

**Symposium:  
The East Timor Case  
before the International Court of Justice \***

**East Timor Moves into the World Court**

*Christine M. Chinkin \*\**

**I. Introduction**

The events leading to Indonesia's military invasion and subsequent annexation of East Timor, accompanied by repeated allegations of gross violations of human rights,<sup>1</sup> are well known. The legality of Indonesia's claim to East Timor as constituting the 27th province of Indonesia has been the subject of much debate.<sup>2</sup> Sixteen years after the occupation, proceedings were commenced in the International Court of Justice to bring Indonesia's claim and the contrary claim of the people of East Timor to their right to self-determination under judicial scrutiny. However these claims will be raised only in

\* Note from the Editors:

The *European Journal of International Law* has decided to occasionally publish articles reviewing the main issues of cases pending before the International Court of Justice. The views expressed in such articles are strictly personal, and do not necessarily reflect those of the editorial board.

\*\* LLB; LLM; PhD (Sydney); Professor of Law, University of Southampton. This article was first presented as a paper at a conference on the Legal Issues Arising from the East Timor Conflict, sponsored by the Human Rights Centre, University of New South Wales and the International Jurists for East Timor, March 1992. An earlier version appeared as 'The Merits of Portugal's Case Against Australia', 15 *New South Wales Law Journal* (1992) 423.

1 There have been numerous reports by non-governmental organizations such as Amnesty International since 1975 of human rights violations in East Timor. The Dili massacre of 12 November 1991 has focussed international attention on the human rights situation in the Territory; see Keesing's Contemporary Archives, November 1991, 38579-80; Report of the Special Rapporteur on Torture, Peter Kooijmans, E/CN.4/1992/17/Add. 1, 8 January 1992.

2 On the background to the Indonesian invasion of East Timor see C. Budiardjo and L.S. Liong, *The War Against East Timor* (1984); de Quadros, 'Decolonization of Portuguese Territories', in R. Bernhardt (ed.), 10 *Encyclopedia of Public International Law* (1987) 93. On the legal claims see Elliott, 'The East Timor Dispute', 27 *ICLQ* (1978) 238; Clark, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression', 7 *Yale Journal of World Public Order* (1982) 2. For a different perspective see A. Alatas, (Minister of Foreign Affairs of Indonesia), *East Timor: Debunking the Myths Around a Process of Decolonization, Remarks before the Members of the National Press Club, Washington DC, 20 February 1992.*

an indirect fashion and neither Indonesia nor East Timor are parties before the Court in the case which is being played out between Portugal and Australia.<sup>3</sup> This article will discuss the way in which the issue of East Timor has been presented to the Court, and some of the arguments that are likely to be raised in the case.

## II. The Timor Gap Treaty

In 1978 Australia moved away from its original condemnation of the 7 December 1975 invasion.<sup>4</sup> In that year it voted against the General Assembly resolution on East Timor and decided 'to accept East Timor as part of Indonesia.'<sup>5</sup> The Australian Government emphasized that it remained highly critical of the way in which Indonesia had integrated East Timor into its territory but regarded it as unrealistic not to recognize Indonesia's effective control there. On 14 February 1979 Australia consolidated this position by according *de jure* recognition to Indonesian sovereignty in East Timor. Shortly after this recognition negotiations commenced between Indonesia and Australia with respect to the allocation of resources of the maritime areas off the southern coast of East Timor, that is between East Timor and Australia. Australia had been unable to conclude any such agreement with Portugal while the latter remained in control in East Timor, although it had entered into maritime delimitation agreements with Indonesia before 1975.<sup>6</sup> As exploitation and exploration became more economically feasible, Australia's interest in securing its share of the potentially valuable hydrocarbon resources in the 'Timor Gap' area became more pressing. In 1989 a decade of negotiations between Australia and Indonesia concluded with the signing of the Timor Gap Treaty.<sup>7</sup>

- 3 *Case Concerning East Timor (Portugal v. Australia)* ICJ Reports (1991) 9 (hereafter referred to as the *Timor Gap case*).
- 4 Australia had voted for General Assembly Resolution 3485 of 12 December 1975 which affirmed the right of the people of East Timor to self-determination and called for the withdrawal of Indonesian forces. As a non-member of the Security Council Australia could not vote on Security Council Resolution 384, 22 December 1975, but it appeared before the Council under United Nations Charter, Article 31. It abstained from voting on General Assembly Resolution 31/53, 1 December 1976 and General Assembly Resolution 32/34, 28 November 1977.
- 5 General Assembly Resolution 33/39 of 13 December 1978. The Australian Government representative explained that 'The text of the Resolution did not reflect a realistic appreciation of the situation in East Timor and no practical purpose was served by the Resolution.' Australian Department of Foreign Affairs, *Annual Report 1978 (1979)* 30.
- 6 Agreement (with Indonesia) Establishing Certain Seabed Boundaries, 18 May 1971, 31 *Australian Treaty Series* (1973); Agreement (with Indonesia) Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, 9 October 1972, 32 *Australian Treaty Series* (1973).
- 7 Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia, Timor Sea, 11 December 1989, in force 9 February 1991, *Australian Treaty Series* No. 9, 1991. See Martin and Pickersgill, 'The Timor Gap Treaty', 32 *Harvard Int'l L.J.* (1991) 560; Stepan, 'Credibility Gap: Australia and the Timor Gap Treaty', *Development Dossier* No. 28, 419 *Australia Council for Overseas Aid* (1990).

Christine M. Chinkin

The formula agreed in the treaty is to divide the area into three zones: the northernmost is to be reserved for exploitation by Indonesia with some provision for profit-sharing by Australia, while in the southernmost the position is reversed. It is the middle zone that has provided the most innovative solution to the problems of boundary delimitation and resource allocation. The management, exploration and exploitation of this zone is to be shared by Indonesia and Australia in a zone of cooperation. Institutional and management arrangements are covered within the treaty by the establishment of a Joint Authority which is to be supervised and monitored by a Ministerial Council. It is a unique formula in maritime law, and one which was hailed by Australian Government officials as a highly successful outcome to the protracted negotiations. It represents:

a creative solution to a diplomatic impasse on boundary negotiations which will result in mutual economic benefits while removing a potential source of bilateral and regional friction. It establishes a unique set of institutional arrangements and a regime for the exploration and development of petroleum resources in the Timor Gap area.<sup>8</sup>

After ratification by the Australian and Indonesian Governments domestic legislation in Australia came into effect on 9 February 1991.<sup>9</sup> The inaugural Ministerial Council meeting was held the same day in Bali.

### III. Portugal's Claim before the International Court of Justice

The Timor Gap Treaty forms the basis of the claim commenced by Portugal against Australia in the International Court of Justice on 22 February 1991. Portugal is seeking a declaration from the Court that by entering into the Timor Gap Treaty with Indonesia Australia has violated Portugal's rights as the competent authority in East Timor, as well as the rights of the people of East Timor.

Substantively, the main aspects of the Portuguese claim are that Indonesia has no authority to enter into negotiations with respect to the maritime area off the coast of East Timor because it has no legal sovereignty over East Timor; that its only claim to sovereignty rests upon the illegal invasion of 1975 and its subsequent unlawful occupation. Consequently Australia's negotiations with Indonesia and its own internal legislation to give domestic effect to the outcome of those negotiations are illegal acts *vis-à-vis* Portugal. Portugal asserts that the conclusion of the treaty denies Portugal's own rights as the only legal authority in the area which rests upon its undisputed status as the colonial power over the Territory, and the fact that there has been no exercise of the right of self-determination by the people of the Territory. The treaty also therefore

8 Statement by the Minister for Foreign Affairs and Trade, Senator Gareth Evans, 8 February 1991, Department of Foreign Affairs and Trade, 62 *The Monthly Record* (1991) 73.

9 Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990; Petroleum (Australia-Indonesia Zone of Co-operation) (Consequential Provisions) Act 1990.

## East Timor Moves into the World Court

violates the rights of the people of East Timor, notably through the denial of their right to self-determination, and of access to and sovereignty over the natural resources in the maritime areas adjacent to their coast.<sup>10</sup> Portugal's claim rests upon violation of its own rights with respect to East Timor, as well as upon the violation of the rights of the people of East Timor. Its claim is an assertion of continuing legal title to the Territory in the face of what it characterizes as *de facto* and illegal external control. Its assertion of legal title is bolstered by a number of resolutions of the General Assembly and Security Council passed between 1975 and 1982 which reconfirm the right of the people of East Timor to self-determination and condemn the Indonesian use of armed force.<sup>11</sup>

### IV. Legal Issues Arising

The Portuguese claim raises important issues of both procedure and substance. Australia has not challenged the Court's jurisdiction in the case which is based on Article 36(2) of the Statute of the International Court of Justice. Both Portugal and Australia have made the requisite declarations and neither has made any reservations that might exclude jurisdiction in this case.<sup>12</sup> From the Australian point of view it does raise the question of whether it is politically desirable to remain vulnerable to claims by other States through being one of the very few States with a virtually unconditional acceptance of the Court's jurisdiction.<sup>13</sup> On the other hand it is testament to Australia's commitment to the peaceful settlement of disputes.

Neither has Australia raised the admissibility of the dispute as a preliminary issue, and the case will therefore proceed directly to argument on the merits. However it is likely that argument on the merits will incorporate questions relating to admissibility. The issues raised by the case demonstrate the close connection that can occur between procedure and substance; between questions relating to the admissibility of the claim

10 Article 1 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966, 1980 *Australian Treaty Series* No. 23, and the International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly of the United Nations, 16 December 1966, 1976 *Australian Treaty Series* No. 5 states that all peoples 'may, for their own ends, freely dispose of their natural wealth and resources.' It continues 'In no case may a people be deprived of its own means of subsistence.' Australia and Portugal are parties to the 1966 United Nations Covenants on Human Rights, but Indonesia is not.

11 General Assembly Resolution 3485 of 12 December 1975; General Assembly Resolution 31/53 of 1 December 1976; General Assembly Resolution 32/34 of 28 November 1977; General Assembly Resolution 33/39 of 13 December 1978; General Assembly Resolution 34/40 of 21 November 1979; General Assembly Resolution 35/27 of 11 November 1980; General Assembly Resolution 36/50 of 24 November 1981; General Assembly Resolution 37/30 of 23 November 1982; Security Council Resolution 384 of 22 December 1975; Security Council Resolution 389 of 22 April 1976.

12 The current Australian declaration was made in 1975, and the Portuguese declaration in 1955. For the text of the respective declarations see 44 *Yearbook of the International Court of Justice* 62 (Australia), 90 (Portugal) (1989-90).

13 This vulnerability is further illustrated by the case commenced by Nauru against Australia; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Jurisdiction and Admissibility, ICJ Reports (1992).

and those relating to its merits.<sup>14</sup> This article will discuss some of former questions and will show how they relate to the substantive questions of self-determination and the illegal use of force.<sup>15</sup>

#### A. Portugal's Claim to Standing

Australia may argue against Portugal's standing to commence this claim against Australia. The concept of an international dispute is wider than that of a case which must be formulated for adjudication before the Court in a bilateral adversarial framework which specifies the legal interests of the particular parties.<sup>16</sup> In the 1966 decision in the *South West Africa* cases the Court rejected claims that Liberia and Ethiopia had standing to bring proceedings against South Africa challenging the latter's alleged violations of the mandate over South West Africa (Namibia).<sup>17</sup> Although Liberia and Ethiopia were parties to the Covenant of the League of Nations under which the mandate was established, they were not parties to the mandate agreement which was struck between the Union of South Africa and the League. The Court therefore held that they lacked a specific legal interest which would have justified according them standing before the Court.<sup>18</sup> Their interest in the dispute with South Africa was no greater than that shared by every other member of the international community, which was not sufficient to commence adjudicative proceedings.

Since only States can commence a case before the Court,<sup>19</sup> the effect of this widely criticized ruling was to rule out the use of the Court's contentious jurisdiction.<sup>20</sup> The people of Namibia could not commence a case on their own behalf,<sup>21</sup> and the United Nations could have recourse only to the Court's non-binding

14 The difficulties of keeping distinct questions of jurisdiction and admissibility were demonstrated in *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States*), Jurisdiction and Admissibility, ICJ Reports (1984) 392 where the Court held that consideration of the Vandenberg reservation to the United States' acceptance of the compulsory jurisdiction of the Court belonged to the merits of the case; cf. *Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. United States*), Merits, ICJ Reports (1986) 14.

15 As the pleadings of both Portugal and Australia have not been made public this discussion is based on the author's analysis of the claim, not on the arguments of the parties involved.

16 For discussion of the difference between parties to a dispute and parties to a case see C. Chinkin, *Third Parties in International Law* (1993) especially Chapters 1, 7, 8.

17 *South West Africa Cases*, (*Ethiopia v. South Africa; Liberia v. South Africa*), Second Phase, ICJ Reports (1966) 4.

18 The Court held that 'To generate legal rights and obligations, it must be given juridical expression and be clothed in legal form.' *Ibid.*, at 34.

19 Statute of the International Court of Justice, Article 34.

20 See Reisman, 'Revision of the South West Africa Cases', 7 *Va.J.Int'l.L.* (1966-7) 4; Falk, 'The South West Africa Cases', 21 *International Organization* (1967) 1; Higgins, 'The International Court and South West Africa - the Implications of the Judgment', 42 *International Affairs* (1966) 573.

21 Neither is there any provision for the acceptance of oral or written statements from individuals or non-governmental organizations; see Statute of the International Court of Justice, Article 34(2) which allows the Court to seek or receive information from public international organizations in contentious

### East Timor Moves into the World Court

advisory jurisdiction.<sup>22</sup> Similarly the people of East Timor lack the status to be a party before the Court, and if Portugal is denied standing there can be no contentious judicial proceedings on this matter.

Portugal is not a party to the Timor Gap Treaty; it must therefore demonstrate that it has a legal interest in the case it has commenced against Australia. Portugal needs in effect to distinguish its position from that of Ethiopia and Liberia.<sup>23</sup> That it has a dispute with Indonesia over the decolonization process in East Timor is evident, but that dispute is not the direct subject of the claim. This is why it is important that Portugal's claim emphasizes that Australia has violated its rights as the continuing legal authority in East Timor and does not rest solely upon allegations of denial of rights to the people of East Timor. However, it has been argued that Portugal has lost its status as colonial authority and cannot now assert its continuing legal competence to satisfy the requirement of standing.<sup>24</sup>

There appear to be a number of grounds for this assertion. The first is that in 1975 the Portuguese administration left East Timor and abdicated its international responsibility in face of the disturbances caused by the different alliances within the Territory.<sup>25</sup> Secondly, it is argued that the concept of opposability makes it unable to bring these claims against Australia. Portugal did not protest in 1978 or 1979 against Australia's recognition of the Indonesian presence in East Timor, although that recognition inevitably entailed the corollary position of the termination of Portugal's authority in the Territory. This argument is especially applicable to Australia's *de jure* recognition in 1979 which implies legitimacy as well as effective control. While every State has the discretion whether or not to recognize a certain state of affairs in another political entity, recognition of a government in place of the government which claims to be the continuing *de jure* authority can be expected to cause some reaction from that authority. It is argued that Portugal's failure to protest can be taken as acceptance of Australia's recognition of Indonesian authority over East Timor, preventing it from

cases and Article 66(2) and (4) with respect to advisory opinions. These provisions have been narrowly interpreted; see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970)*, ICJ Reports (1971) 16 (hereafter referred to as the *Namibia case*).

- 22 Statute of the International Court of Justice, Article 65. In the *Namibia case* *ibid.* the Court held that its assertion of the illegality of the continued presence of South Africa in South West Africa was applicable against all States, including non-members of the United Nations, and that all States had a duty of non-recognition of the situation.
- 23 Theoretically, since there is no doctrine of precedent in international litigation there is no need to distinguish previous decisions of the Court; Statute of the International Court of Justice, Article 59. However, as a matter of judicial consistency the Court has tended to give considerable weight to such decisions.
- 24 Fonteyne, 'The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position', 45 *Australian Journal of International Affairs* (1991) 170.
- 25 In August 1975 the Portuguese Government withdrew to the island of Atauro which was also under Portuguese colonial control. It admitted that it was unable to retain control in East Timor and has never since had any physical presence there. However its removal to Atauro can be interpreted as the colonial power shifting its administration from one part of its local territory to another, not as abdicating responsibility for its possessions.

now relying, as against Australia, on its own legal interest in the Territory. This argument is bolstered by its similar failure to protest about the negotiations between Indonesia and Australia over the Timor Gap until 1985, although these negotiations must have been known and of concern to the State which claims to have legal competence over the area under negotiation.<sup>26</sup> Thirdly, the position of the United Nations provides some support for the Australian case. It is argued that the resolutions relied upon by Portugal do not explicitly spell out that Portugal has any particular role with respect to their implementation. States have not been asked, for example, to cooperate with Portugal in putting an end to the Indonesian occupation, nor has Portugal been authorized to act in any particular way to achieve this same end.<sup>27</sup> Further, the Security Council resolutions do not impose a duty of non-recognition binding upon all members of the United Nations under Article 25 of the Charter as has been the practice in a number of other cases,<sup>28</sup> and there is no general duty of non-recognition. In addition, the United Nations has not dealt with the legality of Indonesia's occupation since 1982.<sup>29</sup> From 1982 onwards East Timor has remained on the United Nations' agenda as a human rights issue rather than as a denial of the right to self-determination and an illegal use of force. This silence is regarded as a failure by the international community to reinforce the legitimacy of East Timor's claims. Taken together, these arguments assert that there is a process of international law known as 'historical consolidation' which assumes that:

there comes a time when realities, however illegal or inequitable they may have been initially, appear to have become irreversible and the world community's interest in orderliness and stability might justify cloaking it with the mantle of legality.<sup>30</sup>

There are however a number of responses that can be made to these arguments. If it is accepted that Portugal remains the only legal authority in East Timor, its legal interest in an agreement to which it is not a party for the disposition of resources from the area seems evident. The argument therefore rests upon the assertion that it has either lost that legal interest, or has left it too late to assert it as against Australia before the International Court of Justice.

26 In its Application to the Court Portugal asserts that it was unaware of the negotiations between Australia and Indonesia over the Timor Gap until 1985.

27 The comparison is drawn with Security Council Resolution 221 (1966) which empowered the United Kingdom to use force, if necessary, to prevent oil being imported to Rhodesia through Beira, in violation of the sanctions imposed against Rhodesia; Fonteyne, *supra* note 24, at 174.

28 Most recently in the case of the Iraqi invasion of Kuwait; see Security Council Resolution 661, 6 August 1990, para. 9(b). The Security Council has also called for non-recognition of the Turkish occupied area of Cyprus, the Bantustans in South Africa, and, before Namibian independence, of South Africa's presence there.

29 The majority supporting the Resolutions on East Timor had become progressively smaller after the first Resolution in 1975. The voting for General Assembly Resolution 3485, 12 December 1975 was 72 in favour, 10 against and 47 abstentions, while that for General Assembly Resolution 37/30, 23 November 1982 was 50 for, 46 against and 50 abstentions. After 1982 there was apprehension that a subsequent resolution might not gain the requisite support.

30 Fonteyne, *supra* note 24, at 178.

### East Timor Moves into the World Court

It is important to distinguish the respective functions of the Court on the one hand and the Security Council and General Assembly on the other within the international arena. As the principal judicial organ of the United Nations the Court rules on the basis of law. It would seem unfortunate if it allowed legal consideration of the issue of title to territory and resources to be avoided through reliance on the notion of the passage of time and consequent refusal to accord standing. The United Nations is a world of political negotiations and compromise. It is undesirable that because the United Nations has not passed certain resolutions (for example that there is a positive duty not to recognize Indonesia's presence in East Timor), or has failed to reiterate a legal position for a long period of time (for example the right of the people of East Timor to self-determination) that these silences should be used to assume the legality of the position. The Court itself continued to maintain the legal existence of the mandate in South Africa and the illegality of South Africa's presence there in any other capacity over a period exceeding 20 years until the formal termination of the mandate by the General Assembly in 1966, despite the factual reality.<sup>31</sup> Through those cases, as well as on other occasions,<sup>32</sup> it has reiterated the importance of the right to self-determination. Failure by the United Nations' organs to request an advisory opinion on the right to self-determination of the people of East Timor, as was done with respect to Namibia and Western Sahara, cannot be taken as an indication of lack of support for their position, nor as extinction of the right.<sup>33</sup>

Further, it is not true that the United Nations has been inactive with respect to East Timor over a sustained period of time. In 1983 Indonesia and Portugal commenced negotiations under the auspices of then Secretary-General Perez de Cuellar, which lasted until 1991.<sup>34</sup> Negotiations were due to recommence in December 1992. The fact that negotiations have continued for nearly a decade between these States militates against any assumption of historical consolidation.

The Court has developed the importance of the concept of protest, and previous cases suggest that failure by a State to make a timely protest can lead to that State having to accept a legal position that it subsequently wishes to deny. For example, in *Anglo-Norwegian Fisheries*<sup>35</sup> the United Kingdom had to accept the validity of the Norwegian baselines which it had not protested for more than 60 years. Similarly, in

31 *International Status of South West Africa*, ICJ Reports (1950) 128; *The Admissibility of Hearings of Petitioners by the Committee of South West Africa*, ICJ Reports (1956) 23; *Namibia case supra* note 21.

32 *Western Sahara Case*, ICJ Reports (1975) 12.

33 There is no obligation upon the organs of the United Nations to seek an advisory opinion and there may be good reasons why this was not done. The outcomes of the Advisory Opinions on South West Africa and that on Western Sahara (decided in the same year as the Indonesian invasion of East Timor) were not encouraging, although they upheld the principle of self-determination.

34 The Secretary-General persuaded the parties to commence negotiations in accordance with General Assembly Resolution 37/30, 23 November 1982 which requested him to do so.

35 *United Kingdom v. Norway*, ICJ Reports (1951) 116.



the *Temple of Preah Vihear*<sup>36</sup> the Court found that Thailand was precluded by its conduct from asserting that it did not accept Cambodian sovereignty over the Temple. Thailand had accepted for over fifty years the benefits of a treaty of 1904, including the benefits of a stable boundary regime between itself and Cambodia, and could not subsequently deny that it was a consenting party to it. Judge Alfaro attached even greater importance to Thailand's failure to protest, arguing that 'the rule of consistency must be observed' and that 'a State cannot challenge or injure the rights of another ... contrary to its previous acts, conduct or opinions during the maintenance of its international relations.'<sup>37</sup> However, in the *Temple* case the border had been a matter of active dispute between the parties; Thailand Government officials had seen and accepted the map depicting the Temple as located within Cambodia and could not subsequently assert that it had made an error. The map and treaty together could be regarded as settling a dispute between the two States, and the policy imperative for stable borders also supports this conclusion. In East Timor there had been no comparable agreement between Indonesia and Portugal on the future of the Territory, and such an agreement could not legally have displaced the right of the people to self-determination. In *Anglo-Norwegian Fisheries* the Court emphasized that there had been general community toleration of the Norwegian system of delimitation, a factor that distinguishes the facts from the present case where Indonesia's invasion was strongly protested within the United Nations. Indeed, Portugal in its capacity as administering power referred the matter of the invasion immediately to the United Nations in 1975, an action that is tantamount to protest. Similarly, it has protested against the negotiations of the Timor Gap Treaty since 1985 and the case has been commenced within two years of the conclusion of the treaty. It can be argued that until the treaty was actually concluded and implemented there was no actual violation of Portugal's rights (and those of the people of East Timor) other than the technical infringement of sovereignty through negotiation with another purported authority. On this analysis, the commencement of the action was prompt.

Further, there is no Statute of Limitations for proceedings before the International Court of Justice and requirements of standing should not indirectly introduce one. The doctrine of *laches*, or loss of rights through excessive delay,<sup>38</sup> may be regarded as a 'general principle of law.'<sup>39</sup> However the purpose of *laches* is to prevent injustice to a respondent State through admitting a case after a long period of time. In this instance the injustice would be caused to the victims of the alleged illegal act, the people of East Timor. Since the application was commenced within two weeks of the implementation of the treaty, arguments based on the undesirability of creating uncertainty as to title to

36 *Cambodia v. Thailand*, ICJ Reports (1962) 6 (hereafter referred to as the *Temple* case). See also *Nicaragua v. United States*, *supra* note 14.

37 The *Temple* case, *ibid*.

38 Fonteyne, *supra* note 24, at 173.

39 Statute of the International Court of Justice, Article 38(1)(c).

### East Timor Moves into the World Court

resources from the area and the ensuing lack of security for investors are unfounded.<sup>40</sup> Again this is a very different situation from that in the *Temple* case where the border had been accepted for fifty years. In *Nicaragua v. United States* the Court used estoppel to support an assertion of jurisdiction, where jurisdiction was strongly contested.<sup>41</sup> It would be unfortunate if it now used similar arguments to find a case inadmissible despite the clear basis for jurisdictional consent.

With respect to the failure of the General Assembly or Security Council to spell out that Portugal has any special responsibility for East Timor, the successive resolutions do assert the continuing right of the people of East Timor to self-determination and Portugal's status as administering authority. In the example of the contrast drawn by the resolutions on Southern Rhodesia, it was there envisaged that the United Kingdom might require Security Council authorization for the commission of what would otherwise have constituted an illegal act; that is, interference with third party shipping bound for the Mozambique port of Beria. Similarly, the Security Council authorized third States to use 'all necessary means' to assist the Government of Kuwait in removing Iraqi forces from Kuwait in 1990.<sup>42</sup> This wording was interpreted as authorizing the use of force. While Kuwait had the inherent right of collective self-defence, the Security Council considered it desirable to authorize the use of force on such a scale. Portugal however has not undertaken any action which might otherwise be illegal, and therefore does not require any specific Security Council authorization. Indeed the General Assembly has urged Portugal to seek a peaceful solution to the dispute, and the Security Council has called upon Portugal to 'cooperate fully with the United Nations to enable the people of East Timor to exercise freely their right to self-determination.'<sup>43</sup> It seems absurd to argue that Portugal cannot attempt to fulfil this task through the principal judicial organ of the United Nations.

Although the Security Council has not specifically called for non-recognition of the Indonesian annexation of East Timor, the General Assembly has determined that 'No territorial acquisition resulting from the use or threat of force shall be recognized as legal.'<sup>44</sup> It has been argued that allowing Portugal to continue these proceedings would effectively impose a retroactive duty of non-recognition of the Indonesian presence in East Timor in place of each State's subjective discretion with respect to recognition.<sup>45</sup> The Court determined in *Nicaragua v. United States* that the

40 Australia however has entered into subsidiary agreements with Indonesia with respect to the exploitation of the Timor Gap area, and has started issuing licences.

41 *Supra* note 14 (Jurisdiction and Admissibility).

42 Security Council Resolution 678 of 28 November 1990.

43 General Assembly Resolution 3485 of 12 December 1975; Security Council Resolution 384 of 22 December 1975.

44 General Assembly 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, 24 October 1970, principle 1.

45 Australia argued this when Portugal first protested against the negotiations for the Timor Gap Treaty in 1985. Cf., '... there are no international norms conditioning the recognition of sovereignty and it is up to each State to decide when to confer recognition.' See Sutherland, 'Australian-Indonesian Sea-

Declaration on Friendly Relations represented customary international law, at least in so far as it related to the prohibition of the use of force and unlawful intervention.<sup>46</sup> There seems to be no reason why this conclusion should not also be reached with respect to recognition of territorial acquisition through the use of force.<sup>47</sup> Significantly, the Declaration does not require non-recognition of an *illegal* occupation of territory, but only of one that has occurred through the threat or use of force. Whether there has been such a use of force is a matter of fact which can be objectively determined without legal analysis. The Indonesian occupation of East Timor certainly falls within this proscription.<sup>48</sup>

There has long been a tension between the desirability of non-recognition of an illegal occupation of territory and the principle of effectiveness, which supports recognition of *de facto* control within a territory.<sup>49</sup> The example of the recognition of the independence of the Baltic States and their admission into the United Nations on 17 September 1991 demonstrates that illegal annexation can be rectified, even after passage of a considerably greater period of time than has elapsed since 1975.

The right of self-determination does not exist in a legal vacuum. People who have been confirmed to have such a right are entitled to expect certain legal consequences to follow, including an obligation upon other members not to act so as to defeat that right:

In their actions against and resistance to such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter of the United Nations.<sup>50</sup>

If this view is accepted there is no need for any separately declared obligation not to recognize a situation allegedly in violation of the right to self-determination. There is a danger of accepting that if an entity with a valid claim under international law has no strong supporters which will keep its claims to the forefront of the international agenda, or alternatively, if its opponents are stronger and able to muster wide support, that entity will lose its legal basis for the claim. That is an assertion of the finality and legitimacy of power, and a denial of the rule of law. It constitutes a rejection of the

Bed Boundary Agreement', *Australian Parliamentary Library Legislative Research Service Paper*, 21 September 1988, 2, cited by Stepan, *supra* note 7.

46 *Supra* note 14 (Merits) See Charlesworth, 'Customary International Law and the Nicaragua Case', 11 *Australian Yearbook of International Law* (1991) 1.

47 There is further support for accepting this principle as customary international law, for example its inclusion in the Convention on the Rights and Duties of States, Montevideo 1933, 16 LNTS 19, Article 11; the Charter of the Organization of American States, Bogota 1948, 119 UNTS 3; the Restatement (Third) of the Foreign Relations Law of the United States 1987, s. 203 (2).

48 For a graphic, albeit supposedly fictional description of the military invasion of East Timor see T. Mo, *The Redundancy of the Courage* (1991).

49 See, for example, *Tinoco Arbitration (Great Britain v. Costa Rica)* 1 *Reports of International Arbitral Awards* (1923) 369.

50 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970, General Assembly Resolution 2625 (xxv), 24 October 1970.

## East Timor Moves into the World Court

concept of an objective illegality, the commission of which imposes obligations upon all members of the international community. The international legal system is weak and often ineffective for the enforcement of legal rights. Against this reality a flexible approach to a lapse of time before a claim is brought should be taken, rather than giving weight to arguments that the illegality has been consolidated into legality. The orientation of the international legal order gives primacy to the claims of States. The claims of other entities with international personality, including claimants to Statehood, cannot be brought within the jurisdiction of the International Court of Justice unless some other entity raises them on their behalf. To deny standing to Portugal would benefit only the alleged wrong-doer, Indonesia and ensure that there is no legal assessment of the claims of the people of East Timor. It would also allow procedural restrictions to impede the development of substantive principles relating to responsibility for illegal acts, and third party responses to illegal acts.<sup>51</sup>

### B. Standing in the Public Interest

Another possibility is that the Court might develop the notion of standing in the public interest, resting upon the obligations owed by all members of the international community to respect the right of the people of East Timor to self-determination. If this were accepted Portugal would have standing as a member of the international community, irrespective of any claims in its own right. The concept of an international *actio popularis*, a third party claim made on behalf of the international community, was rejected by the Court in the *South West Africa* case,<sup>52</sup> but the concepts of *erga omnes* obligations and *jus cogens* have been considerably developed since then, for example by the International Law Commission in its Draft Articles on State Responsibility,<sup>53</sup> and by the International Court of Justice. In particular the famous dicta in *Barcelona Traction* can be used to support this proposition. In that case the Court asserted that:

... an essential distinction should be drawn between the 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. By their very nature the former are the concern of all States. In view

51 For example the development of the concept of *jus cogens*, Vienna Convention on the Law of Treaties, 1969, UNTS 18,232, Articles 53 and 64; the formulation of the concept of obligations owed *erga omnes* by the International Court of Justice, *Barcelona Traction Light and Power Company Case, (Belgium v. Spain) New Application*, ICJ Reports (1970) 3, at 32; the work of the International Law Commission on the concept of an international crime of State, Draft Articles on State Responsibility, Article 19, YBILC (1980) Vol. II, Part 2, 30 and the consequences of the commission of an illegal act. See C. Chinkin, *supra* note 16.

52 *Supra* note 17.

53 Part I, Articles 1-35 have been provisionally adopted by the ILC on first reading, see YBILC (1980) Vol. II, Part 2, 30. Article 19 develops these concepts in its definition of an international crime of State.

of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>54</sup>

However the Court in *Barcelona Traction* was not discussing procedural rights, and the actual decision in that case does nothing to promote the notion of protection of third party interests through development of judicial procedures. In *Nicaragua v. United States*, Judge Schwebel developed the idea in the context of the third party procedural device of intervention. Under Article 62 of the Statute of the Court, a third party can request the Court to exercise its discretion to allow it to intervene in proceedings between other States on the basis of some legal interest of its own it considers may be affected by the decision in the case. Judge Schwebel suggested both that intervention in the public interest be available, and that a party to the proceedings be able to raise issues additional to its own claim where they concerned rights which were the common rights of all third parties. Such rights could not 'rest upon narrow considerations of privity to a dispute.'<sup>55</sup> If this approach were adopted by the Court in the *Timor Gap* case, Portugal could claim breach of its own interest as colonial administrative power and raise the wider issue of violation of the right of self-determination, which as a right held *erga omnes*, Australia, along with all other members of the international community, is bound to uphold. However such a procedural device does not resolve the threshold problem of standing as it relies upon intervention into existing proceedings. It is a means of broadening the ambit of existing proceedings by including matters of community interest, but does not eliminate the need for standing between the parties. Further, Judge Schwebel was a dissenting Judge in *Nicaragua v. United States*, for whose views there was no general support.

### C. Indispensable Third Parties

Another argument that can be raised by Australia is that the dispute is not really between itself and Portugal but between Portugal and Indonesia, or Indonesia and the people of East Timor. In legal terms this translates into the defence that the case should not continue because of the absence of a third party before the Court whose presence is indispensable to the proceedings. The only third party claim that is specified in the Statute of the International Court of Justice is that of intervention under Articles 62 and 63.<sup>56</sup> The indispensable third party claim is based not upon the Statute but on the

<sup>54</sup> *Barcelona Traction Light and Power Company Case, (Belgium v. Spain) supra* note 51.

<sup>55</sup> *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States)*, Request for Provisional Measures, ICJ Reports (1984) 169, at 198; cf., *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States)*, Declaration of Intervention, ICJ Reports (1984) 215, at 22.

<sup>56</sup> Article 62 applies to a third State which considers it has 'an interest of a legal nature which may be affected by the decision in the case' and Article 63 gives States parties to a convention the right to intervene 'whenever the construction of a convention to which States other than those concerned in the case are parties is in question.' On intervention under Article 62 see *Case Concerning the Continental Shelf, (Tunisia/Libya Arab Jamahiriya)*, Application by Malta to Intervene, ICJ Reports (1981) 3;

### East Timor Moves into the World Court

general requirement of consent to the exercise of jurisdiction to the Court. It is typically made by a reluctant respondent State which wishes to abort proceedings commenced against it.<sup>57</sup> Since Portugal has framed its application bilaterally by focusing on Australia's actions with respect to itself, without reference to Indonesia's actions, it is likely that Australia will raise this defence.

Of the two potential third parties to these proceedings, the people of East Timor have no standing before the Court and cannot be the subject of any third party claim, but the position of Indonesia is more complicated. No action can be commenced against Indonesia since it has not accepted the jurisdiction of the International Court of Justice, and has not made a declaration under Article 36(2) of the Statute of the Court. However any finding that Australia's actions in negotiating and concluding the Timor Gap Treaty violate Portugal's rights, necessarily means the same is true of Indonesia, with the additional implication that Indonesia's occupation and annexation of East Timor are unlawful. The indispensable third party defence was accepted in the *Monetary Gold* case,<sup>58</sup> where the Court held that it had no jurisdiction to decide a case where its decision must vitally affect the interests of a third State which was not before it. In that case it was undisputed that gold, the subject matter of the claims, belonged to Albania. However *Monetary Gold* has been given a very narrow reading in subsequent cases, and an indispensable third party claim has not since succeeded.

In *Nicaragua v. United States*,<sup>59</sup> the United States claimed that El Salvador was an indispensable third party to the case. The United States' defence to its actions in Nicaragua was that it was acting in collective self-defence of El Salvador. This necessarily required an examination of the legality of the actions of that State, in particular whether it had a valid claim to self-defence and thus to seek collective self-defence. The Court rejected a general indispensable third party rule of the kind argued for by the United States. It considered that such a rule would only be possible if there was a parallel rule requiring a State to intervene, or to submit to its jurisdiction, and the Court had no authority to make such orders. Although the Court found at the merits stage that its decision in that case would affect El Salvador, it continued to make its

*Case Concerning the Continental Shelf, (Libya Arab Jamahiriya/Malta)*, Application by Italy to Intervene, ICJ Reports (1984) 3; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua to Intervene, ICJ Reports (1990) 92. The last was the only case where a claim under Article 62 succeeded. In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Nicaragua Intervening, ICJ Reports (1990) 92, the legal consequences of intervening were determined. On intervention under Article 63 see *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States)*, Declaration of Intervention, ICJ Reports (1984) 215.

57 The claim has also been made by a party to the proceedings, for example, in *Nicaragua v. United States*, Jurisdiction and Admissibility, *supra* note 14; and by a third party intervener, for example, Nicaragua in the *Case Concerning the Land, Island and Maritime Frontier Dispute, (El Salvador/Honduras)*, *ibid*.

58 *Case of the Monetary Gold Removed from Rome in 1943, (Italy v. France, United Kingdom and United States)*, ICJ Reports (1954) 19 (hereafter referred to as *Monetary Gold*).

59 *Supra* note 14 (Jurisdiction and Admissibility).

determination in the absence of that State.<sup>60</sup> It distinguished *Nicaragua v. United States* from *Monetary Gold* by emphasizing Albania's proprietary interest in the latter case. Similarly in the *Land, Island and Maritime Frontier Dispute*<sup>61</sup> submitted to the Court by El Salvador and Honduras, the claim by Nicaragua to be an indispensable third party was rejected. The chamber constituted to hear the case had already granted Nicaragua's request to intervene under Article 62, but rejected its further claim that its interests in the boundary delimitation were so much part of the subject matter of the case that the chamber could not effectively exercise jurisdiction without Nicaraguan participation. The chamber held that in *Monetary Gold* the Court had found that while Article 62 authorizes proceedings in the absence of a State whose legal interests might be affected, it did not justify the continuation of a case in the absence of a State whose international responsibility would be the very subject matter of the decision. It did not find that to be the case with Nicaragua's claim.

Australia raised unsuccessfully the indispensable third party defence in the admissibility phase of the *Phosphate Lands in Nauru* case.<sup>62</sup> Nauru has claimed that Australia as administering authority in Nauru, under first a mandate agreement and subsequently the Trusteeship Agreement for the Territory of Nauru, violated Article 76 of the United Nations Charter and Articles 3 and 5 of the Trusteeship Agreement.<sup>63</sup> It is seeking rehabilitation of the areas where phosphates were mined out during this period. Australia however argued that as it was not the sole administrative authority in Nauru the case could not be brought against it alone. The United Kingdom and New Zealand who were designated with Australia as members of the 'Joint Authority' over Nauru by the Trusteeship Agreement should also be before the Court. Since any judgment of liability against Australia would necessarily also imply their liability, the case could not continue without their presence or consent. The Court did not accept that any finding of liability against Australia necessarily implied a similar finding with respect to New Zealand and the United Kingdom. It emphasized that Australia had played 'a very special role' in the active administration of Nauru which had not been shared by its two partners. Again, in the words of *Monetary Gold* the interests of New Zealand and the United Kingdom do not form 'the very subject matter' of the case and 'the determination of their responsibility is not a prerequisite for the determination of responsibility of Australia' which is the only basis of Nauru's claim.<sup>64</sup> No finding as to

60 It must be remembered that the Court also rejected El Salvador's application to intervene under the Statute of the Court, Article 63. Before that case it had been assumed that such an application was as of right. The Court held the application to have been premature as it was made at the jurisdictional stage when it belonged more properly to the Merits. El Salvador did not make a subsequent further application.

61 *Case Concerning the Land, Island and Maritime Frontier Dispute, (El Salvador/Honduras)* *supra* note 56.

62 *Certain Phosphate Lands in Nauru*, *supra* note 13.

63 1 November 1947, 10 UNTS 3.

64 *Certain Phosphate Lands in Nauru*, *supra* note 13, at para. 55.

### East Timor Moves into the World Court

the liability of those two States was needed as a basis for the Court's decision with respect to Australia.

Australia will therefore have to convince the Court that Indonesia's position closely resembles that of Albania in *Monetary Gold*. However it seems in fact to be the reverse: in *Monetary Gold* Albania's proprietary interests in the gold were undisputed, while Indonesia's interests in, or sovereignty over, the maritime resources in the zones established by the Timor Gap Treaty are precisely the source of the dispute. Indonesia's position appears more comparable to that of Yugoslavia in the *Corfu Channel* case,<sup>65</sup> where allegations were made in Court to the effect that Yugoslavia had laid mines. Judges in the *Corfu Channel* case emphasized that Yugoslavia could not in its absence be accused or impliedly found liable for any wrong-doing, for this would be contrary to the principle of consent to the jurisdiction of the Court. It would also be contrary to principles of due process. There is no provision for a third party to offer its own evidence of the facts, and to allow even an intervening State to do so would disrupt the case as presented to it by the parties. This in turn would undermine their consent to the Court's jurisdiction. In *Corfu Channel* the Court was able to side-step these complex third party issues by founding Albania's liability on its own omissions with respect to ensuring the security of its territorial sea. Similarly in the *Case Concerning the Continental Shelf* the Court limited its determination of the maritime boundary to the areas where there was no third party interest.<sup>66</sup> In this case it had previously rejected Italy's request to be allowed to intervene in the continental shelf dispute between Libya and Malta,<sup>67</sup> but subsequently took account of Italy's claims by refusing to adjudicate over those areas. The Court, in effect, reformulated the parties' claim into a truly bilateral dispute upon which it was equipped to adjudicate, and accepted that Italy was an indispensable third party to other parts of the claim which had therefore to be excluded. The question in the *Timor Gap* case appears to be whether the Court can adjudicate upon the narrow bilateral question as presented by Portugal, by focusing solely upon Australia's actions *vis-à-vis* Portugal as the legal administering authority, without reference to the position of Indonesia. However, challenging the right of a State to enter into a bilateral treaty necessarily involves the other party to the treaty; it may be more difficult for the Court to avoid making legal implications with respect to Indonesia than it was with respect to the third parties in the *Corfu Channel*, the *Libya/Malta*, or the *Nauru* cases. Indeed the emphasis placed in *Nauru* on Australia's position as the primary actor reinforces this point, as Indonesia clearly occupies this role in the current dispute. Although Portugal has not asked for the treaty to be found to be invalid or void, any finding that Australia has violated Portugal's rights by entering into it necessarily entails the consequence that Indonesia had no competence

65 *Corfu Channel (United Kingdom v. Albania)*, Merits, ICJ Reports (1949) 4, at 15-16.

66 *Case Concerning the Continental Shelf, (Libya Arab Jamahiriya/Malta)*, Merits, ICJ Reports (1985).

67 *Case Concerning the Continental Shelf, (Libya Arab Jamahiriya/Malta)* *supra* note 56.



to conclude the treaty. It is meaningless to argue that Article 59 of the Statute of the International Court of Justice provides adequate protection for Indonesia.<sup>68</sup> Indeed, in *El Salvador/Honduras* the chamber acknowledged that a finding of no condominium in the Gulf of Fonseca opposable to Honduras (because of its absence from an earlier case) would be tantamount to a finding of no condominium at all, and that its determination would therefore impact upon third party rights in the area.<sup>69</sup> In that case the dispute was over the legal status of the Gulf; in the current case it is about the conclusion of a treaty allegedly violating the rights of a people to their natural resources. In these circumstances the Court might apply the principles of *Monetary Gold* and hold that it cannot make a finding adverse to the interests of Indonesia in its absence. Alternatively, its longstanding reluctance to discontinue a case because of the alleged interests of a third party which has failed to intervene might encourage it to continue this restrictive approach, and to concentrate its findings on Australia's actions and disregard any implications of its judgments with respect to Indonesia.

## V. Conclusions

This discussion has shown that there are technical, procedural grounds upon which the Court could find the *Portugal v. Australia* case to be inadmissible, and thus avoid the necessity for making a ruling upon the merits. However there also appear to be grounds upon which the Court could reject such a restrictive approach and could thereby face squarely the substantive questions the case presents such as the legal status of the right to self-determination; whether such a right constitutes a norm of *jus cogens*; whether the people of East Timor have a continuing legitimate claim to self-determination; whether such a right carries obligations *erga omnes*; and the substance of the obligations owed by other members of the international community to such peoples, in particular whether there is a duty not to recognize territorial acquisition in disregard of a claim to self-determination. These questions are fundamental issues of modern international law, and answers to them would be instrumental in shaping the future international legal order. It has been noticeable that the Court has appeared more ready in recent years to tackle difficult legal questions in controversial political contexts.<sup>70</sup> If this attitude is sustained the Court might reject possible defences of standing and indispensable third parties, and give a substantive judgment on its merits.

68 Article 59: The decision of the Court has no binding force except between the parties and in respect of that particular case.

69 *Case Concerning the Land, Island and Maritime Frontier Dispute, (El Salvador/Honduras)* *supra* note 55.

70 An example is its finding of admissibility in the *Nicaragua v. United States* case *supra* note 14 (*Jurisdiction and Admissibility*).