviously, we are confronted by certain facts which may be long- lived. Australia rightly maintained that the rejection of the United Nations status of the Territory by Portugal in the period 1955-1974 did not change the legal status of East Timor. It is therefore difficult to understand how, at the same time, Australia argues the effectiveness

of the incorporation of East Timor into Indonesia, and in particular the contribution made to this effectiveness by acts of recognition of that incorporation. The status of East Timor in law has remained the same ever since Portugal became a Member of the Organization and the United Nations subsumed East Timor under Chapter XI of the Charter. It is a status defined by the law of the United Nations. Unilateral acts - by Portugal during the dictatorship period, and now by Indonesia since 1975 and by the few States which granted recognition - have had and continue to have no primacy over that law.

The Position of Australia

117. In spite of various qualifications which Australia sometimes introduced in presenting this part of the case, it must be assumed, on the strength of her words, that she acknowledges that East Timor is still a non-self-governing territory. "Australia has never recognized the legality of Indonesia's original acquisition of the territory of East Timor" (Rejoinder, para. 224). It also refers to the change in the person of the State now in control of the non-self-governing territory (Indonesia taking the place of Portugal). This implies that, in this respect, the status (as such) of East Timor did not change. The Agent and counsel for Australia said (CR 95/14, p. 13):

> "Australia recognizes that the people of East Timor have the right to self-determination under Chapter XI of the United Nations Charter. East Timor remains a non-self-governing territory under Chapter XI. Australia recognized this position long before Portugal accepted it in 1974. It has repeated this position, both before and after its recognition of Indonesian sovereignty and it says so now."

118. At the same time Australia does not seem to exclude that, in the meantime, the Territory's legal position might have become adjusted to the facts created by Indonesia. Has there been such an adjustment? The language of the Timor Gap Treaty and of some official statements (cf. paras. 127 and 139 below) can be perceived as supporting the concept of change, not of continuity. To be more specific, the position of Australia is ambivalent for three reasons.

119. First, there is the basic difficulty in reconciling Australia's recognition of Indonesian sovereignty with the continuing status of non-self-government, a difficulty all the greater since Indonesia denies the existence of that status. Does not recognition inevitably mean that Australia has consented to the Indonesian concept of what the Territory now is?

120. Second, another source of difficulty is doubts regarding the legal basis for an identical and equal treatment by Australia of the two countries (Portugal and Indonesia) as successive sovereigns of East Timor (see para. 117 above). Portugal's title to sovereignty is not comparable with Indonesia's claim. Since 1974 Portugal has conformed to the rule of the Friendly Relations Declaration[12].

121. Third, one must equally note a general tendency on the part of Australia to emphasize the significance of the fact that Portugal "has no governmental control" over East Timor and has no "territorial presence" there (CR 95/8, p. 79). I would not contend that such an assertion necessarily shows preference of fact over law, yet the tendency blurs the attitude of Australia on the status of the Territory, especially as Indonesia does not regard itself as a new "administering Power."

Recognition and Non-recognition

122. It is convenient to dispose, at the outset, of the argument on the analogy between the Timor Gap Treaty and some of the treaties for the avoidance of double taxation concluded by Indonesia. Australia has drawn attention to these treaties (Counter-Memorial, pp. 213-218, Appendix C; Rejoinder, paras. 52-54; for the Portuguese view, see Reply, para. 6.14). The Court mentions in general terms (i.e., without indicating their category or subject) "treaties capable of application to East Timor but which do not include any reservation in regard to that Territory" (Judgment, para. 32). The Court does not make any explicit inference from these treaties but points to them in the context of treaty-making power, not of recognition. The latter point is made by Australia. That argument is misleading in the sense that no recognition can be implied from the tax treaties. They do not deal with territorial problems, and they do not refer explicitly to East Timor, but concern Indonesian territory under Indonesian legislation for tax purposes alone. This is an issue that could be regulated by the contracting parties without detracting from the posture of non-recognition (if it was adopted) or without entailing recognition. On the other hand, the Timor Gap Treaty refers to "the Indonesian Province of East Timor" and is based on the assumption of Indonesian sovereignty over that area, which sovereignty Australia has recognized.

123. Let me observe that in matters of violent changes resulting in the imposition of foreign rule or dominant foreign influence a longer perspective is necessary. Recent history has again shown that what for many years was regarded as almost permanent and immutable collapsed under our eyes - an outcome which the proponents of Real-politik and of consent to accomplished facts did not foresee. We were told, in connection with East Timor, that "the realities of the situation would not be changed by our opposition to what had occurred" (the position of the United States, quoted in Rejoinder, para. 47). For the time being, that may be true. Yet we all know of instances where there was opposition and various "realities" proved to be less resistant to change than Governments might have thought.

124. In the present case the Court preferred not to consider the problem of the non-recognition of a situation, treaty or arrangement which came into being by means contrary to the prohibition of "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations" (Art. 2, para. 4, of the Charter). However, when stating or confirming the principles relevant to the case this restraint is not the only possible posture.

125. The policy of non-recognition, which goes back to before the First World War, started to be transformed into an obligation of non- recognition in the thirties. Through the Stimson doctrine, the United States of America played a pioneering - and beneficial - role in this development[13]. The rule or, as Sir Hersch Lauterpacht says[14], the principle of non-recognition now constitutes part of general international law. The rule may be said to be at present in the course of possibly reaching a stage when it would share in the nature of the principle of which it is a corollary, i.e., the principle of the non-use of force. In that hypothesis non-recognition would acquire the rank of a peremptory norm of that law (jus cogens). But that is a future development which is uncertain and has still to happen. The Friendly Relations Declaration[15] correctly states the law on the subject: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." Contrary to what has been asserted (Counter-Memorial, para. 365; Rejoinder, para. 74) the obligation not to recognise a situation created by the unlawful use of force does not arise only as a result of a decision by the Security Council ordering non-recognition. The rule is self-executory.

126. But apart from what has been said in paragraph 125 above, there is room for the view that the United Nations rejected the possibility of recognition. For the Security Council called upon "all States to respect the territorial integrity of East Timor" (resolutions 384 (1975) and 389 (1976), para. 1 in each of them) and the General Assembly also made a reference to East Timor's territorial integrity (resolution 3485

(XXX), para. 5; this resolution was reaffirmed by the Assembly in 1976-1978). What else can this mean but prohibition to do anything that would encroach upon the integrity of the Territory? Recognition of it as a province of Indonesia is contrary to the resolutions cited. The Assembly rejected the integration of East Timor into Indonesia (para. 24 above).

127. Yet Australia recognized Indonesia's sovereignty over East Timor; on this occasion it also questioned the legal character of the rule of non-recognition[16]. Sometimes less precise language was used: it was said during the oral pleadings that Australia "recognized the presence of Indonesia in East Timor" (Pellet, 7 February 1995, CR 95/8, p. 10, para. 3). Strictly speaking "presence" could mean less than "sovereignty."

128. The Australian justification was expressed in the following terms: "As a practical matter, Australia could not have avoided the decision to recognize Indonesia [sic], and to negotiate with a view to making a treaty with it on the Timor Gap, if it was to secure and enjoy its sovereign rights there. There was no other State with which it could have negotiated and concluded an effective agreement. No arrangement with Portugal could have achieved Australia's legitimate object, since Portugal did not control the area in question and there was not the slightest prospect that it would do so in the future." (Counter-Memorial, para. 354.)

However, the problem cannot be reduced to "practical" considerations. They do not relieve the State of the duty of non-recognition. The argument, if put forward without any qualification, is unacceptable; admitted unconditionally, it could sap the foundation of any legal rule.

129. While recognition of States or Governments is still "a free act," it is not so with regard to the irregular acquisition of territory: here the discretionary nature of the act has been changed by the rule on the prohibition of the threat or use of force.

130. As indicated above (para. 125) the rule of non-recognition operates in a self-executory way. To be operative it does not need to be repeated by the United Nations or other international organizations. Consequently, the absence of such direction on the part of the international organization in a particular instance does not relieve any State from the duty of non-recognition. Nor does the absence of "collective sanctions" have that effect. Australia espouses a contrary view (Counter-Memorial, paras. 355 and 356; and Rejoinder, para. 229).

131. The Court has not been asked to adjudicate or make a declaration on non-recognition in regard to the Indonesian control over East Timor. But let me restate the question: can the Court avoid this issue when it states certain principles? Non-recognition might protect or indeed does protect the rights to self-determination and to permanent sovereignty over natural resources. Any country has the corresponding duty to respect these rights and no act of recognition can release it from that duty. In other words, it might be necessary to consider whether there is any link between Australia's attitude towards the Indonesian annexation and her duties with regard to East Timor. Such a determination would not amount to delivering any judgment on Indonesia, for the Court would limit itself to passing upon a unilateral act of Australia. That act, contrary to Australia's view (Counter-Memorial, para. 350), means more than mere acknowledgement that Indonesia "is in effective control of the territory" while the recognizing Government is willing "to enter into dealings with that State or government in respect of territory." Recognition leads to the validation of factual control over territory and to the establishment of corresponding rights.

132. The attitude of non-recognition may undergo a change by virtue of a collective decision of the international community. In law, there is a fundamental difference between such a decision and individual acts of recognition. Judge Sir Robert Jennings wrote of "some sort of collectivisation of the process, possibly through the United Nations itself ..." [17]. But up till now nothing of the sort has happened with regard to East Timor. Nor is there any consolidation of the Indonesian "title" through other means.

133. The dichotomy between fact and law permeates this case. I have already touched upon one aspect of it in paragraph 123 above. In this opinion it is not possible to discuss generally the role of the factual element, of facts, as a source of rights, obligations and powers. But it would be too simple to dismiss the continued United Nations status of East Timor and of Portugal as being remote from the facts. Whenever it comes to an unlawful use of force, one should be careful not to blur the difference between facts and law, between the legal position and the factual configuration. Even in apparently hopeless situations respect for the law is called for. In such circumstances that respect should not mean taking an unrealistic posture. History gives us surprises. Contemporary history has shown that, in the vast area stretching from Berlin to Vladivostok, the so-called "realities," which more often than not consisted of crime and lawlessness on a massive scale, proved to be less real and less permanent than many assumed. In matters pertaining to military invasion, decolonization and self-determination, that peculiar brand of realism should be kept at a distance. And one cannot accept that Chapter XI disregards the problem of the legality of the administration of a non-self-governing territory.

B. SELF-DETERMINATION

"Essential Principle"

134. The Court states that the principle of self-determination "is one of the essential principles of contemporary international law." The right of peoples to self-determination "has an erga omnes character." The Court describes the relevant assertion of Portugal as "irreproachable" (Judgment, para. 29). The Court also recalls that "it has taken note in the present Judgment (para. 31) that, for the two Parties, ... [the] people [of East Timor] has the right to self-determination" (para. 37). It is a matter of regret that these important statements have not been repeated in the operative clause of the Judgment.

135. In the opinion of Judge Bedjaoui, President of the Court, self-determination has, in the course of time, become "a primary principle from which other principles governing international society follow" (un principe primaire, d'o dcoulent les autres principes qui régissent la société internationale). It is part of jus cogens; consequently, the "international community could not remain indifferent to its respect" ("la communauté internationale ne pouvait pas rester indifférente son respect"). States, both "individually and collectively," have the duty to contribute to decolonization which has become a "matter for all" ("une affaire de tous")[18]. According to Judge Ranjeva "[t]he inalienability of the rights of peoples means that they have an imperative and absolute character that the whole international order must observe" [19]. Judge Mbaye interprets self-determination in conjunction with "the principle of inviolability of borders" [20]. That link additionally emphasizes the incompatibility of the forcible incorporation of a non-self-governing territory with the requirement of self-determination.

136. By virtue of Chapter XI of the Charter the East Timorese right to self-determination is the focal point of the status of the Territory. This has been confirmed by several United Nations resolutions which have been adopted since the invasion of East Timor by Indonesia and since the incorporation of the Territory into that State.

137. The issue is not limited to the quadrilateral relationship (which today finds its expression in the Geneva consultations), that is, the people of East Timor, the United Nations, Portugal and Indonesia. In particular, the duty to comply with the principle of

self-determination in regard to East Timor does not rest with Portugal and Indonesia alone. Depending on circumstances, other States may or will also have some obligations in this respect. By negotiating and concluding, and by beginning to implement the Timor Gap Treaty, Australia placed herself in such a position.

138. The Friendly Relations Declaration provides as follows: "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle ..."

Self-determination creates a responsibility not only for those who are directly concerned.

The Position of Australia

139. Australia adheres to the principle of self-determination. In the pleadings Australia emphasized her acknowledgement of the right of the people of East Timor to self-determination.

140. However, some official Australian statements combine that broad general stance with a somewhat qualified approach regarding East Timor specifically. During the Senate debate on 14 November 1994 Senator Gareth Evans, Minister for Foreign Affairs, said:

> "The self-determination that Australia talks about and wants to encourage is self-determination within the framework of Indonesian sovereignty. That is the implication of de jure recognition which the other side of Australian politics initiated in 1979 and which we subsequently endorsed when we came into office.
>
> Self-determination in that context, and in the way in which that expression is being used a lot internationally these days, does mean genuine respect for different ethnicity and genuine respect for human rights claims of particular groups within larger national or State entities. That is the kind of thing we are talking about. In that context, some kind of special political autonomy or special status - of the kind, for example, that exists in JogJakarta or Aceh - might be thought to be helpful in that larger process of reconciliation. It is not by itself enough to solve the whole problem but it is at least part of the answer. The other elements of the answer are those I have described, in particular the military drawdown as well as other measures being taken to respect local, religious and cultural sensitivities to a greater extent than has been the case so far." (Senate, p. 2973.)

The reference to "self-determination within the framework of Indonesian sovereignty" should be noted, as well as "respect for different ethnicity," "respect for human rights claims of particular groups," and measures to be taken "to respect local, religious and cultural sensitivities" of the people of East Timor; also "political autonomy or special status" of a particular kind. These are important aims, entirely in line with a certain type of self-determination. But that statement does not fully meet the requirements of General Assembly resolution 1541 (XV). On 7 February 1995 (Current Senate Hansard, Database, p. 572) the Foreign Minister explained "the framework of sovereignty," indicating that:

> "The situation is that before 1975 Australia recognized Portuguese sovereignty over East Timor while, at the same time, simultaneously recognising the right to self-determination of the Timorese people. There is no difference between the situation then and now. A claim of a right to self-determination can exist with a recognition of sovereignty. We recognized Portuguese sovereignty then - and, in fact until 1979 before we formalised it - and since 1979 we have recognized Indonesian sovereignty, but we have also recognized right through that period the right to self-determination by the people of East Timor."

This time the Minister referred to the whole gamut of solutions: "[S]elf-determination can involve a number of quite different outcomes, including of course the emergence of an independent State, but also integration, or some form of association within or with another State, or a degree of autonomy within another State. I think that is important background.

In the case of East Timor, Australia recognises that the people of East Timor do have a right of self-determination - to choose, in effect, how they are governed. This has been Australia's position since before the events of 1975, and it has never been reversed. The United Nations, in relation to East Timor, has certainly recognized that there can be no solution to self-determination and related issues without the cooperation of the Indonesian government; ..."

Thus, in dealing with East Timor the statement adopts a narrower approach: self-determination is reduced to the choice of the form of government ("how they are governed").

Erosion through Acquiescence in Accomplished Facts

141. It may be observed that the parallelism represented by, on the one hand, recognition of sovereignty (no matter how its extension over a territory was achieved) and on the other hand by support (albeit declaratory) for self-determination cannot be assessed in the abstract. The present situation of East Timor is characterized by a lack of balance between these two factors. Recognition militates in favour of the permanency of incorporation, while self-determination is, in fact, suspended. Recognition has its petrifying impact. "[T]he question remains" said George H. Aldrich, Deputy Legal Adviser, U.S. Department of State, "what we are required to do if this right [of self-determination] is not observed as we might wish ..." (quoted in Rejoinder, para. 47). The question is still with us. The United States, which recognized the incorporation, did not have an answer; "the prevailing factual situation" (i.e., Indonesian rule in East Timor) is for it "the basis" of any action (ibid.).

C. ADMINISTERING POWER

Administering Power as Part of the Status of the Territory 142. Australia asserts that "Chapter XI of the Charter makes no reference to the concept of an 'administering Power'" (Rejoinder, para. 186). In its view the practice of the Organization "reveals that the expression 'administering Power,' unlike the expression 'non-self-governing territory,' has not been regarded by the United Nations as a term of art or as a reference to a particular juridical status" (ibid., para. 185). This is not true. "Administering Power," a term which has been appearing in the United Nations resolutions for more than thirty years (since 1962), is a shorthand expression of the Charter phrase "Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government" (Art. 73). Such a Member State, or administering Power, has a position which is part of the status of the non-self-governing territory. That position consists of powers, rights and duties as established by United Nations law and practice. Chapter XI contains the basic rules on the position of the administering Power. If it is said, and rightly so, and this is also the Australian stand, that "[t]he concept of 'non-self-governing territories' is derived from the United Nations Charter itself (see the title of Chapter XI), and is acknowledged to be a juridical status having legal consequences in international law" (Rejoinder, para. 185), then inevitably the "administering Power" shares in that "juridical status": in the sense

of Chapter XI there is no "administering Power" without a non-self-governing territory and vice-versa.

Administering Power as Sovereign

143. Since the Democratic Revolution of 25 April 1974 (the "Carnation Revolution") Portugal has reiterated its view that she has "no territorial claims whatsoever to East Timor" (e.g., United Nations Document A/36/PV. 6, p. 101). This attitude points to the paramountcy of East Timorese interests. It is for the people of East Timor to decide on their future; Portugal will accept that decision, including the Territory's independence if such is the result of the exercise of the right to self-determination.

144. Under Constitutional Law 7/74 East Timor ceased to be part of the "national Territory" in the sense which the Constitution of 1933 gave to this notion. However, priority of self-determination, before it has been freely implemented, does not amount to renunciation of the sovereignty which Portugal has held over that Territory since the 16th century. The abolition of the 1933 rule on colonies as part of "national Territory" introduced, in the municipal law of Portugal, a difference between them and the metropolitan area, that difference being already part of United Nations law, in particular Chapter XI of the Charter and the Friendly Relations Declaration (para. 53 above). In international law the position with regard to sovereignty remained unchanged:

> "without prejudice to immediate recognition of the 'otherness' of the Territory of East Timor and the sovereign right of its people to determine freely its political future, Portugal reserved its own prerogatives in regard to sovereignty and administration. The prerogatives in question are of course all those that accompany, in general, exercise of the jurisdiction of States over territories belonging in full to them, except only for prerogatives incompatible with the status in international law of non-self-governing territories. Such prerogatives would be temporary by nature since they would lapse upon completion of the decolonization process. The process was nevertheless not completed by the scheduled date[21] for reasons beyond Portugal's control. It must therefore be understood that Portugal maintains, de jure, over East Timor all the powers pertaining to the jurisdiction of a State over any of its territories, provided that they are not incompatible with the 'otherness' of East Timor and the right to self-determination of the Timorese people." (Reply, para. 4.54.)

145. It may be added that the renunciation of sovereignty has sometimes resulted in turning a territory into one that would not be subject to the sovereignty of any State; it becomes an area where the element of State sovereignty is absent (e.g., the Free City of Danzig under the treaties of 1919 and 1920). The status of a non-self-governing territory under the United Nations Charter is different. With regard to overseas colonies of Western countries that status comprises the administering State which has sovereignty over the colony. Nor is there any renunciation of sovereignty in the post-revolution Constitutions of Portugal: 1976, Article 307; 1982, Article 297; 1989, Article 293. By virtue of these provisions Portugal imposed on herself a duty to pursue the interests of the people of East Timor, but did not divest herself of sovereignty.

146. Here the distinction between sovereignty and its exercise is a useful one. As already recalled, the Friendly Relations Declaration provides that "[t]he territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the [metropolitan] territory of the State administering it." The reason for that separateness and distinctness is self-determination. But the provision quoted does not aim at depriving the State of its title to sovereignty which it held prior to the Charter and the Declaration. The State has remained sovereign. The said provision imposes restrictions on the exercise of the State's sovereignty. These restrictions are far- reaching. Portugal rightly referred to her "prerogatives [of] sovereignty" (para. 75 above), though on occasions she has avoided the word "sovereignty" in describing her position with regard to East Timor. Instead she has used the terms "jurisdiction" (Co-Agent, counsel and advocate of Portugal, J.M.S. Correia, Public Sitting, 1 February 1995, CR 95/4, para. 2) and "authority" (idem, CR 95/12, para. 3, 13 February 1995,). Nonetheless Portugal explains that the "Administering Powers are independent States which keep their attributes as such when they act on the international scene in relation to the non-self-governing territories for whose administration they are responsible" (ibid.). It is submitted that these "attributes" are nothing more than sovereignty, the exercise of which has been restricted in favour of the self-determination of the people concerned. Portugal stresses that the people of the Territory is "the holder of the sovereignty inherent in the capacity to decide for itself its future international legal status" (loc. cit., CR 95/4, para. 6) and that "the international law of decolonization has transferred the sovereignty relating to such territories to their own peoples" (loc. cit., CR 95/12, para. 3). Under international law these contentions must be understood as referring to self-determination: it is the people which decides on its implementation; but "people" as the holder of "sovereignty" is a concept which, at least in part, lies beyond the realm of law. Continuity of Portugal's Position as Administering Power

147. Portugal remains the administering Power of the Territory of East Timor. This status of Portugal has been corroborated expressly by Security Council resolution 384 (1975) and General Assembly resolutions 3485 (XXX), 34/40, 35/27, 36/50 and 37/30. The position of Portugal was implicitly maintained in a number of other resolutions (cf. para. 22 above). In resolution 384 (1975) the Security Council regretted that "the Government of Portugal did not discharge fully its responsibilities as administering Power in the Territory under Chapter XI of the Charter." This statement did not lead to any change in Portugal's responsibilities; on the contrary, Portugal was called upon, in her capacity of administering Power , "to co-operate fully with the United Nations." In spite of the loss of territorial control over East Timor, Portugal was thus confirmed in her mission and functions.

148. The issue of sovereignty is relevant to the question of continuity. As explained in paragraphs 144 and 145, under Chapter XI of the Charter it is the State which has sovereignty of the colony who becomes and remains administrator. It is an automatic consequence of being sovereign and a contracting party to the Charter, i.e., a Member of the Organization. There is no "appointment" or election to the "function" of administering authority. But sovereignty should not be confused with factual effective control over the Territory. Such control does not of itself bestow on its holder the status of administering Power.

149. At the time of the Indonesian invasion, Australia admitted that Portugal had, "of course, the continuing legal responsibility" (United Nations, Official Records of the Security Council, 1865th Meeting, 16 December 1975, para. 101). But some time later Australia changed her position.

150. The fact that the General Assembly, unlike in resolution 3458 A (XXX) on Western Sahara, did not expressly refer to "the responsibility of the Administering Power and of the United Nations with regard to the decolonization of the territory" is without significance. The resolutions on East Timor maintain that "responsibility" by using other terms.

151. Australia admits that "Portugal may be the administering Power for certain United Nations purposes" (Rejoinder, para.

98). Loss of control over the territory in question no doubt resulted in the actual disappearance of Portuguese administration on the spot. And there may be room for dealing with the State in effective control with regard to certain specific questions (cf. Namibia case, ICJ Reports 1971, p. 56, para. 125).

152. But foreign invasion has not eliminated all the elements which constitute the competence of the lawful administrator. Nor is there a right "for others to recognise that there has been a change in the State administering that Territory" (contra: Rejoinder, para. 183). That change is a matter exclusively within the domain of the United Nations. Until such time as the Organization has taken a new decision, the status of the administering Power continues, legally unaffected, notwithstanding the loss of control over the Territory.

153. Australia contends (Counter-Memorial, para. 41) that

"Portugal did not make any attempt to prevent or repel the Indonesian military intervention. The withdrawal of its administration to Atauro in August 1975, its inaction while there, and its departure from Atauro the day after the Indonesian intervention in December 1975 constituted a clear abandonment by Portugal of its responsibilities as administering Power."

154. It is not possible to agree with the foregoing interpretation. The transfer to Atauro was dictated by security reasons, Dili having been taken by the forces of FRETILIN (para. 14 above). The physical separation from the capital prevented any involvement of the Portuguese authorities in the fighting among East Timorese factions. Such involvement was to be avoided in the interests of the administration of East Timor. As to the Indonesian invasion, Portugal did not have any troops at her disposal in East Timor to offer any resistance: the Governor was left with two platoons of parachutists. Apart from the factual impossibility, it was probably in the interest of all concerned not to extend or intensify the military operations. When the invasion took place Portugal had no other choice but to withdraw her authorities from East Timor. But that withdrawal did not, and could not, amount to abandoning the function of the administering Power. This is so because, first, Portugal had no such intention and, second, no administering Power is competent to give up its position without the consent of the United Nations. A unilateral act would remain ineffective in law. Portugal's international action in the United Nations following the invasion gives ample proof of her decision to continue to exercise the function of the administering authority. At the same time the Organization did not release Portugal from her duties.

155. It would be erroneous to contend that Portugal lost its status of administering Power because some resolutions passed over that status in silence or the United Nations political organs ceased adopting any resolutions on East Timor. The status could be changed only by an explicit decision, including acknowledgement that another State (i.e., Indonesia) had now assumed the responsibility for the Territory. Hitherto this has not happened.

SECTION V: CONCLUSION

156. The Court's decision that it cannot exercise jurisdiction in the East Timor case cannot be regarded as weakening the concept of non-self-governing Territories, though an elaboration on the merits would be welcome. At the present time the United Nations list of these Territories is short as the decolonization process reaches its end. But non-self-government (or governance) need not be a closed chapter: ideologies, political systems and many individual countries are in transition and undergoing transformation. Legal strategy requires that old institutions (like that of Chapter XI of the Charter) adapt to new challenges. It would be better if the Court assumed jurisdiction: better for the prospective developments, better for the rule of law.

157. It is to be regretted that, in its operative part, the Judgment does not recite as relevant the prohibition of force; non-recognition; the self-determination of peoples; the status of East Timor under United Nations law, including the rule that only the Organization can change that status; the position of Portugal as administering Power; the duty of States to respect that status; in particular the duty of States which enter into some arrangements with the government in control of the Territory to consult, when these arrangements reach a certain level of political and legal importance, with Portugal, with the representatives of the East Timorese people and with the United Nations. It is not only appropriate but also highly significant that the reasons for the Judgment affirm some of these principles. But the subject is too important for a cautious presentation of the reasons. The Court's responsibility and function are also involved.

158. The case created an opportunity for assessing the activities of a Member of the United Nations in the light of the Charter. That is a capital issue at a time of crisis for the Organization and, more generally, in the present climate of the growing weakness of legality throughout the world.

159. The conduct of Australia, like that of any other member State, can be assessed in the light of the United Nations resolutions. Such an assessment does not logically presuppose or require that the lawfulness of the behaviour of another country should first be examined. Member States have obligations towards the United Nations which in many instances are individual and do not depend on what another State has done or is doing. To that extent the Court has jurisdiction. Here no prerequisite is imperative. The principal judicial organ of the United Nations cannot desist from such assessment when the dispute submitted to the Court falls under Article 36, paragraph 2, of the Statute. On the other hand, in the present case, because of the non-participation of Indonesia, the Court has no jurisdiction to pass upon the conduct of Indonesia.

160. It has been said that, as Australia accepts the right of the people of East Timor to self-determination, there is nothing for the Court to decide. On the contrary. Portugal raised several issues regarding that right; also, some other ingredients of the status of the Territory have been discussed. And in this opinion I have tried to show that there are various points which are unclear in this respect. Consequently, the Court should adjudicate. In the Judgment there should be an operative part on the merits, or at least on some of them.

161. Doubts were expressed regarding the effectiveness of such a judgment. Let me here take up one specific argument against "judicial propriety" which might appear to have some weight, viz., the view that the judgment would not be capable of execution. It has been pointed out that the present case differs in this respect from Northern Cameroons because Portugal is not requesting the nullification of the Timor Gap Treaty. Why would it be improper for the Court to assess Australia's conduct consisting in the negotiation, conclusion and application of the Treaty? Would a decision on this subject be unenforceable? The implementation of the Treaty is an everyday concern. While the post-adjucative phase is not part of the function of the Court, there is no basis for anticipating non-compliance. Australia has been praised for her loyalty to the Court.

162. This Court administers justice within the bounds of the law. In the present case, on the one hand, we have insistence on national interests - legitimate, it is true - and on Realpolitik: we have been told that recognition of conquest was unavoidable. On the other hand we have the defence of the principle of self-determination, the principle of the prohibition of military force, the protection of the human rights of the East Timorese people. And last but not least, the defence of the United Nations procedures for solving problems left over by West European, in this case Portuguese coloniza-

tion. We may safely say that in this case no Portuguese national self-interest is present. Portugal does not want to be the sovereign of East Timor and to get from it various benefits, maritime ones for example. Her stand is a negation of selfishness. Portugal has espoused a good cause. This should have been recognized by the Court within the bounds of judicial propriety. How could this cause be dismissed on the basis of debatable jurisdictional arguments?

163. What are the duties of third States (and one of them is Australia) towards East Timor? First, not to do anything that would harm or weaken the status of the Territory, including the exercise by the people of its right to self-determination. Second, when a third country (i.e., one which is neither the administering Power nor controls the Territory de facto) concludes a treaty or enters into another arrangement which concerns the interests of the Territory and/or its people, special care is required on its part to safeguard these interests in so far as the third State is in a position to do it. That duty may be said to be comprised by the Security Council's exhortation addressed to "all States or other parties concerned to cooperate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the Territory" (resolution 384 (1975), para. 4, and resolution 389 (1976), para. 5; these resolutions were reaffirmed by the General Assembly in 1976-1978). In regard to East Timor, in view of the prevailing circumstances (including the human rights situation), a third State has the obligation to consult the administering Power and the legitimate representatives of the Territory. Finally, some other duties may follow from both the legal and factual situation in and of the Territory. These duties may be dictated by various considerations, including the fact that the third State is part of the same region.

164. It is true that legitimate maritime interests of Australia had to be taken care of. But as they also concern a maritime area of East Timor, that Territory's status made it imperative for Australia to be in touch on this matter with the United Nations and/or the administering Power.

165. The negotiation, conclusion and performance of the Timor Gap Treaty by Australia are subject to the requirement of conformity with legal rules and legal standards stemming from the duty to respect the status of the Territory, in particular from the requirement of self-determination. Depending on the result of the analysis, there may indeed be responsibility. For instance, the Timor Gap Treaty is silent on any material benefit to be derived by, and possibly assigned to, the people of East Timor. Under United Nations law a large part of the resources covered by the Treaty belongs to that people. How will it be compensated?

166. The duties referred to in the preceding paragraphs are independent of, and do not concern, the bilateral relationship of the parties to the Timor Gap Treaty. They relate to the status of the Territory and the competence of the administering Power as its guardian. It is a question of United Nations law and resolutions and that law and resolutions are to be applied by the Court. Australia assured the Court that, in concluding the Timor Gap Treaty, she also protected the rights and interests of East Timor. The Court is competent to verify this assurance.

167. To conclude, the Court has jurisdiction in this case and the Portuguese claims are admissible. There is nothing improper in dealing with the merits of the case. A judgment on the merits could be rendered along the following lines:

(1) The United Nations has continued to recognize the status of Portugal as administering Power of East Timor. Consequently, Portugal has the capacity to act before the Court in this case on behalf of East Timor.

(2) The non-self-governing status of the Territory of East Timor, and the right of the people of East Timor to self-determination, including its right to permanent sovereignty over natural wealth and resources, which are recognized by the United Nations, require observance by all Members of the United Nations. The Court takes note that in these proceedings Australia has placed on record that it regards East Timor as a non-self-governing territory and that it acknowledges the right of its people to self-determination.

(3) Any change in the status of East Timor can only take place by virtue of a United Nations decision. According to the law of the United Nations no use of force nor any act of recognition by an individual State or States could of itself effect a change in the status of the Territory.

(4) Australia should fulfil its duties resulting from subparagraph (2) in accordance with the law and resolutions of the United Nations. Its national interests cannot be a bar to the fulfilment of these duties.

(5) Portugal is the administering Power of East Timor, and Australia, like any other State, is under a duty to respect that position of Portugal. The fact that Portugal lost the territorial administration of East Timor did not deprive her of other attributes of her competence which are relevant to this case. Portugal did not abandon her responsibilities as administering Power. Portugal continues to hold the "sacred trust" under Chapter XI of the Charter.

(6) In protecting its maritime rights and interests Australia cannot avoid acting in conformity with the duties which are hers as a result of the status of East Timor. These duties include the obligation to respect and take account of the competence of the administering Power. The fact that another State or States failed to respect the position of the administering Power does not relieve Australia of her duties.

(7) Australia did not make recourse to any of the available United Nations mechanisms, and particularly consultations on the negotiation of the Timor Gap Treaty and on how the Treaty could be put into effect without prejudice to the people of East Timor. In particular, it had a duty to consultation to at least some extent with the administering Power and the representatives of the people of East Timor. None of this was done and Australia bears responsibility for this.

(8) In some respects (sub- para. 7) Australia's conduct did not conform to her duties (obligations) resulting from the law of the United Nations on the status of East Timor. A finding by the Court to this effect would in itself constitute an appropriate satisfaction. In particular, the Court could enjoin Australia that in applying and implementing the Timor Gap Treaty she should fully respect the rights of the East Timorese people in view of that people's future self-determination.

(9) There is no evidence of any material damage at present; therefore, no reparatory provision can be imposed on Australia.

(10) The Treaty would not be opposable to an independent or autonomous East Timor.

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