Cour internationale
de Justice

LA HAYE

International Court
of Justice

THE HAGUE

ANNEE 1995

Audience publique

tenue le lundi 6 février 1995, à 10 heures, au Palais de la Paix,

sous la présidence de M. Bedjaoui, Président

en l'affaire relative au Timor oriental

(Portugal c. Australie)

COMPTE RENDU

YEAR 1995

Public sitting

held on Monday 6 February 1995, at 10 a.m., at the Peace Palace,

President Bedjaoui presiding

in the case concerning East Timor

(Portugal v. Australia)

VERBATIM RECORD

Présents : M. Bedjaoui, Président
M. Schwebel, Vice-Président
M. Oda
Sir Robert Jennings
MM. Guillaume
Shahabuddeen
Aguilar Mawdsley
Weeramantry
Ranjeva
Herczegh
Shi
Fleischhauer
Koroma
Vereshchetin, juges

Sir Ninian Stephen
M. Skubiszewski, juges *ad hoc*

M. Valencia-Ospina, Greffier

Present:	President	Bedjaoui
	Vice-President	Schwebel
	Judges	Oda
		Sir Robert Jennings
		Guillaume
		Shahabuddeen
		Aguilar Mawdsley
		Weeramantry
		Ranjeva
		Herczegh
		Shi
		Fleischhauer
		Koroma
		Vereshchetin
	Judges *ad hoc*	Sir Ninian Stephen
		Skubiszewski
	Registrar	Valencia-Ospina

Le Gouvernement de la République portugaise est représenté par :

S. Exc. M. António Cascais, ambassadeur de la République portugaise auprès du Gouvernement de S. M. la Reine des Pays-Bas,

comme agent;

M. José Manuel Servulo Correia, professeur à la faculté de droit de l'Université de Lisbonne et avocat au barreau du Portugal,

M. Miguel Galvão Teles, avocat au barreau du Portugal,

comme coagents, conseils et avocats;

M. Pierre-Marie Dupuy, professeur à l'Université Panthéon-Assas (Paris II) et directeur de l'Institut des hautes études internationales de Paris,

Mme Rosalyn Higgins, Q.C., professeur de droit international à l'Université de Londres,

comme conseils et avocats;

M. Rui Quartin Santos, ministre plénipotentiaire, ministère des affaires étrangères,

M. Francisco Ribeiro Telles, premier secrétaire d'ambassade, ministère des affaires étrangères,

comme conseillers;

M. Richard Meese, avocat, associé du cabinet Frere Cholmeley, Paris,

M. Paulo Canelas de Castro, assistant à la faculté de droit de l'Université de Coimbra,

Mme Luisa Duarte, assistante à la faculté de droit de l'Université de Lisbonne,

M. Paulo Otero, assistant à la faculté de droit de l'Université de Lisbonne,

M. Iain Scobbie, *Lecturer in Law* à la faculté de droit de l'Université de Dundee, Ecosse,

Mlle Sasha Stepan, Squire, Sanders & Dempsey, *Counsellors at Law*, Prague,

comme conseils;

M. Fernando Figueirinhas, premier secrétaire de l'ambassade de la République portugaise à La Haye,

comme secrétaire.

The Government of the Portuguese Republic is represented by:

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Mr. Miguel Galvão Teles, Member of the Portuguese Bar,

as Co-Agents, Counsel and Advocates;

Mr. Pierre-Marie Dupuy, Professor at the University of Paris II (Panthéon-Assas) and Director of the *Institut des hautes études internationales* of Paris,

Mrs. Rosalyn Higgins, Q.C., Professor of International Law at the University of London,

as Counsel and Advocates;

Mr. Rui Quartin Santos, Minister Plenipotentiary, Ministry of Foreign Affairs,

Mr. Francisco Ribeiro Telles, First Embassy Secretary, Ministry of Foreign Affairs,

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Mrs. Luisa Duarte, Assistant in the Faculty of Law of the University of Lisbon,

Mr. Paulo Otero, Assistant in the Faculty of Law of the University of Lisbon,

Mr. Iain Scobbie, Lecturer in Law in the Faculty of Law of the University of Dundee, Scotland,

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as Counsel;

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as Secretary.

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M. Henry Burmester, conseiller principal en droit international, bureau du droit international, services de l'*Attorney-General* d'Australie,

comme coagents et conseils;

M. Derek W. Bowett, Q.C., professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge,

M. James Crawford, titulaire de la chaire Whewell de droit international à l'Université de Cambridge,

M. Alain Pellet, professeur de droit international à l'Université de Paris X-Nanterre et à l'Institut d'études politiques de Paris,

M. Christopher Staker, conseiller auprès du *Solicitor-General* d'Australie,

comme conseils;

M. Christopher Lamb, conseiller juridique au département des affaires étrangères et du commerce extérieur d'Australie,

Mme Cate Steains, deuxième secrétaire à l'ambassade d'Australie aux Pays-Bas,

M. Jean-Marc Thouvenin, maître de conférences à l'Université du Maine et à l'Institut d'études politiques de Paris,

comme conseillers.

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Mr. Derek W. Bowett, Q.C., Whewell Professor emeritus, University of Cambridge,

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Alain Pellet, Professor of International Law, University of Paris X-Nanterre and Institute of Political Studies, Paris,

Mr. Christopher Staker, Counsel assisting the Solicitor-General of Australia,

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Mr. Christopher Lamb, Legal Adviser, Australian Department of Foreign Affairs and Trade,

Ms. Cate Steains, Second Secretary, Australian Embassy in the Netherlands

Mr. Jean-Marc Thouvenin, Head Lecturer, University of Maine and Institute of Political Studies, Paris,

as Advisers.

The PRESIDENT: Please be seated. Within the framework of this first round of oral pleadings in the case concerning *East Timor (Portugal* v. *Australia)*, the Court will devote the whole of this week to hearing the oral arguments of Australia, the Respondent State. I now call upon the Agent of Australia, Mr. Griffith to the bar.

Mr. GRIFFITH: Monsieur le Président, Messieurs les Juges,

This is the third case before the Court to which Australia has been a party. It is the second in which I have had the honour to represent Australia as agent. We have real reason to say that it is always an honour to appear before this Court. We are sad that we appear to plead without the wise counsel today of the former President, and our friend, Eduardo Jiménez de Aréchega, who participated in the preparation of Australia's written pleadings.

Mr President, Members of the Court, Australia is committed to this Court as a means for the peaceful settlement of international disputes. This commitment is manifested in Australia's long-standing acceptance, without reservation, of the Court's jurisdiction under the optional clause. But Mr. President, Australia must protest its international good citizenship being taken advantage of by Portugal. Australia has maintained throughout its pleadings, and today it repeats its position, that Portugal is bringing the wrong case against the wrong party. And it is doing so for the wrong reasons.

Our position is that there simply is no real dispute capable of resolution by this Court.

Portugal casts itself in the role of the champion of the people of East Timor, and of non-self-governing peoples generally. The good guy. It seeks to depict Australia as the avaricious exploiter of a defenceless people, taking advantage of a situation to plunder East Timor's natural resources. Professor Dupuy's bad guy. Portugal also conveys the impression that judgment for Australia in these proceedings would be a judgment against the people of East Timor. A judgment for Portugal is represented as a vindication of the rights of the people of East Timor. But, Mr. President, such a portrayal is a perversion, not only of the facts but also of the legal issues in this case.

Let us be clear about one thing: contrary to what Portugal asserts, this case is not about

whether the people of East Timor have the right to self-determination. They do. Portugal says they do. Australia says they do. There is no dispute on this matter.

And, in repeating Australia's position, on this issue of self-determination for the people of East Timor, Australia must remind Portugal that it has the longer, the better principled and the more consistent record of support than does Portugal. Australia's support of this right of the people of East Timor commenced long before Portugal's colonial recantations of 1974. Notwithstanding the emotional shroud which Portugal, by its presentation to the Court, seeks to attach to its case, the Court deals with this matter on the basis that it is common ground between the parties that the people of East Timor have the right to self-determination.

Thus the lengthy arguments in Portugal's written pleadings and oral proceedings, that the people of East Timor have this right, deal with matter not in dispute. Portugal pushes against an open door, which it does not want to admit is open.

In an effort to keep the issue of self-determination "in play" in these proceedings, Portugal seeks to construct a denial of the Australian position of continuing support. Portugal says that Australia is now modifying its position that it previously took. This is not so. We say again: Australia recognizes that the people of East Timor have the right to self-determination. It is true that Australia also has recognized that Indonesia exercises *de jure* sovereignty over the territory. But there is nothing inconsistent between the fact of this recognition, and the continuation of Australia's recognition of the right to self-determination of the people of East Timor.

In most colonial situations you will find *both* the recognition of the colonial power as the *de jure* sovereign, *and* the recognition of the right to self-determination of the people of the territory. Immediately prior to its unilateral declaration of the independent Democratic Republic of East Timor, even FRETILIN itself "continued to recognize Portuguese sovereignty over the Territory" (PM, Ann. II.24, Vol. II, p. 159, para. 112, and p. 160, para. 117 (Vol. II, p. 141, para. 112 and p. 142, para. 117 of the English version)). The two kinds of recognition are perfectly compatible. Indeed, they usually co-exist.

Prior to 1974, Portugal's constitution claimed East Timor as a province of Portugal. Today,

Indonesia claims it as a province of Indonesia. But the description of the territory under the domestic law of a State exercising sovereignty over that territory is irrelevant to its position and entitlement to self-determination under international law. Australia's present recognition of Indonesian sovereignty is no more inconsistent with this right to self-determination of East Timor than Australia's earlier recognition of Portugal's sovereignty over East Timor. Australia can, and does, both recognize that East Timor is a province of Indonesia *and* that the people of East Timor continue to enjoy the *same* right to self-determination which they enjoyed when under the colonial administration of Portugal. The right continues, although its enjoyment continues to be postponed.

Mr. President, Members of the Court, if this case is not about whether the people of East Timor have the right to self-determination, what is it about? Australia looks for the answer in the Portuguese submissions. It is, of course, the submissions of the parties which fix the limits of the dispute.

In its written pleadings, the *only* conduct of Australia of which Portugal complains is the conduct referred to in Portuguese submissions 2 and 3, which appear in the last two pages of its Memorial (PM, pp. 205-206; PR, pp. 273-275). Portugal's *sole* complaint is that Australia has dealt with a State *other than Portugal* in respect of East Timor, and has excluded any negotiation *with Portugal*. In the oral proceedings, Professor Correia confirmed that the only actions which Portugal considered as wrongful related to the negotiation, conclusion and implementation of the Treaty with a State other than Portugal, namely Indonesia (CR 95/2, p.34).

Thus, this case is about the alleged rights of Portugal: the only question for decision is whether under international law Australia could conclude, and implement, the 1989 Treaty with Indonesia. Portugal says Australia should have dealt with Portugal *and only with Portugal*. Australia disputes this.

Mr. President, Members of the Court,

Effectively Portugal maintains that Indonesia, the State with which Australia has dealt, unlawfully exercises sovereign rights in the territory. Portugal says that Indonesia's presence in the territory is illegal, and that Portugal is the only legitimate authority. Indonesia disputes this. And this, Mr. President, is the dispute between Portugal and Indonesia that is the real subject-matter of the case. The Court necessarily would have to decide the merits of this dispute between Portugal and Indonesia before it could begin to address the question of Australia's position.

But if Indonesia is entitled to exercise of sovereign rights over the territory, Australia cannot be in breach of its international law by dealing with Indonesia. Thus, *unless and until* this Court holds and declares that Indonesia's presence in the territory is illegal, no question of any breach of international law by Australia can arise. But it is obvious to Portugal that the Court cannot determine the right of Indonesia to administer the territory in the absence of Indonesia. Indonesia is not a party to these proceedings, and has not consented to the Court determining this question.

The consequence is unavoidable: that the Court *must* lack jurisdiction to decide the Portuguese claims, or the claims *must* be inadmissible, on the ground that a decision by the Court would require a prior determination of the rights and responsibility of a third State, which is not a party to the proceedings. The *Monetary Gold* principle is directly applicable.

In its attempts to evade this necessary consequence, on behalf of Portugal Professor Dupuy said expressly that the Court is not asked to examine or to judge the legality of Indonesia's conduct in East Timor (CR 95/5, p.70). Mr. Teles said unequivocally that Portugal does not base its claim on any alleged violation by Australia not to recognize a factual situation created by the use of force (CR 95/5, p. 56).

What Portugal says, is that this issue of Portugal's status is a "given" matter to the Court, because on various occasions between 1975 and 1982 the General Assembly has designated or recognized Portugal as the Administering Power of East Timor. Thus, Portugal says, the Court may determine, as an abstract proposition, that *all* States are under a continuing obligation to deal solely with it in respect of the territory. Portugal says the fact of Australia dealing with any State other

than Portugal can be declared to be a violation of international law. As Portugal presents its claim, the conduct of that other State is immaterial. Indeed, on Portugal's view, there is no need to even consider with *which* other State Australia has dealt. All that is relevant is that Australia has dealt with some State, any State, other than Portugal, as the Administering Power of the territory.

But Mr. President and Members of the Court, if the conduct of Indonesia is irrelevant, as Portugal says it is, why does Portugal have so much to say about it? For instance, Volume III of Portugal's Reply contains over 90 pages of material relating to the massacre at Santa Cruz, and the reaction of the international community to this event (PR, Vol. III, pp. 245-338). In argument before the Court, Portugal has said that "indescribable scenes of massacre" followed the Indonesian intervention in East Timor and that Indonesia has "carried out ... a genocidal policy against the East Timorese people with total and systematic disregard of the most elementary human rights" (CR 95/2, pp. 28-29).

Mr. President, Australia has been consistently critical of Indonesia's conduct in East Timor. But why does Portugal refer to these distressing circumstances in these proceedings? Indonesia's conduct is relevant (as by their content Portugal's arguments strongly suggest) and this underscores Australia's contention that the real subject-matter of these proceedings is the continuing dispute between Portugal and Indonesia. But, we say, Australia cannot, and should not, be haled into this Court to answer for Indonesia's conduct. In the absence of Indonesia, the Court cannot pass judgment on it.

If, on the other hand, Indonesia's conduct is not relevant (and Portugal says it is not), why these constant references to it in the written pleadings and the oral submissions? Having "manufactured" a dispute against Australia, Portugal uses the opportunity to ventilate allegations against Indonesia which, it then submits, are of no relevance to the case it has formulated against Australia. The language used by the Agents and Co-Agents was emotive, and highly charged, and it was pointedly addressed to the press in the galleries. It was not relevant to the issues which Portugal itself says are before the Court.

Australia is thus no more than an opportune decoy. It is clear that these proceedings are

brought against Australia only because Australia *is*, and Indonesia *is not*, a party to the optional clause.

Portugal's appalling colonial history is known, and is glossed over rather than denied in these proceedings. Its colonial policy was characterized by the General Assembly as a crime against humanity (General Assembly resolution 2184 (XXI) of 12 December 1966, para. 3; resolution 2270 (XXII) of 17 November 1967, para. 4). Portugal now seeks to take on a new image, as the international champion of non-self-governing peoples. It frankly admits before the Court its hope that these proceedings will "enter the history of international jurisprudence" (CR 95/2, p. 50). Thus, Australia, merely because it has submitted to jurisdiction under the optional clause, becomes vehicle for Portugal's long journey to rehabilitate its tarnished image as a former colonial power.

In order to play convincingly the role of champion, Portugal must cast Australia in the role of villain. In its opening, Portugal gratuitously, by innuendo and misquotation, sought to impugn the reputation of Australia. In the opening statements by its Agents, Portugal went so far as to suggest that Australia knew of, and approved in advance of, Indonesian plans to occupy East Timor, with a view to obtaining access to the petroleum resources in the Timor Gap (CR 95/2, pp. 26-30).

Mr. President, Members of the Court, this allegation, so made, is dishonourable. It is wholly untrue. And, it is an allegation wholly irrelevant to Portugal's case. Portugal has made it clear, time and time again, that its claim is based solely on Australia's dealings with Indonesia since 1978. Its insinuations concerning Australia's conduct in 1974-1975 are both unfounded and untrue, and, also, as Portugal admitted, irrelevant to its case. They were intentionally made as statements of mere prejudice, and for the sole objective of tarnishing the image of Australia.

Counsel of Portugal has quoted from a book by a Timorese leader, which states that he sees no reason why the Timorese people should have to pay for Portugal's crimes (CR 95/3, p. 51). This is, of course, true. But, in taking this case to the Court, Portugal is trying to make Australia pay both for Portugal's own crimes, and for Indonesia's behaviour.

In this process, Portugal seeks to sweep its own colonial record under the carpet. Indeed, it puts itself on a completely new carpet, swept clear of its history. Everything it did (or did not do)

prior to 1974 it says is now irrelevant (CR 95/2, pp. 14-15). But it is not irrelevant. The events in East Timor in 1975 were the result of conditions prevailing in the territory at the time. These were the responsibility of Portugal.

Far from ceasing in 1974, as Portugal pretends (CR 95/2, p. 24), this history of neglect culminated in 1975 when Portugal determined to withdraw from the territory. It was Portugal's withdrawal that was the immediate cause of the conflict. When the FRETILIN counter-coup occurred, most of the local military took sides. This led Portugal to withdraw unilaterally from the mainland. By then Portugal had only two platoons of its own troops (CR 95/3, p. 57). And, in December, it refused to re-engage, despite FRETILIN's requests. It withdrew from Atauro on the first opportunity. Portugal did nothing to restore order. It abdicated its responsibilities entirely. All its "courage" and "determination" came later. All too late.

Mr. President, Members of the Court, the conclusion by Australia of the 1989 Treaty with Indonesia had nothing to do with a desire to gain access to the natural resources of East Timor. Australia's purpose was to exploit Australia's *own* natural resources. The *whole* of the area to which this Treaty relates is an area over which Australia had claimed sovereign rights years before the events of December 1975. And Australia continues to claim sovereign rights over the entire area. Australia's claims were, and are, disputed by Indonesia. A practical solution to this conflict of claims was necessary before Australia could explore and exploit what, we repeat, it continues to claim as its *own* natural resources in the area. Like all peoples, Australians have an inherent right to the exploitation of their off-shore natural resources. The central element in this case is the right of Australia, as a coastal State, to exercise its maritime rights by negotiating a settlement to a dispute with the State in natural control of the opposing coastal territory. In the absence of any authoritative United Nations resolutions to the contrary, a coastal State like Australia is *not* required to refrain from asserting and exercising its own claims and interests in its offshore maritime zones, until a self-determination dispute concerning the opposing coastal State has been settled.

Of course, the 1989 Treaty with Indonesia is not a maritime delimitation treaty. It does not affect the sovereign rights claimed in the Zone of Co-operation by each contracting State (Art. 2,

para. 3, of the Treaty). The Treaty does not bind Portugal. It is merely a treaty between Indonesia and Australia which resolves, on an interim basis, a dispute between States presently exercising sovereign rights over adjacent territory.

Negotiation with Indonesia implied recognition by Australia of this existing fact of the exercise of Indonesian sovereign rights over East Timor. But this is a fact. As I have said, Australian recognition of this is not inconsistent with the right of the people of East Timor to self-determination.

Portugal says that no other State has gone as far as Australia has in recognizing *de jure* Indonesian sovereignty over East Timor. This is untrue. Australia's Counter-Memorial points to numerous (indeed many) other States which have recognized Indonesian sovereignty over East Timor (ACM, pp. 78-86). In particular, States of the region, (such as Malaysia, Papua New Guinea, the Philippines and Singapore) have gone further, indeed much further, than Australia, and have recognized also that an act of self-determination has already taken place in East Timor, as a result of which that people chose integration with Indonesia.

Australia does not doubt that Portugal may have a genuine concern for the welfare of the people of East Timor. Australia shares that concern, and has been active in the assistance that it has given the people of East Timor. But this issue of self-determination is primarily one for the political organs of the United Nations. There is no United Nations resolution requiring, or even calling upon, States to refrain from any dealings with Indonesia in respect of the territory. The facts are that as much as other States have recognized the incorporation of East Timor by Indonesia, they also have entered into treaties with Indonesia, applying to the territory of East Timor.

The United Nations has never criticized Australia or any other State for recognizing Indonesian sovereignty over East Timor, or for dealing with Indonesia in respect of that territory. In particular, no United Nations organ has ever criticized Australia in respect of the 1989 Treaty with Indonesia. And no United Nations organ, or any other State other than Portugal, has ever suggested that, under international law, all States are required to deal solely with Portugal in respect of East Timor.

In 1982, in the last of the resolutions it adopted on the question of East Timor, the General Assembly requested the Secretary-General to invite consultations with "all parties directly concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem" (resolution 37/30 of 23 November 1982, operative para. 1). The resolution the previous year had identified the "interested parties" as Portugal, the representatives of the East Timorese people, and Indonesia (resolution 36/50 of 24 November 1981, operative para. 3). Clearly Portugal is not recognized by the United Nations as the sole legitimate authority in East Timor. It is merely one of several parties directly concerned.

Pursuant to the General Assembly's request, consultations involving Indonesia and Portugal have been held under the auspices of the Secretary-General, and are still continuing. The Secretary-General held a fifth round of meetings in Geneva with the Foreign Ministers of Portugal and Indonesia on 9 January 1995. A statement following the meeting is before the Court as document 3 in our folder provided to the Court this morning. It notes that the two Ministers "agreed to consider at the next round of talks substantive issues identified by the Secretary-General regarding possible avenues towards achieving a just, comprehensive and internally acceptable solution to the question of East Timor" (p. 2, para. 6). It notes also "the need for continued restraint by both parties in the interest of maintaining a favourable atmosphere for further progress towards a comprehensive solution to the question of East Timor" (p. 3, para. 8). Thus, the United Nations itself recognizes that achievement of self-determination in East Timor requires a prior resolution of a difference between Portugal and Indonesia.

Portugal now seeks unilaterally to remove the issue of East Timor into the new forum of this Court. It does so notwithstanding its own recognition of "the need for continued restraint ... in the interest of maintaining a favourable atmosphere for further progress" in the ongoing consultations with the Secretary-General, to which I have just referred. If Portugal wants to pursue this matter, the place to do it through the appropriate political organs of the United Nations and in the framework of the Secretary-General's negotiations. Australia hopes that the situation in East Timor will be satisfactorily resolved through an act of self-determination by the people of East Timor. But the

Court cannot produce that result, nor resolve the question of East Timor in these proceedings.

Here there is simply no bilateral legal dispute between Portugal and Australia capable of resolution by the Court. No decision by the Court on the merits of this case will lead to any practical resolution of the solution in East Timor. There is only a negative side, for a decision by the Court certainly has the potential to affect adversely relations between Australia and Indonesia and the help Australia can offer to the people of East Timor; to affect adversely the continuing efforts of the Secretary-General; and to affect adversely the exploitation by Australia of its own natural resources.

In this case Australia did not raise preliminary objections for separate and prior determination. The same factual material was relevant both to the jurisdiction and admissibility arguments, and to the arguments on the merits. Many of the arguments are interrelated. It is possible to respond to each of the various propositions put by Portugal at the level of admissibility *and* at the level of merits, as is demonstrated in Australia's Rejoinder (ARej., paras. 9 to 31).

If the Court finds that it has no jurisdiction, or that the Portuguese claim is inadmissible, the Court cannot of course determine the merits even though these have been argued by the Parties. Consistently with the nature and limits of international adjudication, the Court can only determine issues of merits if it first determines that the Application by Portugal is admissible *and* that the Court has jurisdiction in relation to it.

But if, contrary to what Australia argues, the Court does decide the merits of the case, Australia submits that the Portuguese argument is untenable. The question then is whether, as a consequence of Chapter XI of the Charter, all States must deal solely with Portugal in respect of the territory of East Timor. Portugal asserts, in effect, that Chapter XI has the result of entrenching a colonial State's existing rights and powers in respect of a territory, irrespective of subsequent political developments. But Chapter XI is concerned with the rights of non-self-governing peoples, and not the rights of States administering them. It is intended to bring about an early termination of all colonial régimes. It is not concerned with ensuring the protection of a former colonial State's rights in respect of a territory, let alone their survival long after that State has ceased to exercise any

control over the territory.

As has been said, the abstract question put by Portugal is whether all States are required to deal *solely* with Portugal, so that it is a breach of international law to deal with *any* other State. The Court is not asked to consider with *which* other State Australia has dealt, let alone whether the conduct of that other, unnamed, State is illegal.

Portugal says that an obligation to deal solely with it arises from its objective legal status as "administering Power" of the territory. Australia denies that there is any such objective legal status under international law having the legal effects contended for by Portugal. And in the absence of any particular status which would carry the attributes Portugal alleges, Portugal simply has no case which the Court can decide against Australia. Our case is that Australia cannot, and is not, required to deal *exclusively* with Portugal, a State which has been totally absent from the territory for almost 20 years. And, beyond this, the Court is not asked to determine, and cannot determine, with which State Australia *may* deal.

Mr. President, Australia's arguments have been elaborated in its written pleadings. Counsel for Australia will now proceed to deal with the matters put in Portugal's oral pleading. We will proceed as follows:

First, Ambassador Tate will deal with Australia's policy towards East Timor and refer to the making of the Treaty.

I will then address certain key issues relevant to the case and their egal significance.

Professor Crawford and Professor Pellet will then deal with Australia's argument that the Court cannot proceed to hear and determine this case in the absence of a necessary third party, Indonesia.

Mr. Burmester will then argue that Portugal lacks the requisite standing to bring these proceedings against Australia.

Professor Crawford and Mr. Burmester will then deal with the issue of self-determination, and will show that nothing in the Treaty denies this right, that the implementation of self-determination in the present circumstances is a matter for the political organs of the United Nations, and that, in the

absence of a contrary direction by the United Nations, Australia is entitled to deal with the State in effective control of the territory.

Professor Bowett will then present Australia's arguments on the legal effect of the United Nations resolutions on the question of East Timor. He will show that no United Nations resolution imposes a binding obligation on Australia not to deal with Indonesia in respect of East Timor.

Dr. Staker will then argue that in international law there is no special juridical status of "administering Power" which would require Australia to deal solely with Portugal in respect of East Timor.

Professor Pellet and Professor Bowett will then present argument on Australia's right to negotiate for the protection of its own maritime resources, and show that, in so doing, it has not infringed any right belonging to other "interested parties".

Finally, I will argue that the Court should not decide the merits of the case for reasons of judicial propriety and I will also make related submissions on the question of remedies.

Mr. President, in our speeches, the members of the Australian delegation will not give precise references. With your permission, these will be provided to the Registry for inclusion in the verbatim record, and we give anticipatory thanks for that.

Mr. President, I ask you to call upon Ambassador Tate to address the Court, if the Court pleases.

The PRESIDENT: Thank you very much Mr. Griffith. I give the floor to Ambassador Tate.

Mr. TATE: Mr. President, distinguished Members of the Court, I regard it as a great honour to appear before this Court. I intend to deal with some important features of Australia's policy towards East Timor.

Firstly, I turn to the issue of self-determination.

Early in the Portuguese presentation, there was an attempt to poison the mind of the Court so that it would devalue what is incontestable - namely the Australian Government's support during

1974 and 1975 for the right of self-determination belonging to the East Timorese people. Portugal set out to characterize Australia's statements of support as a sham for public consumption, bearing no relation to the real policy of the Government (CR 95/2, p. 26).

So, by means of a misleadingly truncated quotation from a passage in the book *A Frightened Country*, by Mr. Alan Renouf, Portugal sought to leave the Court with the clear impression that, in private conversation with President Suharto in Jogjakarta on the 6 September 1974, the then Prime Minister of Australia, Mr. Gough Whitlam, had abandoned support for the principle of self-determination in the unfolding of the future of East Timor.

Nothing could be further from the truth, as is illustrated by passage after passage following the paragraph from which Portugal so selectively and misleadingly quoted (CR 95/2, p. 26). Members of the Court will find the full text (pp. 439-449) in the Judges' folder. Renouf writes that Whitlam insisted that "the Timorese should ultimately decide their own future". Renouf himself records that the policy which resulted from the Whitlam/Suharto conversation "thus came to be that Australia's primary concern was self-determination" (Renouf, *op. cit.*, pp. 443-444).

Mr. President, Members of the Court, there was no secret approval of integration into Indonesia without the genuine approval of the East Timorese people. There was no secret understanding that Australia would ever condone the use of force to bring about such integration. Indeed, Renouf makes this crystal clear in the pages from which Portugal so selectively drew. In fact those pages record Australia's warning against the use of force as a constant theme of conversations with Indonesia at ministerial and departmental levels.

Renouf records that in the second round of Whitlam/Suharto discussions held in Townsville on 3 to 5 April 1975:

> "Whitlam obtained an assurance that Indonesia would not use force in East Timor. He stressed that there should be no departure from an internationally acceptable act of self-determination, although he continued to believe that the best result of the plebiscite would be incorporation into Indonesia. In the *communiqué*, it was stated that the Timorese had the right to determine their own future." (Renouf, *op. cit.*, p. 445.)

There is not a trace of dishonourable or hypocritical conduct by the Australian Prime Minister. Nothing justifies Portugal's outrageous claim where it speaks of "the barely concealed countenancing

of an Indonesian armed invasion" (CR 95/2, p. 30).

It is true that the question of Australia's contributing to a military force in East Timor was raised. Australia was invited by an interested party to participate in a multi-national force of troops to quell the civil war breaking out in East Timor. The interested party was Portugal (PR, p. 53, para. 3.71). According to Renouf, the Australian Government opposed Portugal's proposal because this would make Australia appear colonialist, which she was not (Renouf, *op. cit.*, pp. 445-446).

Mr. President, Mr. Whitlam's Government was elected on a platform of withdrawal of Australian troops from a civil war on the ground of South-East Asia. One Vietnam experience was enough for my generation. Australia rightly refused the Portuguese request to send its young soldiers into the tragic fratricidal conflict which had broken out in East Timor. Incredibly, last Monday, some 20 years later, Portugal still complained to this Court about Australia's refusal (CR 95/2, p. 27).

So, Mr. President, Members of the Court, Australia neither condoned the use of force by Indonesia, whether in advance of the event or subsequently, nor did it respond positively to the Portuguese invitation to be part of an armed force in East Timor.

Therefore, you could imagine how insulting it was to hear the charges against Australia of "the barely concealed countenancing of an Indonesian armed invasion" (CR 95/2, p. 30) and of aiding and abetting what was described as a "genocidal policy" in East Timor (CR 95/2, p. 28) - charges which I have demonstrated to be totally without foundation. The second charge is particularly extraordinary coming from a State which is yet to become a Party to the Genocide Convention. If Portugal's allegations were true, why did it not complain at the time? Why did it not commence proceedings 19 years ago? The allegations have nothing to do with the conclusion of a Treaty in 1989. They are free-standing. Portugal chooses to make them, having formulated an Application to which they are irrelevant.

Portugal comes before this Court, declaring that this should not be interpreted as a hostile act. Nevertheless it has engaged in an opening of venomous hostility wrongly directed against Australia and its distinguished former Prime Minister. It was designed to prejudice the Court's hearing of the

Australian declaration of support for the still existing right of the people of East Timor to self-determination. You should now know that, when you hear it, the Australian declaration is honourably spoken.

The Court can therefore have the fullest confidence as you read the Working Paper of the United Nations Secretariat on Timor of 22 May 1975 (A/AC.109/L.1015, PM, Ann. II.11, Vol. II, p. 61 (Vol. II, p. 57 of the English version)) which reads that:

> "The Australian Government has repeatedly stated that the right to self-determination of the people of Timor must be the decisive factor in the examination of the Territory's future."

The document notes also that on 23 October 1974, the then Prime Minister of Australia, Mr. Gough Whitlam, had said in Parliament that Australia did not seek any special position in that Territory and that the wishes of the Timorese would be decisive in determining their independence or their integration with Indonesia.

This attitude was reiterated in the wake of the December 1975 events. Speaking before the Security Council on 14 April 1976, the Australian representative said:

> "The Australian position on the Timor conflict has been clearly stated. It accords with the resolutions adopted in December by the General Assembly and the Security Council. We support the main thrust of both resolutions, notably their call for a withdrawal of outside forces and a process by which the people of East Timor can determine their own future.
>
> It remains the firm policy of the Australian Government that the people of the territory should exercise freely and effectively their right of self-determination." (PM, Ann. II.25, Vol. II, p. 234, paras. 36 and 38 (Vol. II, p. 214, paras. 36 and 38 of the English version)).

On that occasion the Australian delegate also emphasised the importance of the resumption of international humanitarian aid to the territory (*ibid*, p. 235, para. 41 (p. 215 of the English version)).

Further details of statements made by Australian Ministers or representatives both before and after the events of December 1975 are given in the Australian Counter-Memorial (paras. 57-71) and its Rejoinder (para. 41). It can be seen that in these statements, Australia expressed regret at the actions of Indonesia and maintained Australia's opposition to the manner of Indonesia's incorporation of East Timor.

Mr. President, if there was one matter properly highlighted by Portugal last Monday it concerned the meeting of the so-called Popular Assembly in Dili in May 1976 (CR 95/2, p. 71). Portugal properly emphasized that the United Nations declined the invitation from Indonesia to attend the meeting. I emphasize that Australia acted entirely in harmony with the United Nations in that regard. Indeed, it was precisely because the United Nations had not participated in or observed any so-called act of self determination that the Australian Foreign Minister stated to the Parliament:

> "But without that United Nations participation, this Government did not believe it could lend its presence to what took place as a further act in this tragic affair." (ACM, Ann. 19, p. A67.)

This is an early demonstration of Australia's assessment of, and support for, the role of the United Nations as being absolutely crucial.

Australia recognizes that the implementation of the right to self-determination of the people of East Timor is a matter pre-eminently for the responsible organs of the United Nations. Throughout the period that East Timor has been on the United Nations agenda, Australia has supported the Secretary-General in his efforts to find a solution to the situation. Australia has continued to encourage Portugal and Indonesia to consult one another, either directly or under the auspices of the Secretary-General, with a view to resolving that situation. Australia has been and remains ready to accept and act on any authoritative decision made by the competent organs of the United Nations in the matter, or on any internationally acceptable resolution of the issue arrived at by the "parties directly concerned", of which Australia is not one.

But to return to the aftermath of the meeting of the so-called Popular Assembly. Following the Indonesian announcement of integration in July 1976, the Australian Foreign Minister said that "the process of decolonization in East Timor should be based on a proper act of self-determination" and that "the present situation is that Indonesia has moved, without United Nations involvement, to integrate East Timor as its twenty-seventh province". He said that therefore "in the circumstances Australia cannot regard the broad requirements for a satisfactory process of decolonization as having been met" (ACM, Ann. 20, p. A68).

This position is recorded yet again in the United Nations Secretariat's Working Paper on

Timor later that year, which notes that "Australia has furthermore expressed its support for a genuine act of self-determination and the early resumption of international humanitarian aid to the Territory" (Committee of 24, "Timor", Working Paper prepared by the Secretariat, Addendum, 2 September 1976, A/AC.109/L.1098/Add. 1, PM, Ann. II.12, Vol. II, p. 86, para. 40 (Vol. II, p. 80, para. 40 of the English version)).

This humanitarian aid aspect is another theme of Australia's policy towards East Timor. While Australia did not endorse the vote of the Popular Assembly as a satisfactory exercise of the right of self-determination, it did seek to deal with Indonesia in relation to East Timor with a view to promoting the interests of the people of East Timor. This is the motive of practical concern to alleviate the human suffering of the East Timorese people.

The extent of Australia's humanitarian and other assistance to East Timor since 1975 is irrelevant to the legal issues which Portugal is asking the Court to decide. However, without trespassing too much on the patience of the Court, I am compelled by Portugal's portrayal of Australia as a greedy plunderer to make some remarks about this matter.

For instance, Australia entered into an agreement with Indonesia to enable several hundred East Timorese to join their families in Australia (PM, Ann. III.37, Vol. V, p. 244). It must be remembered that some 2,500 Timorese were evacuated to Australia after the Indonesia intervention of 1975. This was the beginning of a very sizeable community of East Timorese in Australia. And in October 1976, Australia announced that it would make available A$250,000 for humanitarian relief through the Indonesian Red Cross. This was in addition to an earlier contribution.

Australia has continuously supported the involvement of Red Cross relief missions. It has contributed A$2.66 million since 1983 to the International Committee of the Red Cross (ICRC) for its activities in East Timor. The Australian Government assisted a United Nations Childrens' Fund (UNICEF) project in East Timor from its inception in 1982 until 1989. The total contribution to that project was A$3.9 million (see PM, Ann. IV.12, Vol. V, p. 334 for details as in 1990).

Australia has also made major development aid contributions of its own towards the people of East Timor. Australian development assistance in Indonesia is heavily targeted to East Timor. The

Australian International Development Assistance Bureau, in consultation with the Indonesian National Development Planning Board, has developed a programme which will provide A$30 million of development assistance to East Timor in the next five years. The projects in this programme are designed to be of direct benefit to the people of East Timor. The two largest projects under the programme are a project to improve water supply and sanitation amenities for the poor and socially disadvantaged in East Timor, worth A$12 million, and an agricultural and rural development project worth A$10.5 million. Not one of these projects would be possible without Indonesian co-operation.

Much of this assistance was necessary to improve the shocking conditions in which Portugal left the unfortunate people of East Timor. Portugal, I observe, has given prominence in its argument to its participation in various diplomatic initiatives, but has not said whether it has given any direct and practical assistance to the people in East Timor since it abandoned them in 1975. Perhaps next week the Agent of Portugal could inform the Court of any financial assistance it has provided for humanitarian relief and development projects for the people of East Timor in East Timor since 1975.

It is in the context of this outline of the provision of humanitarian and development aid over two decades that the Court can now appreciate the *bona fides* of the statement by the Australian Minister for Foreign Affairs on 20 January 1978. In this statement, he noted that in order to pursue "the future progress of family reunion and the rehabilitation of East Timor, Australia will need to continue to deal directly with the Indonesian Government as the authority in effective control. He then said:

> "This is a reality with which we must come to terms. Accordingly, the Government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize *de facto* that East Timor is part of Indonesia." (ACM, Ann. 21, p. A69.)

In December of that year, the Australian Foreign Minister announced that the start of negotiations between Australia and Indonesia on a Timor Gap treaty would imply *de jure* recognition of the Indonesian incorporation of East Timor. He repeated, yet again, that Australia's entry into these negotiations did not "alter the opposition which the Government has consistently expressed

regarding the manner of incorporation", but that Australia had to "face the realities" (PM, Ann. III.37, Vol. V, p. 244).

This recognition of realities did not entail any modification of Australia's position on self-determination. Speaking before the General Assembly on 4 October 1983, a full four years later, the Australian Foreign Minister repeated what he had said in Jakarta earlier in that year saying:

> "I noted on behalf of the Australian Government that Indonesia had incorporated East Timor, and at the same time I expressed our concern that an internationally supervised and accepted act of self-determination had not taken place".

He expressed his hope that Indonesia and Portugal would be able "to reach a lasting settlement of this question, a settlement which will take into account the best interests of the people of East Timor" (PM, Ann. III. 44, Vol. V, p. 269, para. 194 (Vol. V, p. 27, para. 194 of the English version)).

Portugal argued from what it says is the necessary meaning to be drawn from that statement (CR 95/2, pp. 70, 71). But theoretical inferences dissolve before the Australian Foreign Minister's emphatic expression of "concern that an internationally supervised and accepted act of self-determination had not taken place". This is not a mere report of a fact. It is an expression of concern that that which should have been done was not done. Australia maintains both its recognition and its expression of concern; from which the proper inference to draw is that the people of East Timor have a still existing right to self-determination. Hence, Australia's plain statements to that effect.

Mr. President, Members of the Court, Australia has adopted a properly critical role concerning violations of human rights in East Timor. Indeed, Portugal will be aware that after the signing of the Timor Gap Treaty in December 1989, Australia stated on 18 January 1990 in a note to Portugal that "Australia's recognition of the incorporation of East Timor into Indonesia in no way condones the use of force by Indonesia. Australia's active support for the rights of the people of East Timor is well documented." (PM, Ann. III.26, Vol. V, p. 216.)

On a number of occasions, Australia has conveyed its strong concern to Indonesia when those rights have been violated. For instance, paragraph 43 of Australia's Rejoinder gives details of the

reaction by Australia to the massacre in Dili in 1991. Australia strongly condemned the incident and called on the Indonesian Government to ensure proper steps were taken to discipline those responsible.

In response to those events, the Australian Prime Minister said in the Parliament on 27 November 1991 that Australia would "urge the Indonesian Government to respond positively to this tragedy which has occurred". He added that

> "The Indonesian Government, in our view has to seek a resolution of that continuing conflict [in East Timor] and understand that the military solution is no solution ... [T]he Indonesian Government must make renewed efforts not to meet just in some formal tokenistic way but to sit down and talk with the people of East Timor, including the people from the resistance."

The full text is set out in Annex 1 to Australia's Rejoinder. Other responses by Australia to events in East Timor are set out in Annexes 2 and 3 of the Australian Rejoinder.

As a State in the region, and one which is geographically proximate to East Timor, Australia is interested in encouraging reconciliation between Indonesia and the people of East Timor. In particular, it has sought to encourage the Indonesian Government to take steps which would assist in this process of reconciliation. The Australian Government has identified an urgent necessity for the Indonesian Government to lower the profile and size of its armed forces in East Timor, to allow a greater degree of political autonomy in East Timor, and to take a range of other actions which would more appropriately respect the different religious and cultural sensitivities of the East Timorese people.

Mr. President, Members of the Court,

I turn finally to a brief consideration of the situation with respect to the making of the Timor Gap Treaty.

Australia's motivation in entering into the 1989 Treaty with Indonesia was to enable Australia to exercise what Australia considered to be its *own* sovereign rights in the area. The *whole* of the area to which the Timor Gap Treaty relates is an area over which Australia claims sovereign rights under international law, and over which Australia has claimed sovereign rights since well before the events of 1975.

Prior to the events of 1975, this position was made clear to Portugal in two diplomatic notes from the Australian Government in 1971 and 1974 respectively (PM, Ann. IV.6, Vol. V, pp. 287-288; Ann. IV.11, Vol. V, pp. 327-331). When in 1974 Australia sought to negotiate with Portugal, Portugal responded that it preferred to await the results of the Law of the Sea Conference, scheduled to take place later that year (PM, Ann. IV.10, Vol. V, p. 326).

Australia's position was maintained in negotiations with Indonesia from 1979, and Australia continues to maintain that position today (PM, Ann. IV.12, Vol. V, p. 333). Australia was prevented from enjoying these rights because they were disputed by Indonesia. Because Indonesia was effectively acting as the opposite coastal State, Australia had to reach agreement with Indonesia so as to enable Australia to enjoy its own rights.

Australia does not in any way deny that prior to 1975, Portugal disputed Australia's claims, and that subsequently Indonesia has and still does dispute those claims. That is precisely the point. Australia had to negotiate with whichever State was effectively acting as the coastal State.

By late 1978, Australia had to negotiate with Indonesia if any kind of effective agreement were to be implemented. Portugal was not in a position to give effect to such an agreement. But more importantly, Portugal was not in a position to resolve Australia's dispute with Indonesia. Even if Australia had concluded a futile agreement with Portugal in 1989, Indonesia would still have made conflicting claims to rights in the area. Because Indonesia was effectively acting as the opposite coastal State that dispute could not be ignored.

In short, a dispute between Australia and Indonesia existed in fact, and this real dispute could only be resolved by negotiations between Australia and Indonesia. The Preamble to the Treaty properly notes the commitment of the parties to "their policies of promoting constructive neighbourly cooperation" (Application Instituting Proceedings, Annexes, p. 25). When Australia is in dispute with the State effectively acting as the opposite coastal State, surely such co-operation, here expressed in Treaty form, is highly desirable.

As has been said by the Agent, the Treaty is not a maritime delimitation agreement which establishes permanent maritime boundaries. Therefore, as he said, it does not bind Portugal, and,

Mr. President and Members of the Court, it would not be binding on a future independent East Timor should that be the result of a genuine exercise of their still existing right of self-determination.

Mr. President, Members of the Court

I would now invite the Court to call upon Dr. Griffith to address on particular features salient to these proceedings.

The PRESIDENT: Thank you very much Mr. Ambassador. I give the floor to Mr. Griffith.

Mr. GRIFFITH:

Key Elements of the Dispute and their Legal Significance

Mr. President, Members of the Court

I turn now to address the legal significance of some key elements concerning the conduct of Portugal and the United Nations treatment of Portugal, both before and after December 1975.

It is the case that following its admission to the United Nations in 1955, and in defiance of clear findings by the United Nations, Portugal consistently denied that the territories it administered were Chapter XI non-self-governing territories. It denied that those territories, or their people had any right to self-determination. Portugal was consistently condemned by the United Nations, in resolutions the terms of which were increasingly severe. Portugal admits a 1951 constitutional revision, which had the effect of deeming these territories to be "overseas-provinces", was "an attempt ... by constitutional means to impose upon the colonized peoples a denial of their right to self-determination" (PM, p. 5, para. 1.07).

Portugal now seeks to present the "Carnation Revolution", and Portugal's consequent change of colonial policy, as a clean break with the past. It seeks to convey the impression that whatever may have happened prior to 1974, it was thereafter the model administering power, doing everything appropriate to bring about self-determination in East Timor until its administration of the territory was forcibly interrupted by Indonesia in December 1975. But, of course, the basic principle of the continuity of a State prevents it giving the facile answer that the "new Portugal" has nothing to do

with colonial Portugal. The Court heard Professor Higgins explain that responsibility does not disappear with the passage of time (CR 95/5, p. 9). Let Portugal remember that!

One thing is clear: the chaos and breakdown in administration between July 1974 and December 1975 was the direct result of Portugal's long neglect over four centuries.

Further, the United Nations response to events in East Timor must be seen in the context of the whole history of the United Nations involvement in the decolonization of territories under Portuguese administration. Portugal did not attract United Nations condemnation solely for its refusal to recognize that the overseas territories it administered were Chapter XI territories entitled to self-determination. Portugal also was consistently condemned for its *own* acts committed against the peoples of those territories.

In resolution 1699 (XVI) of 19 December 1961, the General Assembly noted "the continuing deterioration of the situation in the territories under Portuguese administration" (preambular para. 5). From 1962, the General Assembly began to adopt annual resolutions on "Territories under Portuguese administration". In the first of these resolutions in 1962, it expressed great concern "at the intensified measures of oppression being carried out by the Portuguese Government against the indigenous peoples of the Territories under its administration" (General Assembly resolution 1807, 14 December 1962, preambular para. 6), and noted with deep concern that the colonial policies of Portugal had "created a situation which constitutes a serious threat to international peace and security" (*ibid.*, preambular para. 9). In that resolution, the General Assembly went so far as to request the Secretary-General, in the event that Portugal failed to comply with General Assembly resolutions "to take all appropriate measures to secure the compliance of Portugal with its obligations as a member State".

Subsequent resolutions on territories under Portuguese administration contained further condemnations. Thus, in 1966 and 1967, the General Assembly condemned Portugal's policy for its

repression and neglect of its colonies and the colonial war it was waging was identified as a "crime against humanity" (General Assembly resolution 2184 (XXI), 12 December 1966, para. 3; resolution 2270 (XXII), 17 November 1967, para. 4).

We note also, that, from 1966, the texts of these resolutions referred to territories under Portuguese "domination", rather than under Portuguese "administration".

In every one of the resolutions adopted by the General Assembly, the Security Council was requested to consider taking measures in relation to these territories. And the Security Council in fact adopted five resolutions dealing with Portuguese territories (referred to in the ARej., pp. 180-181).

So, it was not a case of Portugal simply "reforming" itself in 1974 and deciding to recognize its obligations under Chapter XI of the Charter. The immediate cause of Portugal's change in colonial policy in 1974, was, as Portugal admits, the colonial war being waged in its African territories (PM, para. 1.10). The General Assembly resolution on "Territories under Portuguese domination" was adopted in December 1974, some months after this change in colonial policy. It welcomed Portugal's change in policy, but added that it was

> "*Cognizant* that the changes in the policy of Portugal towards its colonial territories were brought about mainly as a consequence of the heroic struggle and persistent resistance of the peoples of the Territories concerned, led by their national liberation movements, for the achievement of their independence and the restoration of their human rights" (General Assembly resolution 3294 (XXIX) of 13 December 1974, preambular para. 8; PM, Ann. II.8, Vol. II, pp.36-38).

Prior to 1974 the General Assembly had already recognized that the national liberation movements in its territories were "the authentic representatives of the true aspirations of the peoples of those Territories" (e.g., General Assembly resolution 3113 (XXVIII), 12 December 1973, operative para. 2). At the 28th session of the General Assembly in 1973, the General Assembly approved the credentials of the representatives of Portugal "on the clear understanding that they represent Portugal as it exists within its frontiers in Europe" and that they did not represent the Portuguese administered territories in Africa (General Assembly resolution 3181 (XXVIII), 17 December 1973).

Although the resolution referred specifically to the territories in Africa, the necessary consequence of the words "Portugal as it exists within its frontiers in Europe" was that the General Assembly also did not recognize Portugal as representing the people of East Timor. The fact is that, even after its change of policy in 1974, the United Nations never recognized the legitimacy of any claim by Portugal to represent internationally the territories under its administration. In December 1974, the General Assembly welcomed Portugal's change in colonial policy (General Assembly resolution 3113 (XXVIII) of 12 December 1973). But notwithstanding this change of policy, the title of the resolution itself was altered from "Territories under Portuguese administration" - the title used in all previous resolutions - to "Territories under Portuguese *domination*". Also, the 1974 resolution reaffirmed the General Assembly's

> "total support of, and constant solidarity with, the peoples of the Territories under Portuguese domination in their legitimate struggle to achieve without further delay freedom and independence under the leadership of their national liberation movements - which are the authentic representatives of the peoples concerned" (operative para. 6).

There is no suggestion in this 1974 resolution that the General Assembly was now looking forward to Portugal, as a model Administering Power, developing self-government and assisting the peoples of these territories in the progressive development of their free political institutions, as provided for in Article 73 *(b)* of the Charter. Portugal had signally failed in the past to fulfil its obligations under Chapter XI, and the past had not been forgotten. The General Assembly was now looking forward to the speediest possible end to the Portuguese colonial presence.

James Dunn, former Australian consul in Dili, to whom Portugal has frequently referred, writes that in the long period of Portuguese settlement in East Timor "their achievements were unimpressive, and they left the colony as one of the poorest and least-developed countries in the Third World" (ACM, p. 15, para. 28). Mr Ramos-Horta, one of the FRETILIN leaders, is quoted as saying "East Timor, under the Portuguese, seemed to sit still in history. The clock of development didn't tick there. For centuries the Portuguese neglected the East Timorese" (ACM, p. 15, para. 29).

Further details about the conditions prevailing in East Timor at the time of the Indonesian

intervention can be found in the annexes to the Portuguese pleadings. In February 1976, the Secretary-General's Special Representative reported:

> "Recent population estimates vary from 650,000 to 670,000. Less than 10 per cent of the population are reported as literate. Although many primary schools have been established in recent years, there is but one secondary school ... Fewer than 10 East Timorese hold university degrees." (United Nations doc. S/12011, 12 March 1976, para. 7; PM, Ann. II.10, Vol. II, p. 48f.)

Speaking before the Security Council on 15 December 1975, Mr. Ramos-Horta described the Portuguese presence in East Timor as "five centuries of cruel exploitation and oppression" (PM, Ann. II.24, Vol. II, p. 140, para. 99).

This is something which the General Assembly also did not forget. The first of the Security Council resolutions on East Timor, adopted in December 1975, expressed regret that "Portugal did not discharge fully its responsibilities as administering Power in the Territory under Chapter XI of the Charter".

There are a number of key events before December 1975. On 10 and 11 August 1975, the UDT attempted a coup in East Timor. This was defeated within a few days by a FRETILIN counter-coup strongly supported by Timorese troops, being the remnants of the Portuguese army. These troops made arms available to FRETILIN. Portugal made little response. On 22 August 1975, the Minister for Foreign Affairs of Portugal stated that armed conflict had spread so widely that the Portuguese authorities were no longer able to control the situation or even fully to assess it with the limited possibilities of communication (A/10208, Ann.).

After repeated requests by the Governor for direction from the Portuguese Government in Lisbon, the Portuguese administration was authorized to move from Dili. Far from being told to resume control of the situation as Portugal claims (PM, p. 10, para. 1.14), the Governor was directed to withdraw from the situation. The Governor and his administration moved to the offshore island of Atauro, 23 kilometres north of Dili, where they remained until December 1975. Thus, from August, Portugal ceased to exercise any effective power in the territory. Indonesian military action was completely irrelevant to this. While Portugal continued to undertake certain diplomatic efforts internationally in connection with the decolonization of East Timor (PM, paras. 1.29-1.30), from

August 1975 it was no longer in any practical sense the State administering the territory. As Portugal has told the Court (CR 95/3, p. 57) its military force was a mere two platoons: presumably less than 100 personnel.

By mid-September 1975, FRETILIN was reportedly in control of Timor. FRETILIN announced that it had dropped its demands for immediate independence in favour of the establishment of a provisional government in 1976 and independence a few years later. But subsequently, on 28 November, FRETILIN declared the independence of the territory and the establishment of the "Democratic Republic of East Timor".

The reasons that FRETILIN gave for declaring independence were the Indonesian threat in Timor and the fact that the anticipated talks between Portugal and the various parties had been delayed, a delay for which they held the Portuguese Government responsible (PM, Ann. II.10, Vol. II, p. 49, para. 16). Speaking before the Security Council on 15 December 1975, Mr Ramos-Horta, the representative of FRETILIN, said that the unilateral declaration of independence "was merely a formal act to legalize, in juridical and international terms, a *de facto* situation that had already existed for three months" (PM, Ann. II.24, Vol. II, p. 141, para. 112, also p. 142, para. 118).

Two days after the FRETILIN declaration of independence, APODETI, UDT, KOTA and the Partido Trabalhista proclaimed the independence of the Territory and its integration with Indonesia (Committee of 24, "Timor", Working Paper prepared by the Secretariat, 24 June 1976, A/AC.109/L. 1098, PM, Ann. II.12, Vol. II, pp. 71-72, paras. 16 and 19-20).

Thus, by 30 November 1975, not only did Portugal exercise no control over the territory in fact, but it was not recognized by any of the political groups in East Timor as having *any* right to exercise any powers of sovereignty over the Territory whatsoever. And, significantly, we say to the Court, the position then prevailing had nothing to do with Indonesia.

Portugal did not recognize this declaration of independence, but on the day of the declaration sent a letter to the Secretary-General of the United Nations admitting that "the Portuguese authorities do not have the means to assure normalization of the situation in Timor" (A/10402-S/11887, PM,

Ann. II.19, Vol. II, p. 96).

Mr. President, Members of the Court, in simple terms, in the troubles of 1975 Portugal abdicated its responsibilities. It is a fact that at the time of the Indonesian intervention Portugal was not administering East Timor. Effectively it had abandoned its administration. It muses in its Memorial (para. 1.14) that it is "one of History's mysteries" that the Indonesian intervention "should have taken place precisely when Portugal had managed to create the conditions which could enable it to resume control of the situation". What nonsense! Portugal even suggests that this loss of control of the territory was caused only by the Indonesian intervention (CR 95/3, p.57). Let us be clear, it was Portugal's loss of control of the territory which preceded Indonesia's actions. And it was the admitted breakdown of law and order in the territory, and Portugal's absence from it, which were invoked by Indonesia as the reasons for its action at the time (see PM, Ann. II.24, Vol. II, pp. 154-157, paras. 76-94).

In its pleadings Portugal defends its conduct in East Timor between the time of the Carnation Revolution and December 1975 (PR, para. 3.19; CR 95/3, p. 57). But a more accurate summary was that of the Malaysian delegate who said in the Security Council Debates on 15 December 1975, immediately after the invasion:

> "The political parties in Timor did not in fact have to fight the colonial Power, because the colonial Power backed out and left in the early stages of the fighting. In evacuating almost all of the Portuguese administrative and military personnel at the very early signs of trouble in Portuguese Timor, the colonial Power abdicated the solemn responsibilities it had assumed as the administering Power under the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples. (PM, Ann. II.24, Vol. II, p. 163, para. 144.)

The Costa Rican delegation could not "find any justification for Portugal's weakness as the administering Power - at the final stage of its mandate" (*ibid*, Vol. II, p. 177, para. 53).

As we know, the Portuguese authorities put up no resistance whatever to the Indonesian forces.

Mr Ramos-Horta has written:

> "[T]he sad irony was that two modern Portuguese frigates were anchored off Atauro. They never sailed to the coast as a reminder of Portuguese sovereignty and a warning to Indonesia. The ships' crews were also sunbathing on the Atauro beaches -". (J. Ramos-Horta, *Funu: The Unfinished Saga of East Timor*, Red Sea Press, Trenton,

New Jersey, 1987, p.60).

Mr. President, Members of the Court, on any view, Portugal's conduct at the time amounted to an effective abandonment of its administration of the territory. The fact is that Portugal *never* discharged the obligations of an administering State under Article 73 when it was in control. It admits that since 1975 it has been incapable of doing so, and that it now cannot do so. Yet it maintains now before the Court that it continuously has remained the *sole* State legitimately entitled to administer East Timor.

Mr President, I am about to turn to a new topic. I could continue or, alternatively, I am in your own hands for an adjournment.

The PRESIDENT: You can continue.

Mr. GRIFFITH: Mr. President, we turn now to consider the reaction by the United Nations to the position of Portugal after December 1975. Portugal says, and Australia agrees, that the primary responsibility for questions of decolonization rests with the United Nations, especially the General Assembly. Portugal's entire argument relies on the fact that the General Assembly has adopted resolutions referring to Portugal as the "administering Power". The attitude of the United Nations is thus of absolutely crucial importance to Portugal's case against Australia.

As we know, on the question of East Timor two Security Council resolutions were adopted in 1975 and 1976 and eight General Assembly resolutions were adopted, between 1975 and 1982. (The French language texts of these resolutions in French are set out in Annex 1 of Portugal's Application and Annexes I.1-I.10 of Portugal Memorial. The English language texts are contained in Annexes 25 and 26 of Australia's Counter-Memorial.)

I refer the Court to the account of the debates in the Security Council and General Assembly preceding the adoption of these resolutions given in Australia's Counter-Memorial (paras. 72-144). As Australia's arguments on the legal effects of these resolutions for Australia will be presented later by Professor Bowett, I confine myself, now, to references to their treatment of Portugal.

Two things are clear. *First*, there is nothing in any of these resolutions calling for a return of

Portuguese administration of these territories. *Secondly*, none of these resolutions say that Portugal is the *sole* State entitled to deal with other States in respect of the territory or call for non-recognition of any other administration.

So what *do* these resolutions say? They do make it clear that Portugal is an "interested" party. But, in this regard, no different from Indonesia.

Further, the resolutions also reveal an evolution in the attitude of the United Nations organs, particularly the General Assembly between 1975 and 1982.

The first resolution was General Assembly resolution 3485 (XXX) of 12 December 1975, adopted five days after the Indonesian intervention. While not calling for a return of a Portuguese administration, operative paragraph 3 of that resolution appealed to "all the parties in Portuguese Timor to respond positively to efforts to find a peaceful solution through talks between them and the Government of Portugal". The General Assembly thereby acknowledged that Portugal was not a "party in Portuguese Timor", but that it had a role to play in international efforts to find a solution to the strife between the parties who were in East Timor.

Ten days later, the Security Council adopted resolution 384 (1975). In this resolution (as in all subsequent resolutions) the territory was now referred to as "East Timor" rather than "Portuguese Timor". Operative paragraph 3 merely called upon the Government of Portugal "to co-operate fully with the United Nations", just as the following operative paragraph urged all States and other parties concerned "to co-operate fully with the efforts of the United Nations". Apart from the fact that Portugal is referred to as the Administering Power, there is no suggestion that Portugal had any special role in relation to the issue or to its resolution.

In April 1976, the Security Council adopted its second and, indeed, its last resolution on the question. Unlike the earlier General Assembly resolution and the earlier Security Council resolution, Portugal is not referred to as the "Administering Power". Apart from recording that a statement had been heard by the representatives of Portugal, there is no specific reference at all to Portugal in the resolution, and no other indication that the United Nations considered that Portugal had any particular role to play.

In the General Assembly resolutions of 1976 and 1977, the position is similar. Portugal is not referred to as the Administering Power, and apart from recording the fact that the representatives of Portugal had made a statement, there is no specific mention of Portugal.

In the General Assembly resolution of 1978, there is no mention of Portugal *at all*.

In the General Assembly resolution of 1979, Portugal is referred to only in the context of recording the fact that Portugal has made a statement. There is no other reference to Portugal. Operative paragraph 2 of the resolution declared that "the people of East Timor must be enabled freely to determine their own future, under the auspices of the United Nations", without specifying what role, if any, Portugal had.

It took until 1980 for Portugal to become active in taking steps to assist in resolving the East Timor question. The 1980 General Assembly resolution welcomed the diplomatic initiative taken by Portugal and urged "all parties directly concerned to co-operate fully with a view to creating the conditions necessary for the speedy implementation of General Assembly resolution 1514 (XV)" (operative para. 3). Portugal, of course, was a "party directly concerned". But so also were Indonesia and the representatives of the East Timorese people. Portugal was only one of several parties directly concerned.

Again, in the 1981 resolution, the General Assembly invited "the Administering Power to continue its efforts with a view to ensuring the proper exercise of the right to self-determination and independence by the people of East Timor" (operative para. 4). But the previous paragraph called upon

> "all interested parties, namely Portugal, as the Administering Power, and the representatives of the East Timorese people, as well as Indonesia, to co-operate fully with the United Nations with a view to guaranteeing the full exercise of the right to self-determination by the people of East Timor" (operative para. 3).

These two paragraphs make it clear that the United Nations in 1981 recognized that Portugal had a role to play in the implementation of the principle of self-determination in East Timor, and that its diplomatic efforts were welcome. But they also make it clear, *first*, that Portugal is only one of three interested parties, *secondly*, that Portugal is not the party representing the people of East Timor, and,

thirdly, that it is the United Nations which has responsibility for the achievement of decolonization in East Timor. The interested parties are called upon to co-operate with the United Nations.

In the 1982 General Assembly resolution, its last resolution, no particular role for Portugal is specified, apart from the fact that specialized agencies which assist the people of East Timor are called upon to do so "in close consultation with Portugal as the Administering Power".

Mr. President, what do we conclude from this?

First, there is no suggestion from the terms of these resolutions that any return of Portuguese control in the territory pending the achievement of self-determination was ever contemplated by the United Nations. Indeed, the preambular paragraph to the 1975 Security Council resolution recites, in the past tense, that "Portugal did not discharge its responsibilities as Administering Power".

Secondly, there is no suggestion that after 1975 the United Nations considered Portugal as the sole State entitled to represent the territory internationally, and in particular, as the *only* State legally entitled to deal with other States in respect of the territory. To the contrary, all of the resolutions adopted from 1979 expressly recognize that the solution to the problem is to be found "within the framework of the United Nations".

Given Portugal's record as a colonial power, the history of United Nations involvement in the decolonization of territories under Portuguese administration, and also the history of events in East Timor all this was to be expected. Plainly, it is impossible to suggest that, by its resolutions passed in the interests of the people of East Timor, the organs of United Nations actually contemplated that Portugal would assume, unilaterally, the role now claimed by it in relation to the right of self-determination. Rather, the resolutions contemplate Portugal acting at all times in co-operation with the United Nations.

What also is decisive for the purpose of the present case is that nowhere in the text of any of the resolutions is there any statement that States should not recognize the authority of Indonesia over East Timor, or that States should refrain from any dealings with Indonesia in respect of the territory. As this is something which also will be taken up by Professor Bowett, at present, I merely contrast the terms of resolutions concerning other territories adopted within the United Nations both before

and after the resolutions relating to East Timor, which, by their terms, called upon member States not to recognize the authority of a particular State or regime over particular territory, and not to deal with that State or regime in respect of that territory. (See ACM, App. A.)

The limited role envisaged by the United Nations for Portugal is also reflected in the United Nations' attitude to Indonesia. As will be seen, there was a manifest change in attitude by the General Assembly in 1979.

In the early resolutions, adopted in 1975 and 1976, the Government of Indonesia was called upon to withdraw its forces from East Timor "without delay" or "without further delay". (General Assembly resolution 3485 (XXX), on 12 December 1975, Security Council resolution 384 (1975), and Security Council Resolution 389 (1976).) General Assembly resolution 31/53 of 1 December 1976, adopted just under a year after the Indonesian intervention, also calls upon the Government of Indonesia to withdraw its forces from the territory, although on this occasion the words "without delay" or "without further delay" are not included.

It is clear that these calls by the United Nations for Indonesia to withdraw made no assumption that upon such withdrawal Portugal would resume administration of the territory pending self-determination. The Special Representative of the Secretary-General appointed under the 1975 Security Council resolution reported that the Government of the "Democratic Republic of East Timor" favoured replacement of the Indonesian forces by an international force composed of Portuguese and contingents from Western European countries. But it is very significant for a State which says it was in a position to "resume control of the situation" (PM, para. 1.14), that Portugal *did not even insist on being involved* in any international force. It said that it would not oppose an international force being dispatched without inclusion of Portuguese contingents (PM, Ann. II.10, Vol. II, p. 51-52, paras. 40-41). Thus, even if Indonesia had complied with these early calls for its withdrawal, Portugal would not necessarily have returned.

However, in 1979, there was a clear break in the policy of the General Assembly. In *none* of the subsequent resolutions from 1979 onwards is there any call for Indonesia to withdraw.

We must take it that by this date the General Assembly had recognized that Indonesia was not

going to withdraw. Nor is there any reference to Article 2, paragraph 4, and Article 11, paragraph 3, of the Charter. Professor Higgins weakly puts forward an explanation that the priorities of the United Nations changed (CR 95/5, p. 30). But to say that it was too busy with other matters, or that this change is without significance, is to demean the central role of the United Nations in relation to the East Timor question.

Operative paragraph 2 of the 1979 resolution states that "the people of East Timor must be enabled freely to determine their own future, *under the auspices of the United Nations*". There is no suggestion that a prerequisite to the exercise of self-determination requires Indonesian withdrawal from the territory of East Timor (although, of course, such withdrawal might be a *consequence* of the exercise of the right of self-determination). Nor is the intervention of Indonesia there deplored. Nor is there any suggestion, in 1979, that States must, or should, refrain from dealing with Indonesia in respect of the territory. Indeed, there is no reference to Portugal at all in the resolution, other than to record the fact that the representative of Portugal had made a statement.

Further, *the 1979 resolution omits all reference to any of the earlier resolutions*, and it contains provisions unlike those in the earlier resolutions. All this must signal the adoption of a new attitude and policy by the General Assembly in relation to East Timor. And this new policy is reflected, with minor amendments, in the subsequent resolutions.

In the 1980 and 1981 resolutions, like the 1979 resolution, there is no mention at all, let alone any reaffirmation, of the earlier pre-1979 resolutions. Admittedly, the 1982 resolution did state that it was adopted "bearing in mind" the earlier resolutions, *but* it does not "reaffirm" or "recall" them.

One can bear in mind differences as well as similarities. By choosing not to reaffirm previous United Nations resolutions, the General Assembly must be taken to have signalled and resolved that the earlier resolutions dealing specifically with East Timor were no longer to be regarded as appropriate or operative. Mr. President, Members of the Court, no other construction may be put on these crucial differences in the terms of successive resolutions.

Mr. President, possibly this would be a convenient time for the Court to adjourn.

The PRESIDENT: Thank you, Mr. Griffith. This is a convenient time to interrupt your statement to allow for the customary short break. The Court will now take a 15-minute break.

The Court adjourned from 11.30 a.m. to Noon.

The PRESIDENT: Please be seated. Mr. Griffith.

Mr. GRIFFITH: Mr. President, Members of the Court. The fact is that since 1979, the General Assembly itself, while continuing to recognize that the people of East Timor had the right to self-determination, has accepted the reality of the Indonesian presence in East Timor pending self-determination, and has ceased to call for Indonesian withdrawal. Portugal of course ignores these developments, and asks the Court to ignore the very real and material changes in the language of the resolutions. Like Portugal's colonialism, it asks the Court to freeze the General Assembly in time.

As we know, although the question of East Timor has been included in the Assembly's provisional agenda for each year since 1982, the question of East Timor was no longer dealt with by the General Assembly. Every year since 1982, the General Assembly has followed the General Committee's recommendation and deferred consideration of East Timor to the next session. Thus, the General Assembly has not modified its attitude adopted in 1979, and reaffirmed in 1980, 1981 and 1982.

The Committee of 24 has also reviewed the situation in East Timor each year since 1983. On each occasion, it has decided to consider and to continue consideration of the question at its next session, subject to any direction from the General Assembly. The Committee has been kept well informed. In the course of its annual deliberations, the Committee has heard statements from member States as well as petitioners, such as Amnesty International and FRETILIN, concerning the situation in the Territory. The Committee has also been provided with carefully written working papers prepared by the United Nations Secretariat (A/AC.109/715, A/AC.109/747, A/AC.109/783,

A/AC.109/836, A/AC.109/871, A/AC.109/919, A/AC.109/961, A/AC.109/1001, A/AC.109/1072). On no occasion has the Committee envisaged any role for Portugal other than as an interested party. Nor has it criticized any third country for dealing with Indonesia with respect to East Timor.

These same observations also apply to the consideration of East Timor by the Commission on Human Rights (ACM, para. 159 and ARej., para. 59). In 1983, that Commission reaffirmed the rights of the people of East Timor to self-determination, a matter not in dispute in these proceedings. However, the Commission has never expressed the view that as a consequence of the right to self-determination, States are under an obligation not to deal with Indonesia in respect of the territory, or an obligation to deal solely with Portugal.

This is true also of the consideration of East Timor by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (ACM, paras. 160 and 161 and ARej., para. 60). The Sub-Commission has recommended to the Commission on Human Rights that it consider the situation pertaining to human rights and fundamental freedoms in East Timor and has encouraged the Secretary-General in his efforts to find a durable solution to the situation. It has never suggested that States are under an obligation to deal solely with Portugal in respect of the territory.

I turn then to the important matter of the efforts of the United Nations Secretary-General. The Secretary-General's direct involvement in East Timor began in December 1975, when the Security Council requested him to send a Special Representative to East Timor to make an on-the-spot assessment of the situation and to establish contact with all the parties in the territory and the States concerned (Security Council resolution 384 (1975)). Following the visit of the Special Representative to East Timor in 1976, the Secretary-General suggested in his report of 29 February 1976 that as the parties concerned had expressed their readiness to continue consultations with his Special Representative, these consultations should be continued for the time being on the understanding that any developments would be reported to the Security Council. The Security Council accepted the Secretary-General's suggestion. In 1979, the General Assembly also requested the Secretary-General to continue with the consultations and report thereon to the General Assembly. In 1982 it went further and, in resolution 37/30 of 23 November 1982, requested

the Secretary-General to initiate consultations with all parties concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem (ACM, paras. 176-177).

In accordance with this last resolution on East Timor, the Secretary-General has since 1983 kept the General Assembly informed of developments in exercising his good offices. Every year since 1984, he has submitted a brief progress report (A/38/352, A/39/361, A/40/622, A/41/602, A/42/539, A/43/588, A/44/529, A/45/507, A/46/456, A/49/391).

The most recent report of the work by the Secretary-General is the statement in the form of a Press Release of 9 January 1995, which we have included as Document 3 in our Folder to the Court.

In this manner the Secretary-General is playing a central and continuous role in facilitating consultations between Portugal and Indonesia the processes for which he is mandated by the United Nations as the most appropriate means for the settlement of the problem of East Timor. He has not suggested that other States act or refrain from acting in any manner in order to assist these processes. He has never criticized any third State, by name or indirectly.

In summarizing the United Nations response to the East Timor question, it *is* significant that there has been *no* Security Council resolution since 1976 and *no* General Assembly resolution since 1982. In its final resolution in 1982, as in all resolutions since 1979, the General Assembly did not call on Indonesia to withdraw immediately and unconditionally, but merely called on the parties to negotiate. Why? The answer must be that a majority of the Assembly accepted that an Indonesian withdrawal was neither credible nor required by the exigencies of the situation. If that was the case in 1982, it must have been even more the case in 1989 (when Australia concluded the Treaty with Indonesia) and even more so today. The General Assembly since 1983 has received reports from the Secretary-General related to the exercise of his good offices, and at each session has deferred consideration of the question. This is in recognition that negotiations under his auspices are continuing and it would be premature to take any action.

Clearly the United Nations does not see any role for Portugal other than that of participation in these processes of consultation and negotiation.

Given the views of a majority of the General Assembly in 1982, and the failure of Portugal to

bring the matter before the General Assembly or the Security Council in subsequent years, the position is clear: no restitution of the pre-1975 position is contemplated. Further, we note again the significant fact that there has been no criticism by any United Nations body of Australia's recognition in 1979, or of its negotiations with Indonesia between 1979 and 1989, or of the conclusion of the Timor Gap Treaty in 1989 or enactment of consequential legislation, or any of the other acts of implementation of which Portugal complains.

Mr. President, Members of the Court,

As we have noted, the day after the Indonesian intervention, the Portuguese authorities deserted even the island of Atauro, and thereby permanently abandoned the last remnant of Portuguese presence in the territory. Atauro itself was never under attack. Portugal merely left never to return.

Admittedly, Portugal then broke off diplomatic relations with Indonesia, and brought the matter before the Security Council. And, in April 1976, it brought the matter before the Security Council again.

However, thereafter, Portuguese activity in relation to the situation in East Timor waned rapidly. Paragraph 46 of Australia's Counter-Memorial contains quotations both of the former Portuguese Foreign Minister and also of Mr. Ramos-Horta in criticism of Portugal's inaction in subsequent years.

In its Memorial (para. 1.48), Portugal says that from 1976 until the present day, representatives of Portugal, when taking the floor during the General Assembly's annual sessions, have drawn attention to the situation in East Timor. A reference is given in a footnote to the pages of the annexes to the Memorial where each of these statements can be found.

Mr. President, Members of the Court, an examination of these statements to which Portugal refers is revealing, and gives real colour and content to these claims of constancy and consistency. Each year representatives of Portugal made a statement in the General Assembly covering a wide range of issues around the globe. And, admittedly, somewhere in the middle of each speech, one can find a short paragraph or two referring to East Timor. In the case of the 1975 and 1976 speeches,

only a short extract containing the paragraphs dealing with East Timor is reproduced in the Annexes to Portugal's Memorial. But the speeches at the subsequent sessions are set out in full. The result is that the General Assembly statements occupy over 150 pages in the Portuguese Memorial. But, if Portugal had chosen merely to reproduce those paragraphs dealing with East Timor (as it does in relation to the 1975 and 1976 speeches), it would have needed only a few pages. In short, whatever Portugal may now say, the fact is that Portugal's references to East Timor before the General Assembly have been brief and low-key.

Although, in 1976, Portugal did still maintain the express position that it was "the sole legitimate authority in Timor" (Committee of 24, "Timor", Working Paper prepared by the Secretariat, 24 June 1976, A/AC.109/L.1098, Portuguese Memorial, Ann. II.12, Vol. II, p. 75, para. 36), this claim was not subsequently repeated in the statements before the General Assembly or the Committee of 24. The assessment of Mr. Ramos-Horta was that "From 1976 until 1982, the Portuguese acted as if they had accepted the *fait accompli*" (J Ramos-Horta, *Funu: The Unfinished Saga of East Timor* (Trenton, New Jersey 1987), pp. 125-126)).

Mr. Chairman, Members of the Court, the statements in 1976 and 1977 make quite clear the role that Portugal saw for itself: it was that of doing whatever a consensus of the United Nations suggested was appropriate. Portugal certainly had abandoned any thought that it had any continuing responsibility of its own to act in anything other than a formal sense as Administering Power for East Timor. This was made clear in its 1978 statement: It said "we believe that the United Nations should promote compliance with the resolutions adopted by the General Assembly and the Security Council" and appealed to "all those who can to intervene in this matter" (PM, Ann. II.29, Vol. II, p. 279, para. 204). Portugal had washed its hands of any responsibility.

Again, in 1979, there was a single paragraph in which Portugal directed "an appeal to the international conscience so that conditions may be rapidly created allowing for a progressive normalization of the life of the peoples of East Timor" (PM, Ann. II.30, Vol. II, pp. 285-286, para. 60), nothing more.

At the time of Australia's recognition of the exercise of Indonesian sovereignty in East Timor,

Portugal itself had for some years appeared to have ceased to describe itself as "Administering Power". It had not asserted internationally that it was the State with which others were required to deal in respect of the territory. On the contrary, it is clear that its policy was that the matter was one for the United Nations, with which Portugal was prepared to co-operate "within its limitations". As corroboration for this conclusion, it will be recalled that the General Assembly resolutions adopted in 1976 and 1977 did not refer to Portugal as the Administering Power, and that the resolution adopted in 1978 did not refer to Portugal at all.

Examination of all the Portuguese statements included in the Portuguese pleadings reveals that between 1976 and 1989, when the Treaty between Australia and Indonesia was concluded, Portugal *never* demanded the withdrawal of Indonesia from East Timor as a prerequisite to self-determination. It *never* claimed that other States who had recognized that incorporation - and there were quite a few, including some regional States - were in breach of international law. It *never* claimed that, pending self-determination, Portugal was the sole State entitled to deal with other States in respect of the territory.

But throughout this period of 1976-1989, Portuguese statements reaffirm a number of elements:

First, that Portugal had no claims on the territory of East Timor. Portugal now says that despite its statements continuously reaffirming this, it still considered itself to be the sole State entitled to deal with other States in respect of the territory until self-determination had been achieved. Yet, this is a qualification or claim which Portugal never made at the time.

Second, that Portugal had consistently maintained that the solution to the East Timor problem was to be found *within* the framework of the United Nations.

Third, that within that framework, for Portugal the solution was to be found through discussions between all of the parties concerned.

In January 1992, Portugal informed the Secretary-General that it was ready to participate in a dialogue "*sans conditions préalables*", under the auspices of the Secretary-General, with Indonesia and all directly interested parties. This is important. Portugal itself did not exclude, as a matter of

principle, the maintenance of the status quo. Portugal proposed that talks resume under the mediation of an experienced person of international prestige accepted by the parties. As we have seen, since then the Secretary-General pursued further talks with both Indonesia and Portugal, with a view to the parties engaging in a serious dialogue on the issue of East Timor.

Mr President, Members of the Court, as matter of principle, it is well established that legal rights claimed by Portugal and denied by other States can only be preserved by adequate and persistent protests by the State whose rights are being denied (*Anglo-Norwegian Fisheries* case, *I.C.J. Reports 1951*, at p. 138). Silence, or inaction incompatible with the position now asserted cannot be ignored. Such silence or inaction is clearly relevant. In so far as Portugal, in the present proceedings, seeks to invoke rights of its own in relation to the resources of East Timor, Portugal has not taken the necessary action to preserve any rights which it might otherwise have had.

With regard to Australia, Portugal's position has been equivocal. Australia recognized *de facto* Indonesia's incorporation of East Timor in January 1978. Towards the end of that year, Australia announced that the opening of the Timor Gap negotiations, scheduled for March 1979, would constitute *de jure* recognition of Indonesia's position. At those stages all Portugal did was to express "surprise" (in January and December 1978) at Australia's recognition (ACM, Anns. 22 and 23). On the subject of the Timor Gap negotiations there was, at that time, complete silence.

Negotiations with Indonesia commenced in February 1979, but Portugal made no formal objection, by note or minute, to their commencement. It was not until over six years later, in September 1985, (when the negotiations for a joint development zone were announced) that Portugal made formal protest concerning the Timor Gap negotiations.

In order to excuse or justify its *apparent* silence over the period 1979-1985, Portugal has relied upon the extraordinary proposition that "protest was already implicit in the attitude Portugal had consistently maintained" (PM, p. 53, para. 2.13). This is neither an explanation nor an excuse for its total failure to protest. During this period, Portugal itself did not assert that it was the *sole* State with which others were entitled to deal, nor did it protest against the dealings which numerous other States had with Indonesia applying to the territory of East Timor. Faced with the substantial

derogations that were occurring from the position now maintained by Portugal, it could only protect its position by unequivocal protest and statements of its views: prior to 1985 there simply were none.

Portugal also asserts that "Portugal opted for the multilateral context", particularly the United Nations, "to state and restate its position" (PM, p. 53, para. 2.13). But this is also incorrect. As we have seen in the multilateral contexts, it said very little and nothing, not a word, regarding Australia's attitude was said in the United Nations. We have only the sounds of silence.

Mr. President, Members of the Court. There is one final matter on which I must comment. That is the question of Australia's own rights in the area of the Timor Gap. Ambassador Tate has reminded the Court that Australia has always claimed sovereign rights in the entire area of the Zone of Co-operation.

Mr. Galvão Teles, however, would have the Court think that the only issue is the overlap of 200-nautical-mile-zones, and that beyond Australia's 200-mile limit the offshore territory must be regarded as East Timorese.

He made little mention of the Timor Trough - as if it was an insignificant feature.

This is not so. In fact it is as large, as steep, and as deep, as the Grand Canyon, as an examination of the bathymetric profile and a map showing the bathometry of the area indicate. These are in the Judges' folders as plans 1, A and B, and if I could briefly take the Court through this - if they would open the two maps which are attached to this folder - to indicate the function of these maps. The first map indicates a bathymetric profile sketch, it indicates the continental shelf running at a depth of, more or less, mostly less, than 200 metres to the edge of the Timor Trough and then steeply descending through the depths of 2,000 metres to 3,000 metres, at the deepest point. The section line shows the diagrammatic line of this cross-section and if I can invite the Members of the Court to turn to the next following map, one can see that the configuration of the trough, which is marked in deep blue on this second map, indicates the situation of the trough, so that the northern line of the Zone of Co-operation, the northern line of area C, is parallel to the trough itself. The bottom line represents the northern boundary of the Zone of Co-operation. Such a major

geomorphological feature cannot be ignored. It truly is a Grand Canyon under the sea.

You have been told by Portugal that this case is not a maritime delimitation case. This is true. It follows then that the Court cannot consider this case on the basis, put more than once by Portugal, that there is, at the least, an uncontestable area of sea-bed, north of Australia's 200-nautical-mile line, to which Australia can claim no interest. This is represented on Mr. Teles' map and also on the second plan to which I have taken the Court. Let me make it plain: Australia claims, and continues to claim, an interest in the *entire* area covered by the Treaty Zones A, B and C, (up to the line of the trough). Australia puts its claims in accordance with international law and practice. It is an issue which the Treaty itself does not prejudge. Notwithstanding Portugal's own analysis of these claims, in these proceedings the Court cannot take a position on this contested issue. Before I leave this matter could I refer the Court also to the two additional fold-out maps which are part of this folder, the first indicates the Zone of Co-operation with which the Court is already familiar, and the second is a map of the area between Australia and East Timor and Indonesia of course, indicating the situation of the Zone of Co-operation: so a compilation of those four maps will give the Court an idea of the geomorphology of the area.

Mr. President, at this point I invite you to call on Mr. Crawford to open our submissions on admissibility.

The PRESIDENT: Thank you very much, Mr. Griffith. Now, I call upon Mr. Crawford to take the floor.

Mr. CRAWFORD: Monsieur le Président, Messieurs de la Cour. C'est de nouveau un grand honneur pour moi de plaider devant vous, et surtout pour la première fois sous votre présidence, Monsieur le Président.

A. Introduction

1. So far the Court has heard an account of Australian policy towards East Timor and an analysis of some salient features of Portugal's claims. Australia turns now to the issues of admissibility in this case. It does so - and the Court will have noticed - not by way of preliminary objection but in association with the merits, and as to this a preliminary remark is in order. Mr. Galvão Teles sought to derive from the decision to argue together both the admissibility and the merits of the present case an admission on the part of Australia, to the following effect:

> "ceci implique une admission liminaire de la part de l'Australie : qu'il peut y avoir des solutions au fond qui, à elles seules, rendront inacceptables les objections australiennes regardant la recevabilité de la requête" (CR 95/5, p 49).

"Ceci implique", Monsieur le Président, nothing of the kind. Australia judged that, given the close links between the issues of admissibility and the way Portugal had chosen to present its case, it was highly likely, one would say inevitable, that the admissibility issues would need to be dealt with again, and would recur, at the stage of the merits. It was perfectly in order under the Rules to treat the issues as connected, because they are. To extract concessions from this mode of procedure is fanciful.

2. Turning then to the issues of admissibility, it is my responsibility, in conjunction with my colleague Mr. Pellet, to deal with the first and primary basis for the inadmissibility of Portugal's claim. In Australia's view, this is the wrong case against the wrong party. The substance of Portugal's claim necessarily involves the Court in determining, authoritatively, the legal status, rights and international responsibility of a third State not a party to these proceedings. And this is something the Court cannot do.

3. The Court has of course heard quite a deal of this argument in the past 10 years or so. I am afraid that in this case it is hearing, and will hear, a great deal more! This morning I will first analyse the substance of Portugal's claims, which Australia says are inadmissible, and I will then outline the legal principles applicable to the issue of inadmissibility, with some emphasis on the Court's most recent pronouncement in the case concerning *Certain Phosphate Lands in Nauru*. Mr. Pellet will then focus on the issue of inadmissibility as it relates to Portugal's ostensible case, to

its claims based on what it describes as "Australia's conduct". I will return, tomorrow, to look at the issue of inadmissibility as it relates to what we say is Portugal's real case, the real focus of Portugal's claims, the 1989 Treaty itself, the validity of which Portugal purports not to challenge. However one looks at it the result is the same; Portugal is calling on the Court to make a determination against Australia that can only be made, in judicial proceedings, on the basis of a prior authoritative determination of the international responsibility or lack of territorial title of a third State.

B. The substance of Portugal's claims

4. Let me begin by outlining the actual claims made by Portugal in its Application, which of course defines, in terms of Article 40 of the Statute, the "subject of the dispute", or to use the language of Article 38, paragraph 2, of the Rules of Court, "the precise nature of the claim" (for further analysis see ACM, Part II, Chap. 1; ARej., Part I, Chap. 1.)

5. Section 1 of the Portuguese Application is headed "Subject of the Dispute". In that section, and throughout the Application, the only complaint made by Portugal of Australia's conduct is of certain actions or activities which, to quote paragraph 2 of the Application:

> "have taken the form of the negotiation and conclusion by Australia with a third State of an agreement relating to the exploration and exploitation of the continental shelf in the area of the 'Timor Gap' and the negotiation, currently in progress, of the delimitation of that same shelf with that same third State".

Moreover, it is said - and rightly said - that this conduct excludes any equivalent negotiation with Portugal (Application, para. 3). Australia has negotiated with Indonesia, not with Portugal, has reached agreement and is taking steps to implement that agreement. This is the gravamen, the gist, the substance of Portugal's Application. And that is borne out also by paragraphs 18-26 of the Portuguese Application, where the Australian "activities" referred to throughout are those relating to the negotiation, agreement and initial implementation of the Treaty.

6. This conception of the dispute is borne out in the Portuguese submissions in its Memorial and Reply. Paragraph (1) of the submissions is a preliminary issue, a reason for giving judgment rather than part of the remedy; in other words, it is a *moyen* - it relates, of course, to self-determination. The key paragraphs are paragraphs 2 and 3. These specify that Australia is in breach of international law for two reasons. First, Portugal says,

> "inasmuch as in the first place it has negotiated, concluded and initiated performance of the Agreement of 11 December 1989, has taken internal legislative measures for the application thereof, and is continuing to negotiate, with the State party to that Agreement, the delimitation of the continental shelf in the area of the Timor Gap..."

for that reason, Australia is in breach of international law. Secondly, it says, because Australia has excluded negotiation with Portugal on the same matters, it is in breach of international law. Thus the complaint relates to the negotiation, conclusion and initial implementation of a Treaty with an

anonymous State party rather than with Portugal. The State party is in fact Indonesia. Paragraphs 4 and 5 deal with the consequences of this conduct.

7. The same approach was taken by Portugal in its oral arguments and submissions last week (see e.g. CR 95/2, p. 53, Galvão Teles; CR 95/6 p. 22, Dupuy).

8. Despite some of Portugal's arguments in its written and oral pleadings, this is not a case of "self-determination" in the abstract, and it could not be: Australia has no quarrel with Portugal on that basic principle. Nor has Portugal sought to make Australia's alleged conduct in the period 1974-1975 the subject of any submission (see CR 95/5, pp. 70, 74, Dupuy). Earlier statements alleging Australian complicity in an act of aggression or even of genocide were, one infers, material for the media rather than the Court. They have been sufficiently dealt with by Dr. Griffith and Ambassador Tate. What matters for the Court is that the case, as formulated in the Application, focuses, as I have shown, to the exclusion of all other scenarios, real or imaginary, on the action of Australia in negotiating, concluding and beginning to implement the Treaty. It is true that Portugal asserts in its written pleadings and in some of its oral arguments (CR 95/6, p. 22, Dupuy) that it does not challenge the Treaty as such, but only the fact that Australia has concluded it with a State other than Portugal - I will return to those issues tomorrow. The fact remains that in its submissions as in its Application, it has chosen the conduct of negotiation, conclusion and implementation of the Treaty as the focus of its complaint. And the question is, what are the legal implications of this way of putting the case?

9. Before I address that question, one point of clarification is in order. Since the substance of Portugal's case, its declared subject-matter, is Australia's acts of treaty-making, the relevant period for the purpose of the present case is the time at which the Treaty was made, that is to say, 1989. It is true that Portugal complains of Australia's negotiation of the Treaty, a process which took ten years. But the negotiation was not an autonomous act; it was conduct performed for the purpose of concluding an agreement, if agreement could be reached. It is difficult to see how the negotiation could be unlawful if the agreement which was its outcome was lawful, and certainly a decision of this Court that Australia should not have negotiated with Indonesia but that, having done so, the

Agreement itself is "licit" would be for Portugal a hollow victory, or no victory at all. Thus it can be seen that the process of negotiation is purely preliminary to and dependent in terms of its legality upon the actual conclusion of the Treaty in 1989. The same is true, of course, of its subsequent implementation, and of any Treaty that may in time replace it (although that possibility is currently entirely speculative; no further agreement is in prospect). Thus the focus of this case is on the conclusion of the Treaty in 1989. And the question for the Court, in relation to the admissibility of the case, is whether it can give Portugal the relief it seeks in relation to the conclusion of the Treaty in 1989 without, as a necessary step, having to determine the legal status, rights or responsibility of a third State.

C. The applicable principles of law

10. To assist in answering that question, let me first summarize very briefly the applicable legal principles, principles which have been worked out by the Court over a series of cases and, most recently, one which involved Australia itself, *Certain Phosphate Lands in Nauru* in 1992 (*I.C.J. Reports 1992*, p. 240).

11. The issue in that case was whether the Court could determine questions of the international responsibility of Australia for acts done by it on the joint behalf of itself and the two other States which together formed the Administering Authority of Nauru under trusteeship. Since Australia was acting on behalf of the three States under an express agreement that it should do so, any finding against Australia would be prima facie applicable to the other two States. It was argued that this was enough to make the issue of the responsibility of those two States, the United Kingdom and New Zealand, the very subject-matter of the decision.

12. This was of course an invocation of the Court's decision in the *Monetary Gold* case, where the Court had declined "[t]o adjudicate upon the international responsibility of Albania" in its absence and without its consent (*Monetary Gold removed from Rome*, *I.C.J. Reports 1954*, p. 19).

13. In the *Nauru* case the whole Court affirmed the rule in *Monetary Gold* - and I note that Portugal does not challenge that. But a majority of the Court declined to apply that rule to the facts.

It did so - the majority did so - on the ground that the interests of the United Kingdom and New Zealand were not "the very subject-matter of the judgment to be rendered on the merits of Nauru's Application" (*I.C.J. Reports 1992*, p. 261, para. 55). The reason for this was explained by the Court in the following passage:

> "In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim... In the *Monetary Gold* case the link between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical... In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia." (*I.C.J. Reports 1992*, p. 261, para. 55.)

14. Thus the Court drew a distinction between the *implications* of a judgment for third parties, on the one hand, and the situation where the rights or legal situation of a third party must be determined *for the purpose of* determining the issues arising in the case which it has to decide. That link, in the Court's words, must be "not purely temporal but also logical". If the Court in the *Monetary Gold* case had determined that the gold should be delivered to Italy, this would have been because - and necessarily because - Italy had a valid legal claim against Albania. The Court would necessarily have had to adjudicate on that claim. Implications as to Albania's conduct would not have been enough: it would have had to *decide*. And without Albania's consent, it could not decide, it could not make a finding. By contrast, in the *Nauru* case the Court's decision would have had *implications* for the other two States, but would not have constituted a decision or a finding so far as they were concerned. As Nauru contended in that case, there were arguments potentially open to New Zealand and the United Kingdom which were not open to Australia, and there was absolutely no need for the Court to pronounce on those arguments (see CR 91/20, 19 November 1991, p. 92; CR 91/22, 22 November 1991, p. 45).

15. The point was also explained by Judge Shahabuddeen in a separate opinion in the following words:

> "the test is not merely one of sameness of subject-matter, but also one of whether, in relation to the same subject-matter, the Court is making a judicial determination of the

> responsibility of a non-party State... [W]ould a decision in this case constitute a judicial determination of the responsibility of New Zealand and the United Kingdom? Or, if it would not technically constitute such a determination, would it be tantamount to such a determination in the very real sense in which the Court was asked to determine the responsibility of Albania?" (*I.C.J. Reports 1992*, p. 296.)

And the answer to those two questions posed by Judge Shahabuddeen, in the circumstances of the *Nauru* case, was no.

16. Three members of the Court disagreed with that answer. In the words of the then President, Sir Robert Jennings, the Court would "unavoidably and simultaneously be making a decision in respect of the legal interests of those two other States" (*I.C.J. Reports 1992*, p. 302). In Judge Ago's view, "by ruling on these claims against Australia alone ... the Court will, inevitably, affect the legal situation of the two other States, namely their rights and their obligations" (*I.C.J. Reports 1992*, p. 328). According to Judge Schwebel, a finding against Australia would be "tantamount to a judgment upon the responsibility of New Zealand and the United Kingdom" (*I.C.J. Reports 1992*, p. 342). Judge Oda did not find it necessary to decide the point at that stage of the case (p. 303).

17. In reaching its decision the Court was no doubt influenced by the fact that the Nauruan claims arose from a trusteeship responsibility explicitly accepted by Australia, as well as the other two States, a "sacred trust of civilization" in which, under the arrangements applicable to Nauru, Australia had the leading role. The case in no sense involved a third party or bystander, someone called on to respond to the possibly unlawful acts of another State. There was nothing consequential or secondary about Australia's position in relation to Nauru. The tripartite "Administering Authority" for Nauru was not a separate legal person, not an international organization created *ad hoc* for the purpose, but simply three States acting jointly in that role. And under the applicable arrangements Australia's legal status, powers and responsibilities were primary; it could not be displaced from the exercise of the actual administration of Nauru except by its consent, and in fact, it never was displaced.

18. This is the background for the Court's decision - central to the case. To repeat, the Court held that:

> "a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia" (*I.C.J. Reports 1992*, p. 261, para 55).

19. Mr. President, Members of the Court, that is a recent decision of yours, adverse to Australia. Far from seeking to evade its responsibilities (as Professor Dupuy hinted: CR, 95/6, p. 10) Australia accepted that decision, and subsequently resolved the dispute with Nauru by way of an amicable settlement for a substantial sum of money, in excess of A$100 million (see Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru, 10 August 1993, reprinted in (1993) *ILM*, Vol. 32, p. 1471; noted by the Court in its order of discontinuance of 13 September 1993, *I.C.J. Reports 1993*, p. 322). Some proportion of this settlement amount, the Court may be interested to hear, has since been contributed by the United Kingdom and New Zealand under separate agreements (see Exchange of Letters constituting an Agreement between the Governments of Australia and the United Kingdom of Great Britain and Northern Ireland relating to Nauru, Canberra, 24 March 1994, *Australian Treaty Series*, 1994, No. 9; Exchange of Letters constituting an Agreement between the Governments of Australia and New Zealand relating to Nauru, Canberra, 23 May 1994, *Australian Treaty Series*, 1994, No. 17). Australia now relies on the Court's decision, in circumstances to which, as Professor Pellet and I will demonstrate, it is plainly and by its terms applicable.

D. The principles of law applied to Portugal's claim: An overall perspective

Mr. President, Members of the Court:

20. We pass then to the application of the principle in the present case. Let me first say briefly, and looking at the matter in an overall perspective, why Portugal's claim is inadmissible, applying the law developed by the Court in the line of decisions from *Albanian Gold* to *Nauruan Phosphate*. Professor Pellet and I will go on to develop and particularize the argument as it relates to various aspects of Portugal's claims vis-à-vis the Treaty. But the overall position can be stated

very simply.

21. In the present case, *implications* as to Indonesia's conduct, its responsibility, its status in relation to East Timor are not enough; the Court must decide, in the sense of making an authoritative finding. It must decide, *prior to* and *for the purpose of* determining the issues arising in this case, that Indonesia was not sovereign over East Timor in 1989, and that it had no right to make the Treaty. In *Monetary Gold*, Italy was entitled to the gold if and only if Albania's conduct was unlawful. In the present case, Portugal is entitled to the relief it seeks if and only if Indonesia's conduct in occupying and administering the territory was unlawful, and if, as a result of that unlawfulness, Indonesia had no right or status in 1989 to make a treaty on behalf of East Timor. From the point of view of their admissibility, the two cases - this case and the *Monetary Gold* case - are exactly similar; the same principle applies to both.

22. This objection is general and particular: it applies globally to the Portuguese case, that is, to the substance of the case as a whole, but it also permeates the particular issues Portugal raises - or claims to have avoided raising - on the merits. Thus Australia will return to the problem of admissibility where it arises in specific contexts, in amplification and confirmation of the general arguments made here.

23. The *Nauru* case was, of course, analysed in some detail by Professor Dupuy. His analysis produced the following conclusion:

> "l'existence d'un lien conventionnel entre deux Etats n'empêche nullement que, selon les cas, sa négotiation, sa conclusion, ou même sa mise en oeuvre, si elles s'avèrent incompatibles avec les obligations des parties contractantes vis-à-vis d'autres Etats, engagent individuellement la responsabilité de chacun d'entre elles" (CR 95/6, p. 21).

I will say more about this issue tomorrow, in the context of Portugal's pretended non-attack on the 1989 Treaty. But Professor Dupuy's conclusion completely overlooks the point of the decision in *Nauru*, as in *Monetary Gold*. Of course, the mere fact of a conventional link with a third State is not enough; Australia has never suggested otherwise. The question is whether as a necessary or, as the Court put it, logical, step in its reasoning, the Court has to decide on the legal responsibility, status or powers of a third State - decide in the sense of making a finding. The Court cannot, of

course, bind the third State. And if the issue is the capacity of that third State to enter into a treaty, its right or power to do so, or its responsibility for doing so, then that attracts the *Monetary Gold* principle, a principle which Portugal expressly accepts (CR 95/6, p. 11, Dupuy), and the case is inadmissible.

24. Despite Portugal's protestations, the argument I have outlined applies both as to the legality of Australia's conduct and as to the validity of the Treaty of 1989. My colleague Professor Pellet will begin by addressing the Court on the admissibility issue so far as it relates to Australia's conduct, since Portugal seeks to distinguish that conduct from the Treaty itself. I will then return tomorrow, Mr. President, to deal with arguments revolving around the Treaty as such.

Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you Professor Crawford. Je donne maintenant la parole au professeur Pellet.

M. PELLET : Merci, Monsieur le Président.
Monsieur le Président, Messieurs les Juges,

LA LICEITE DES CONDUITES DE L'AUSTRALIE - L'ABSENCE DE L'INDONESIE

1. C'est toujours un honneur insigne pour un internationaliste de se présenter devant vous. J'en ressens le privilège à chaque nouvelle affaire et je vous suis très reconnaissant de me l'accorder.

Toutefois, Monsieur le Président, je ne peux dissimuler qu'en écoutant nos adversaires plaider la cause du Portugal la semaine dernière, le sentiment de malaise que j'avais déjà éprouvé en lisant le mémoire et la réplique s'est encore aggravé et je dois dire que j'en ressens une certaine amertume.

Les conseils du Portugal, qu'au demeurant je salue amicalement, s'ingénient à présenter l'Australie comme la *mauvaise* partie; celle qui aurait porté atteinte aux droits d'un petit peuple sans défense et, en particulier, violé ses droits fondamentaux à disposer de lui-même et à la souveraineté permanente sur ses ressources et ses richesses naturelles.

Chacun sait bien, pourtant, dans cette salle, que ce n'est pas ainsi que les choses se présentent. D'abord parce que, dans un procès devant votre haute juridiction, il n'y a pas les *bons* d'un côté et

les *mauvais* de l'autre; il y a seulement des Etats souverains qui ont le droit à un arrêt fondé sur un raisonnement juridique solide; l'Australie a la certitude que c'est dans cet esprit que vous vous prononcerez. Ensuite et surtout parce que si les droits de Timor ont été violés, ce n'est de toute façon pas par l'Australie. Dès lors, le principe essentiel du consentement à votre juridiction vous interdit de vous prononcer. On peut le regretter, mais l'état actuel d'intégration, très inachevée, de la société internationale, ne permet pas d'aller au-delà. Vous l'avez rappelé à maintes reprises, et le professeur Crawford vient d'exposer les conséquences qu'en tire votre jurisprudence.

2. Monsieur le Président, le Portugal n'aime pas que l'on fasse une distinction entre l'affaire fictive qu'il vous présente et l'affaire réelle; entre l'*alleged case* et le *real case*. Il affirme qu'il s'agit d'une «déformation» de l'objet de la requête (réplique, p. 10, par. 1.17) conduisant à des «résultats absurdes» (p. 12, par. 2.04).

Monsieur le Président, je ne veux pas m'exposer à de tels reproches. Pour y échapper, le mieux est certainement de partir de ce que dit la Partie portugaise elle-même. En premier lieu, elle le reconnaît espressément, l'*Indonésie*, selon ses propres termes, a «méconnu le principe du droit des peuples à disposer d'eux-mêmes», «notamment en envahissant par la force le territoire du Timor oriental puis en conduisant jusqu'à aujourd'hui la répression systématique et meurtrière des mouvements de libération nationale et de la population timoréenne» (réplique du Portugal, p. 218-219, par. 7.31). Au contraire, «l'Australie, quant à elle - c'est M. Dupuy qui parle - n'a évidemment participé à aucun des actes de violence directe contre le peuple du Timor oriental» (CR 95/5, p. 70; voir aussi réplique du Portugal, p. 219, par. 7.32). Monsieur le Président, c'est pourtant bien l'Australie, pas l'Indonésie, qui est ici et maintenant devant vous - et c'est faute de pouvoir s'en prendre à la «poutre» que le Portugal détecte dans l'«oeil» indonésien qu'il s'en prend à ce qu'il croit être la «paille» australienne.

Que reproche-t-il alors à l'Australie ? Pas d'avoir utilisé la force contre le peuple de Timor - nous venons de l'entendre.

Dans son mémoire, le Portugal avait avancé une autre théorie qui l'exposait, elle aussi, à de

grands dangers - dangers procéduraux s'entend, il ne prend pas d'autres risques. Il avait imprudemment présenté «la négociation, la conclusion et le commencement d'exécution» de l'accord conclu entre l'Australie et l'Indonésie le 11 décembre 1989 comme la première et la principale «*causa petendi*» de ses demandes - ce sont toujours ses propres termes et il le répète même, mot pour mot, à deux reprises (p. 74, par. 3.04 et p. 203, par. 8.01). Mais un traité, Monsieur le Président, ce n'est pas un simple fait, un fait «en soi» comme le voudrait le Portugal (mémoire du Portugal, p. 750, par. 3.06), c'est, par définition, «un accord international conclu ... entre Etats» et, en la présente occurrence, l'Indonésie est l'un de ces Etats; le professeur Crawford, comme il vient de le dire, montrera les conséquences de cette constatation d'évidence qui relève, elle aussi, de l'«affaire réelle» : dans sa totalité, le prétendu différend qui vous est soumis se réduit à la négociation, à la conclusion et au commencement d'exécution de l'accord australo-indonésien de 1989 et l'on ne peut, dans un contentieux réel, porté devant une «vraie» juridiction, inventer un accord abstrait, conclu avec une partie sinon inconnue, du moins occultée et «tue».

3. Flairant le danger, le Portugal a donc dû franchir un degré supplémentaire dans l'abstraction, et s'est efforcé d'occulter non seulement le rôle de l'Indonésie, mais l'existence même du traité australo-indonésien de 1989. Ceci est net dans sa réplique, c'est plus frappant encore dans ses plaidoiries orales de la semaine dernière.

De manière infiniment plus vague et confuse, il dit désormais ne viser «*que les conduites australiennes* : entre autres celle d'avoir négocié et conclu l'«accord», comme simple fait; celle de se proposer d'explorer et d'exploiter le plateau continental dans la zone du «Timor Gap» en certains termes, pris, eux aussi, simplement comme un fait» (mémoire du Portugal, p. 75, par. 3.06). Subtile distinction, en vérité : le Portugal dit ne pas contester la validité de l'accord de 1989, mais la licéité de sa négociation, de sa conclusion, et de son exécution (cf. réplique du Portugal, p. 16, par. 2.10) - comme si l'on pouvait négocier, conclure et exécuter un «fait».

> «La requête portugaise ne vise que les *conduites de l'Australie* et que *l'illicéité* de ces conduites découlant du fait que l'Australie n'a pas traité le Timor oriental comme un territoire non autonome, ni respecté les résolutions pertinentes des Nations Unies.» (Réplique du Portugal, p. 211, par. 7.19.)

Il s'en est tenu à cette nouvelle thèse lors de ses plaidoiries de la semaine dernière (cf. CR 95/4, p. 51

ou CR 95/6, p. 31-32).

Voici, Monsieur le Président, le différend tel qu'il est allégué par le Portugal.

Eh bien, soit ! Essayons d'appliquer les règles, totalement irréalistes, que le Portugal veut nous dicter, essayons de faire abstraction de l'Indonésie. Ce ne sera, malheureusement pour le Portugal, que pour constater que ceci est totalement impossible, car on ne peut pas jouer avec la réalité; le droit s'applique à des questions concrètes, nées de situations réelles qu'on ne peut pas effacer d'un coup de baguette magique. Un conseil du Portugal a dit la semaine dernière que l'on ne pouvait mettre l'histoire entre parenthèses. C'est vrai. On ne peut pas non plus mettre les faits entre parenthèses ni effectuer un tri entre eux.

4. La sagesse populaire de mon pays dit qu'«avec des «si», on mettrait Paris dans une bouteille»... C'est avec des «si» que le Portugal veut vous convaincre que vous êtes, Messieurs de la Cour, compétents pour connaître de sa requête. Son argumentation me paraît en effet, en substance, être la suivante : *SI* la puissance administrante de ce territoire était le Portugal, *SI* l'Indonésie ne pouvait prétendre exercer aucun droit d'aucune sorte sur ce territoire, *SI* le traité de 1989 portait sur des ressources naturelles relevant exclusivement du Portugal, et *SI*, dans ces conditions, l'Australie l'avait signé avec un Etat autre que le Portugal, la responsabilité de l'Australie se trouverait engagée.

Ce raisonnement se heurte a deux objections, l'une et l'autre dirimantes.

En premier lieu, la Cour ne peut évidemment pas

- décider que c'est le Portugal avec lequel un traité de ce type peut être conclu sans décider au préalable que l'Indonésie n'a pas cette capacité,
- ni déterminer que le Portugal est investi de droits exclusifs sur ce territoire, sans déterminer, toujours préalablement, que l'Indonésie qui pourtant revendique de tels droits, n'en a, pour sa part, aucun,
- ni admettre les prétentions portugaises sur les ressources naturelles de Timor, sans écarter d'abord celles, concurrentes, de l'Indonésie,
- ni enfin postuler que la conclusion d'un traité est un simple fait, un fait «en soi» comme le voudrait le Portugal (mémoire du Portugal, p. 75, par. 3.06) alors que, par définition - je l'ai

déjà dit -, un traité «est un accord international conclu ... entre Etats» et que, en la présente occurrence, l'Indonésie est l'un de ces Etats.

L'Australie n'a pas conclu, un jour quelconque, avec un Etat quelconque, un traité quelconque, portant sur les ressources naturelles d'un territoire quelconque. Elle a conclu, le 11 décembre 1989, un accord bien précis avec un Etat bien précis, l'Indonésie, par lequel ces deux Etats prévoient, pour une période déterminée, l'exploitation partiellement conjointe des ressources naturelles du plateau continental qu'ils estiment, l'un et l'autre, leur appartenir. Certes, le Portugal peut contester ceci s'il le veut. Pour cela, il doit d'abord établir que l'Australie n'a aucun droit sur cette partie du plateau continental réclamée par le Portugal, et dont le régime est l'objet même de l'accord avec l'Indonésie; or, en la présente espèce, les seuls droits contestés sont ceux dont se prévaut l'Indonésie, décidément omniprésente. L'Australie, Monsieur le Président, ne s'est pas emparée de ressources ne lui appartenant pas : elle estime qu'elle a des droits souverains sur ces ressources mais, à tout prendre, si tel n'était pas le cas, ce serait l'Indonésie, toujours elle, qui aurait, illicitement selon le Portugal, cédé ces ressources à l'Australie. Le problème n'est donc pas de savoir si l'Australie a disposé de ce qui ne lui appartenait pas, mais, bel et bien, de déterminer si *l'Indonésie* les a cédées. Autrement dit, si *l'Indonésie* est chez elle au Timor oriental. Ceci ne peut pas être postulé; on ne peut pas faire «comme si» c'était vrai; pour trancher le différend qui lui est soumis par le Portugal, la Cour doit nécessairement se prononcer sur ce point.

Du reste et en second lieu, avec les «si» portugais, la tâche de l'Australie - et de la Cour - se trouverait encore singulièrement simplifiée car *SI* la présentation du Portugal était juridiquement acceptable, *S'IL* n'importait pas de savoir avec quel Etat l'Australie a conclu un traité, ni de qui relève le territoire qui est concerné par ce traité, alors il est clair que l'Australie a parfaitement le droit de conclure un accord avec l'Etat *quelconque* qui lui fait face en vue de l'exploitation conjointe des ressources naturelles du plateau continental ou des plateaux continentaux qui les sépare.

5. Monsieur le Président, les choses sont malheureusement moins simples et les «conduites» que le Portugal impute à l'Australie ne peuvent être détachées de celles de l'Indonésie. Ce n'est que *si* l'Indonésie n'exerce pas de droits souverains au Timor oriental que par ricochet, ou par voie de

conséquence, ces conduites pourraient, peut-être, entraîner la responsabilité de l'Australie.

En soi, bien sûr, la détermination d'une telle responsabilité n'a rien d'impossible juridiquement, mais elle passe nécessairement par la détermination, préalable, de celle de l'Indonésie; or sur cela, la Cour ne peut, statutairement, pas se prononcer en l'absence de cet Etat. Contrairement aux allégations insistantes du Portugal, l'Australie ne dit pas «c'est pas moi, c'est l'autre« (cf. CR 95/5, p. 67 ou 95/6, p. 10) ni «Nothing to do with me» (CR 95/4, p. 42), elle estime seulement qu'en application des principes les mieux établis du Statut, la Cour ne peut pas savoir «qui c'est ?». Les règles de procédure ont une fonction, une fonction non pas «échappatoire» mais protectrice; et ceci prend un relief tout particulier lorsqu'il s'agit de protéger les droits d'un Etat souverain.

Sur ce point, Monsieur le Président, il faut être très clair. Par la voix du professeur Dupuy, le Portugal a accusé l'Australie de se faire le porte-parole de l'Indonésie (cf. CR 95/6, p. 24). S'il veut dire par là que l'Australie prend le parti de l'Indonésie dans le différend qui l'oppose au Portugal, rien n'est plus faux. Par contre, si mon contradicteur et ami veut dire par là que l'Australie souhaite que la souveraineté de l'Indonésie soit intégralement préservée, que l'Australie estime que ce pays a le droit de n'être jugé par cette Cour que s'il l'accepte, conformément à l'un des principes les mieux établis du droit international, alors le Portugal a raison : l'Australie, qui souffre elle-même d'une procédure évidemment abusive, est prête à être «plus indonésienne que Djakarta» et à dire ici ce que l'Indonésie ne peut pas dire elle-même car elle n'est pas partie à l'instance, à savoir que le comportement d'un Etat, quel qu'il soit, ne peut faire l'objet d'un prononcé judiciaire s'il n'y consent point.

Il ne s'agit pas, comme le répète sans fin le Portugal, de se «cacher» derrière l'Indonésie en pratiquant une stratégie de fuite (cf. CR 95/2, p. 38; CR 95/4, p. 52; CR 95/5, p. 66; CR 95/6, p. 17, etc.) pour échapper à ses propres responsabilités. il s'agit d'empêcher que les droits de deux Etats souverains soient bafoués simultanément :

- en premier lieu, l'Indonésie a le droit de ne pas être jugée si, dans sa sagesse souveraine, elle en décide ainsi; on peut modifier le Statut; peut-être qu'on devrait modifier le Statut; mais aussi longtemps qu'il démeure en l'état, aussi longtemps que l'article 36 est ce qu'il est, ni les

Etats, ni la Cour, ne peuvent en faire une application sélective et discriminatoire;

- en second lieu, pour sa part, l'Australie a le droit de ne pas être jugée pour des actes qu'elle n'a pas commis, or, même s'il s'en défend du bout des lèvres, c'est bien ce que recherche le Portugal. il s'emploie à ce que l'opprobre qui entache, à ses yeux, le comportement de l'Indonésie, retombe sur l'Australie.

6. Celle-ci aurait, selon lui, changé de stratégie. Dans son contre-mémoire, la Partie australienne a insisté sur le fait que «le véritable défendeur n'est pas partie à l'instance» (contre-mémoire de l'Australie, p. 7; voir CR 95/5, p. 59); dans sa duplique, l'Australie aurait reconnu s'être «trompée de défense» du fait qu'elle accepterait d'être «partie pertinente» mais non «partie suffisante» (*ibid.)*.

Il n'existe aucune incompatibilité entre ces deux arguments; ils se complètent et se renforcent : l'Australie estime que le Portugal n'en a en réalité que contre l'Indonésie. Malgré sa vertueuse indignation anti-australienne aux fins de ce procès, c'est l'Indonésie que le Portugal cherche à atteindre. La preuve en est que le Portugal consacre finalement l'essentiel de ses plaidoiries à dénoncer les agissements de ce pays, pas de l'Australie; on le comprend d'ailleurs : s'il ne peut établir l'illicéité des conduites indonésiennes, du même coup, et «par nécessité logique absolue» - le Portugal aime bien cette phrase - ses accusations contre l'Australie tombent. L'Australie est la mauvaise cible, the *wrong target*, et, si elle pouvait devenir cible à son tour la balle devrait d'abord, nécessairement, inévitablement, traverser la première cible; la responsabilité, originaire, de l'Indonésie devrait être établie.

On a dit dans cette salle que l'Australie jouerait à «chat-perché» (CR 95/6, p. 22). Je n'aime pas beaucoup ce genre de comparaison ludique dans une affaire si douloureuse - car s'il s'agit d'un jeu, il est cruel. Mais qu'il me soit permis de dire que, si quelqu'un joue, nous pensons, de ce côté de la barre, que c'est le Portugal. Il joue avec l'honneur de l'Australie; il joue avec la souveraineté de l'Indonésie; il joue à colin-maillard : aveuglé - par ses bonnes intentions peut-être, mais aveuglé -, il s'en prend à un Etat qui n'en peut mais, faute de pouvoir attraper celui qu'en réalité il poursuit.

7. Pour tenter de dissimuler la faiblesse congénitale de sa thèse, le Portugal doit dès lors :

1) formuler des questions totalement artificielles en des termes terriblement abstraits et qui, pourtant, ne parviennent pas à masquer le fait fondamental que, si responsabilité il y a, celle de l'Australie ne serait que consécutive à celle de l'Indonésie;

2) il doit s'abriter derrière des décisions fictives des Nations Unies, et

3) il doit introduire des distinctions, sans aucune pertinence en l'espèce, entre obligations et droits *erga omnes* d'une part et obligations et droits *erga singulum* d'autre part.

Monsieur le Président, j'ai l'intention de reprendre ces trois points un à un, mais je pense que, puisqu'il est à peu près l'heure, il serait sans doute opportun que je m'arrête ici. Je vous remercie.

Le PRESIDENT : Je vous remercie beaucoup, Monsieur le professeur Pellet. La Cour reprendra ses audiences demain matin à 10 heures.

L'audience est levée à 13 heures.

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