THE MERITS OF PORTUGAL'S CLAIM AGAINST AUSTRALIA

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I. INTRODUCTION

In December 1989 Australia and Indonesia concluded over a decade of negotiations with respect to the exploitation of the maritime areas off the southern coast of East Timor with the signing of the *Timor Gap Treaty*.[1] The concluded Treaty has settled arrangements for the exploration and exploitation of off-shore resources between Australia and Indonesia between the northern coast of Australia and East Timor. The formula agreed in the Treaty has been 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 co-operation.

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1 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, Australia TS No 9, 1991. See W Martin and D Pickersgill "The Timor Gap Treaty" (1991) 32 *Harvard International Law Journal* 560.

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, 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.[2]

After ratification by the Australian and Indonesian governments domestic legislation in Australia came into effect on 9 February 1991.[3] The inaugural Ministerial Council meeting was held the same day in Bali.

It is this Treaty which is at the basis of the claim commenced by Portugal against Australia in the International Court of Justice on 22 February 1991.[4] 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 subsequently 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 a 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 violates the rights of the people of East Timor, notably through the denial of their right to self-determination,[5] and of access to and sovereignty over the natural

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

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

4 *Case Concerning East Timor (Portugal v Australia)* 1991 ICJ Rep 9 (Order of 3 May).

5 One of the purposes of the United Nations is "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples ..."; *United Nations Charter*, Article 1 (2). The right to self-determination is contained in Article 1 of the *International Covenant on Civil and Political Rights*, adopted by the General Assembly of the United Nations on 19 December 1966, 1980 Aust TS No 23, and the *International Covenant on Economic, Social and Cultural Rights*, adopted by the General Assembly of the United Nations, 19 December 1966, 1976 Aust TS No 5. See also *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*, GA Res 2625, 24 October 1970, principle 5. Australia and Portugal are parties to the 1966 United Nations Covenants on Human Rights, but Indonesia is not.

resources in the maritime areas adjacent to their coast.[6] It is important to note that Portugal rests its claim 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.

The background to this claim is therefore the invasion and annexation of East Timor by Indonesia in 1975.[7] Portugal had been the colonial power in the Territory since the sixteenth century. After the revolution in Portugal in 1974 it belatedly turned its attention to decolonisation of its overseas possessions. In July 1974 Portugal acknowledged that East Timor was a non self-governing territory under Chapter XI of the United Nations Charter and submitted a Memorandum to this effect to the Secretary-General in August 1974. There were discussions about the future status of East Timor throughout 1974 and 1975, and in July 1975 it passed a constitutional law specifying that the political future of the Territory should be decided in accordance with the wishes of the people, determined after free elections.[8] Events were overtaken by the struggles between the various political groups which had formed within East Timor.[9] These culminated in the proclamation by FRETILIN of the independent Republic of East Timor on 28 November 1975 and the rapid response by other groups which proclaimed integration with Indonesia on 30 November 1975. Any prospect of an orderly progress towards decolonisation through constitutional means was finally lost after the Indonesian invasion of 7 December 1975 and its continued occupation and control through the use of force and repeated allegations of gross violations of human rights.[10] Portugal's claim is an assertion of continuing legal title to the Territory in the face of what it characterises as de facto and illegal control.[11] 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

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6 Article 1 of the 1966 United Nations Covenants on Human Rights 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".

7 On the background to the Indonesian invasion of East Timor see P Elliott "The East Timor Dispute" (1978) 27 *International and Comparative Law Quarterly* 238; C Budiardjo and LS Liong *The War Against East Timor* (1978); F de Quadros "Decolonisation of Portuguese Territories" in R Bernhardt (ed) 10 *Encyclopedia of Public International Law* 93-6.

8 *Constitutional Act* 7/74, 27 July 1974.

9 The three major parties were FRETILIN (Frente Revolucionaria Timor Leste Independente) which favoured independence, UDT (Uniao Democratica Timorense) which favoured some form of association with Portugal, leading to independence and APODETI (Associacao Popular Democratica de Timor) which favoured integration with Indonesia; see Elliott note 7 *supra*.

10 There have been numerous reports since 1975 of human rights violations in East Timor by such non-governmental organisations as Amnesty International. The Dili massacre of 12 November 1991 has focused international attention on the human rights situation in the Territory; see Keesing's Contemporary Archives, November 1991, 38579; Report of the Special Rapporteur on Torture, Peter Kooijmans, E/CN4/1992/17/Add 1, 8 January 1992.

11 Indonesia proclaimed East Timor as the 27th Province of Indonesia on 17 July 1976. It asserts that this is in accordance with the wishes of the people of East Timor and that therefore there has been an act of self-determination; see Elliott note 7 *supra*. However as Indonesia is not a party before the Court its arguments on these questions will not be directly presented.

Timorese to self-determination and condemn the Indonesian use of armed force.[12]

The Portuguese claim raises important issues of both procedure and substance. It has brought a fiercely contested claim for self-determination made in the traditional context of decolonisation back to the attention of the international community through the public forum of the International Court of Justice at a time when that attention had turned to the post-colonial self-determination claims of indigenous peoples and peoples in Eastern Europe. However before the Court can consider these substantive matters it must determine that the case is admissible and appropriate for adjudication in the form presented to it. It is these preliminary questions that will be discussed in the remainder of the article.

II. PROCEDURAL ISSUES RAISED BY THE PORTUGUESE APPLICATION

A. JURISDICTION

As a preliminary issue, it seems that the Court has jurisdiction under Article 36(2) of the Statute of the Court. Jurisdiction before the International Court of Justice is based upon consent, which can be given by a State in advance of any particular dispute arising through a declaration to the Secretary-General of the United Nations that the State accepts the jurisdiction of the Court with respect to any other State accepting the same obligation.[13] Both Portugal and Australia have made the requisite declarations. The current Australian declaration was made in 1975, and the Portuguese declaration in 1955.[14] Neither declaration has any reservations that might exclude jurisdiction in this case. From the Australian point of view it does raise the question of whether it is sensible to remain one of the very few States which has a virtually unconditional acceptance of the jurisdiction of the International Court. It makes Australia vulnerable to claims from other States, as seen in both this case and the application made by Nauru.[15] On the other hand it is testament to Australia's commitment to the peaceful settlement of disputes.

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12 GA Res 3485, 12 December 1975; GA Res 31/53, 1 December 1976; GA Res 32/34, 28 November 1977; GA Res 33/39, 13 December 1978; GA Res 34/40, 21 November 1979; GA Res 35/27, 11 November 1980; GA Res 36/50, 24 November 1981; GA Res 37/30, 23 November 1982; SC Res 384, 22 December 1975; SC Res 389, 22 April 1976.

13 *Statute of the International Court of Justice*, Article 36 (2).

14 For the text of the respective declarations see 44 YBICJ 62 (Australia), 90 (Portugal) (1989-90).

15 *Certain Phosphate Lands in Nauru (Nauru v Australia)* 1989 ICJ Rep 12. The case was found admissible on 26 June 1992.

B. PORTUGAL'S STANDING TO BRING THE CLAIM

The fact that the Court has jurisdiction does not mean that it will necessarily proceed to adjudicate the merits of the claim. There are still a number of procedural arguments that Portugal must successfully refute. The first relates to the standing of Portugal to bring the claim. The Court has held that to be a party in a case a State must have a legal interest in the dispute. In the 1966 decision in the South West Africa cases it denied that Liberia and Ethiopia had sufficient standing to commence a case against South Africa with respect to the latter's alleged violation of the Mandate over South West Africa (Namibia).[16] 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 between the Union of South Africa and the League. The Court therefore held that they lacked any specific legal interest in the case which could have justified a holding of standing.[17] Their interest was no greater than that owed to every other member of the international community, which was not sufficient to commence proceedings. Since only States can commence a case before the Court,[18] the effect of this widely criticised ruling was to rule out the use of the Court's contentious jurisdiction.[19] The people of Namibia could not commence a case on their own behalf,[20] and the United Nations could have recourse only to the Court's advisory jurisdiction, which is non-binding.[21]

Portugal is not a party to the *Timor Gap Treaty* between Australia and Indonesia; it therefore has to distinguish its position from that of Liberia and Ethiopia as non-parties to the Mandate agreement over South West Africa.[22]

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16 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase, 1966 ICJ Rep 4 (Judgment of 18 July).

17 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.

18 *Statute of the International Court of Justice*, Article 34.

19 See W M Reisman "Revision of the South West Africa Cases" (1966-7) 7 *Virginia Journal of International Law* 4 ; R Falk "The South West Africa Cases" (1967) 21 *International Organization* 1 ; R Higgins "The International Court and South West Africa - the Implications of the Judgment" (1966) 42 *International Affairs* 573.

20 Neither is there any provision for the acceptance of oral or written statements from individuals or non-governmental organisations; see *Statute of the International Court of Justice*, Article 34 (2) which allows the Court to seek or receive information from public international organisations in contentious 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) 1971 ICJ Rep 16 (Adv Op 21 June).

21 *Statute of the International Court of Justice*, Article 65. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 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.

22 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.

This requirement of standing is why it is important that Portugal's claim emphasises violations of its own rights as the continuing legal authority in East Timor and does not rest solely on 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 rely upon it to satisfy the requirement of standing.[23]

There appear to be a number of grounds for this assertion. The first is that in 1975 the Portuguese administration in fact left East Timor[24] and abdicated responsibility for it in face of the disturbances caused by the different alliances within the Territory itself. In view of its own denial of its international responsibility for East Timor Portugal cannot now claim continuing legal competence. Secondly, it is argued that the concept of opposability makes it unable to bring such claims against Australia. Portugal made no protest to Australia at the time of the Australian recognition of the Indonesian presence in East Timor in 1978, although recognition of Indonesian sovereignty inevitably entailed the corollary position that Portugal's authority in the Territory was terminated. While every State has the discretion whether or not to recognise 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 in the relevant area can be expected to cause some reaction from that authority. It is argued that Portugal's failure to protest in 1978 can be taken as acceptance of Australia's recognition of Indonesian authority over East Timor, preventing it from 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 they had commenced shortly after recognition and must surely have been known to Portugal.[25] These arguments essentially rely upon the concept of estoppel, a concept which has been used in international legal reasoning. Thirdly, is the position of the United Nations. 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 co-operate with Portugal in putting an end to the Indonesian occupation, nor is Portugal authorised to act in any particular way.[26] 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

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23 JP Fonteyne "The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position" (1991) 45 *Australian Journal of International Affairs* 170.

24 In August 1975 the Portuguese government withdrew to the island of Atauro admitting that it was unable to control the Territory. It has never since had any presence there.

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

26 The comparison is drawn with SC Res 221, 1966, which empowered the United Kingdom to use force, if necessary, to prevent oil being imported to Rhodesia through Beria, in violation of the sanctions imposed against Rhodesia; Fonteyne note 23 *supra* at 174.

a number of other cases,[27] and there is no general duty of non-recognition. In addition, the United Nations has not dealt with the issue of the legality of Indonesia's occupation and the right of self-determination since the last General Assembly Resolution in 1982.[28] Since that time East Timor has remained on the United Nations agenda solely as a human rights issue, not as a denial of the right of self-determination. This silence is regarded as a failure to reinforce the legitimacy of East Timor's claims.

The conclusion of these arguments against allowing Portugal standing is that there is a process of international law known as 'historical consolidation.' This 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".[29]

There are a number of responses that can be made to these arguments. If it is accepted that Portugal remains the 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.

The Court is a legal body which makes its determinations 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, on the other hand, is a political body where political considerations determine its agenda and the wording of its Resolutions. It is the world of negotiations and compromise. It is therefore undesirable that because the United Nations has not passed certain resolutions (for example, that there is a duty not to recognise Indonesia's presence in East Timor), or has failed to reiterate certain things for a long period of time (for example, the right of the East Timorese 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 of over twenty years until the termination of the Mandate by the General Assembly in 1966, despite factual aspects to the contrary.[30] Through those cases, as well as on other occasions,[31] it has

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27 Most recently in the case of the Iraqi invasion of Kuwait; see SC Res 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 of South Africa's presence in South West Africa, Namibia.

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

29 Fonteyne note 23 *supra* at 178.

30 *International Status of South West Africa Case* 1950 ICJ Rep 128 (Adv Op 11 July); *The Admissibility of Hearings of Petitioners by the Committee of South West Africa* 1956 ICJ Rep 23 (Adv Op 1 June); *Legal*

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 of extinction of the right.[32]

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 the legal position that it subsequently wishes to deny.[33] However, in *Anglo-Norwegian Fisheries* the role of protest was discussed in the context of the emergence of a new rule of customary international law which would bind a State unless it had protested from the outset. In a legal system which relies upon consent, failure to protest against an emerging principle of law is very different from failure to protest against the commission of an illegal act. The latter should not be taken to imply that that act can be regarded as legal. Even where an illegal act concerns a particular State more than other States, there may be good reasons for failure to protest. The more difficult case for Portugal to distinguish is that of the *Temple of Preah Vihear*. There 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 the 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".[34]

However, in the *Temple Case* the border had been a matter of dispute between the parties; Thailand 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 requirement for stable borders also supports the outcome. In the East Timor case there had been no apparent agreement between Indonesia and Portugal on the future of East Timor. Indeed, Portugal, in its capacity of administering power, referred the matter of the

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Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council 276 (1970) note 20 *supra*.

31 *Western Sahara Case* 1975 ICJ Rep 12 (Adv Op 16 October).

32 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.

33 *Anglo-Norwegian Fisheries Case* (*United Kingdom v Norway*) 1951 ICJ Rep 116 (Judgment of 18 December); *Case Concerning the Temple of Preah Vihear* (*Cambodia v Thailand*), Merits, 1962 ICJ Rep 6 (Judgment of 15 June); *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*), Jurisdiction and Admissibility, 1984 ICJ Rep 392 (Judgment of 26 November).

34 *Case Concerning the Temple of Preah Vihear, ibid* at 42 (Individual Opinion Judge Alfaro).

invasion immediately to the United Nations in 1975, an action that can be perceived as 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) with respect to the resources, only the more technical infringement of sovereignty through negotiation with another body. On this analysis, the commencement of the action was prompt. Further, there is no Statute of Limitations for proceedings before the International Court and requirements of standing should not indirectly introduce one. The doctrine of laches, or loss of rights through excessive delay,[35] may be regarded as a "general principle of law".[36] However the purpose of laches is to prevent injustice to a respondent State through accepting the admissibility of 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, and as has been argued, the application has not been excessively delayed. Since the Application was commenced within two weeks of the implementation of the Treaty, arguments based on the undesirable impact of uncertainty of title to resources from the Area and lack of security for investors are unfounded. 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 arguments to support an assertion of jurisdiction, where jurisdiction was strongly contested.[37] 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 authorisation for the commission of what would otherwise have constituted an illegal act, interference with third party shipping bound for the Mozambique port of Beria. Similarly, the Security Council authorised the use of "all necessary means" to assist the Government of Kuwait in removing Iraqi forces from Kuwait in 1990.[38] This wording was interpreted as authorising the use of force. In this case Portugal has not anticipated taking any action which might otherwise be illegal, and therefore does not require any specific Security Council authorisation. Indeed it seems absurd to argue that it cannot, as a party

35 Fonteyne note 23 *supra* at 173.

36 *Statute of the International Court*, Article 38 (1)(c).

37 *Military and Paramilitary Activities in and against Nicaragua* note 33 *supra.*

38 SC Res 678, 28 November 1990.

to the dispute, pursue one of the peaceful methods for the settlement of disputes listed in Article 33 of the United Nations Charter.[39]

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 recognised as legal".[40] It has been argued that allowing Portugal to continue this action would have the effect of imposing a retroactive duty of non-recognition of the Indonesian presence in East Timor. It could equally be seen as clarifying the normative status of this principle. It might be noted that the Resolution on Friendly Relations does not require non-recognition of an illegal occupation of territory, but 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. 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.[41] The recent 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.

There is a danger of saying 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 concept of an objective illegality, the commission of which imposes obligations upon all members of the international community. It is acknowledged that 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 statist 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 International Court unless some other entity raises

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39 Indeed the General Assembly has urged Portugal to seek a peaceful solution to the dispute; see, for example, GA Res 3485, 12 December 1975.

40 *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*, note 5 *supra*, principle 1. In *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States*), Merits, 1986 ICJ Rep 14 (Judgment of 27 June). The Court found that this Resolution represented customary international law, at least in so far as it related to the prohibition of the use of force and unlawful intervention.

41 See for example *Tinoco Arbitration* (*Great Britain v Costa Rica*) (1923) 1 RIAA 369.

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.[42]

C. 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*,[43] 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*,[44] and the International Court. 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 a vis another State in the field of diplomatic protection. By their very nature the former are the concern of all states. In view 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.[45]

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 feels 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

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42 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, 1970 ICJ Rep 3 at 32 (Order of 5 February); the work of the International Law Commission on the concept of an international crime of State, *Draft Articles on State Responsibility*, Article 19, 1980 2 YBILC Pt II, p 30 and the consequences of the commission of an illegal act. See C Chinkin *Third Parties in International Law* (forthcoming 1992).

43 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Second Phase note 16 *supra.*

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

45 *Barcelona Traction Light and Power Company Case* note 42 *supra.*

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".[46] 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.

D. INDISPENSABLE THIRD PARTIES

Another claim that can be raised by Australia is 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 is that of intervention under Articles 62 and 63.[47] The indispensable third party claim is based not upon the Statute but on the 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, which is likely to be precisely the position of Australia in the *Timor Gap Case*.[48]

There are of course two potential third parties to these proceedings: the people of East Timor and Indonesia. The former have no standing before the Court and thus cannot be the subject of any third party claim. Their interests can only be raised by a State with standing before the Court. The position of Indonesia however is different. Although it is Indonesia's actions with respect

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46 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Request for Provisional Measures, 1984 ICJ Rep 169 at 198 (Order of 10 May); cf *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Declaration of Intervention, 1984 ICJ Rep 215 at 223 (Order of 4 October).

47 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, 1981 ICJ Rep 3, (Judgment of 14 April); *Case Concerning the Continental Shelf, (Libya Arab Jamahiriya/Malta)*, Application by Italy to Intervene, 1984 ICJ Rep 3, (Judgment of 21 March); *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua to Intervene, 1990 ICJ Rep 92 (Judgment of 13 September); on intervention under Article 63 see *Military and Paramilitary Activities in and against Nicaragua* note 46 *supra*.

48 The claim has also been made by a party to the proceedings, for example, the United States in *Military and Paramilitary Activities in and against Nicaragua* note 33 *supra*, Australia in *Certain Phosphate Lands in Nauru* note 15 *supra*, and by a third party intervener, for example, Nicaragua in the *Case Concerning the Land, Island and Maritime Frontier Dispute, ibid.*

to East Timor that lie at the heart of the case, 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). 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.

Portugal has framed its Application from a bilateral perspective which focuses on Australia's actions vis a vis itself, with no reference to those of Indonesia. It is likely to fall to Australia to raise the indispensable third party defence to admissibility. The claim succeeded in the *Monetary Gold Case*,[49] 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 is not before it. In that case it was undisputed that the gold, the subject matter of the claims, belonged to Albania. In the absence of any compulsory jurisdiction before the International Court, it must be acceptable for State A to be able to prevent adjudication between States B and C over what are established or accepted as State A's rights. 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, 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. The Court however rejected any 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 jurisdiction, and the Court has no authority to make such orders. Although the Court found that its decision in that case would affect El Salvador, it continued to make its determination in its absence.[50] It did distinguish Nicaragua from *Monetary Gold* by emphasising Albania's proprietary interest in the latter case. Similarly in the *Land, Island and Maritime Frontier Dispute* submitted to the Court by El Salvador and Honduras,[51] 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

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49 *Case of the Monetary Gold Removed from Rome in 1943, (Italy v France, United Kingdom and United States)*, 1954 ICJ Rep 19 (Judgment of 15 June).

50 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.

51 *Case Concerning the Land, Island and Maritime Frontier Dispute* note 47 *supra*.

jurisdiction without Nicaraguan participation. The Chamber held that in *Monetary Gold* the Court had found that while Article 62 authorises proceedings in the absence of a State whose legal interests might be affected, it did not justify the continuance 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.

The Court has demonstrated a marked reluctance to allow unsubstantiated references to the interests of third parties to interfere with its exercise of jurisdiction over States which have submitted their claims before it. It favours the bilateral presentation of the case assumed by the adversarial process.

Australia would therefore have to convince the Court that Indonesia's position closely resembled 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 is more comparable to that of Yugoslavia in *Corfu Channel*,[52] where allegations were made in Court to the effect that Yugoslavia had laid the mines. Judges in the *Corfu Channel Case* emphasised 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.[53] In this case it had previously rejected Italy's request to be allowed to intervene in the continental shelf dispute between Libya and Malta,[54] 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 it can adjudicate upon the narrow bilateral question as presented by Portugal, by focusing solely upon Australia's actions vis a vis Portugal as the legal administering authority, without reference

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52 *Corfu Channel* (*United Kingdom v Albania*), Merits, 1949 ICJ Rep 4 at 15-16 (Judgment of 9 April).

53 *Case Concerning the Continental Shelf*, (*Libya Arab Jamahiriya/Malta*), Merits, 1985 ICJ Rep (Judgment of 3 June).

54 *Case Concerning the Continental Shelf*, (*Libya Arab Jamahiriya/Malta*), Application by Italy to Intervene note 47 *supra*.

to the position of Indonesia. However, challenging the right of a State to enter into a treaty necessarily involves the other parties to the treaty; it may be more difficult for the Court to avoid the implications with respect to Indonesia than it was in either the *Corfu Channel Case*, or the *Case Concerning the Continental Shelf*. 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 to conclude the Treaty. It is meaningless to argue that Article 59 of the Statute provides adequate protection for Indonesia.[55] Indeed, in the *Land, Island and Maritime Frontier Dispute* the Court 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.[56] 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 third party interests might encourage it to continue its restrictive approach to that case.

III. CONCLUSION

This discussion has shown that there are technical, procedural grounds upon which the Court could find the 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 avoid 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*; the substance of the obligations owed by other members of the international community to such people; and whether a treaty concluded in disregard of the right to self-determination is void as contrary to *jus cogens*. These questions are fundamental issues of modern international law and the answers to them might 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

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

56 *Case Concerning the Land, Island and Maritime Frontier Dispute* note 47 *supra* at 121.

political contexts.[57] If this attitude is sustained the Court might reject defences of standing and indispensable third parties, and continue to hear the case on the merits.

57 An example is its finding of admissibility in the *Nicaragua v United States case*.