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tenue le mercredi 8 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 Wednesday 8 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

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

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

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

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

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

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

as Advisers.

The PRESIDENT: Please be seated. The Court will now resume its sitting to hear the oral argument of Australia and I call upon Mr. Burmester to complete his statement which he began yesterday.

Mr. BURMESTER: Mr. President, Members of the Court. When I finished yesterday, I had indicated that, in order to determine if Portugal had standing, it was necessary to understand the circumstances in which it exercised and continued to be called an Administering Power.

1.1 The conduct of the self-determination exercise

In the case of Portugal such an examination shows a very factual and limited legal capacity, particularly in relation to the right to organise and conduct the self-determination exercise. If Portugal does not have this particular duty, it is difficult to see how any legal right and interest in relation to the territory exists.

Being deprived through abandonment of the powers and rights possessed by a normal and effective administrator, Portugal contends that it still retains the powers and rights necessary to organise and conduct the self-determination exercise leading to the decolonisation of East Timor and that such rights "belong to Portugal" (PR, p. 76, para. 4.25). This in fact Portugal says is its main function. But it is without foundation.

Mr. Griffith on Monday analyzed the limited role exercised by Portugal over the territory in 1974 and 1975; and Portugal's inconsistent behaviour since. In relation to the exercise of the right to self-determination, Portugal is only one of several interested Parties and *not* the representative of the East Timor people.

Nevertheless, Portugal claims to have the right and the responsibility and I quote from paragraph 5.46 of their Memorial: "for conducting the process ... which will lead to the institution of free and informed choice by the people concerned". Portugal also notes that:

> "the organisation of the process of free choice falls within the scope of the powers of administration, *at least so long as, and in so far as, the General Assembly confines itself to a supervisory role and finds no reason itself to dictate the procedure to be followed"* (PM, p. 133, para. 5.46; emphasis added).

By its own admission therefore Portugal, thus, acknowledges that an Administering Power may not

in all cases have the responsibility to effect self-determination. Yet, in the following paragraph of the Memorial (para. 5.47), Portugal makes a fanciful description of the role it believes it is called upon to play in the decolonization of East Timor, assigning at the same time a limited and passive role of mere supervision to the competent organs of the United Nations.

What I have qualified as the fanciful description by Portugal of its own rights is as follows, and I quote from the Memorial:

> "In the great majority of cases, the administering power has been responsible for determining at what stage and in what circumstances the consultation of the people is to be effected. The administering power, after reaching agreement with the representatives of the territory's people on the procedure to be followed, has *informed* the United Nations of *its decision* to conduct a formal consultation of the people of the territory. At the same time, the administering State *invites* the United Nations to supervise or observe the process. Participation by the United Nations through supervision or observation depends, in principle, on a request or invitation from the administering power." (PM, p. 134, para. 5.47; emphasis added).

This is a wildly inaccurate statement of Portugal's role in relation to East Timor - a territory from which it has long been absent. In the case of East Timor, in particular, the General Assembly has not acted on the basis that Portugal can be left to pursue its own procedures for the exercise of self-determination.

Now, it is true, Portugal did take action in 1974 to enable the self-determination process to begin (CR 95/2, p. 24). But whatever it may wish, it is in no position to pursue this role today. It abandoned the territory and any capacity to bring about self-determination.

Until 1974, it resisted any efforts to ascertain the will of the inhabitants of its colonies. When its position changed in 1974 the United Nations welcomed this, and called on Portugal to take steps to ensure the full implementation of resolution 1514 (XV). However, this was to be in conjunction with the national liberation movements in their capacity as "qualified counterparts" with the aim of the total transfer of powers to the representatives of the peoples concerned (resolution 3294 (XXIX) of 13 December 1974).

The Portuguese authorities in Lisbon did enact a law, No. 7/75 of 17 July 1975, governing specifically the decolonization of East Timor "setting out the self-determination procedure for the territory and the governmental structure during the transitional period of three years". Thus, as the

Memorial admits, Portugal arranged "the self determination process by means of a unilateral act" (PM, p. 15, para. 1.22).

However, one and a half months after the adoption, by unilateral act, of that law and annexed statute, the Portuguese administration, devoid of any support, was told by Lisbon to withdraw to the Island of Atauro - and it did so. And then in December the same year told to withdraw even from there - and it did. It has since been in no position in any way to effect an act of self-determination or to protect the integrity of the territory. Portugal was not left to make its own arrangements for self-determination. It was very much required to accept the reality of the liberation movements. As soon as Indonesia appeared on the horizon, Portugal scurried away. It left the people of East Timor to determine their future by themselves. Mr. Griffith outlined the circumstances of this abandonment in greater detail.

Portugal says it never intended to relinquish its powers as Administering Power (CR 95/3, p. 62). But the facts show it did so. It told the United Nations it was for the United Nations to find a solution. If Portuguese policy today is to seek a major role in relation to the self-determination of the people, that cannot restore legal rights previously abandoned. The fact that in 1984 FRETILIN abandoned its proclamation of independence and again recognised Portugal as Administering Power (CR 95/3, p. 54) cannot confer any rights on Portugal it had previously lost. Being called Administering Power does not itself demonstrate that it has the necessary rights. This is confirmed by the United Nations treatment of Portugal. The United Nations does *not* envisage a role for Portugal as an "essential element" or a "relevant instrument", to use the words of Portugal's counsel, in the self-determination process, despite what Portugal claims (CR 95/3, p. 72).

1.2 The UN treatment of Portugal's role in relation to East Timor

The United Nations has drawn consequences from Portugal's ineffectiveness in acknowledging that it is no longer the legitimate representative of the East Timorese people. It has not entrusted Portugal with responsibility to organize and conduct the self-determination exercise. That would put Portugal in the position to act as judge and arbiter in its own dispute. Portugal for this purpose is no more than an "interested party". And here is a significant "functional" limitation - the possibility of

such a limitation Portugal itself acknowledges.

The General Assembly has established a mechanism which is the necessary antecedent for the implementation of the right to self-determination in this case, namely the settlement of the underlying dispute. To this end the General Assembly has encouraged and promoted consultations and eventually negotiations between the two States concerned. The last word on the subject - as long ago as 1982 - is the request in paragraph 1 of resolution 37/30, addressed to the Secretary-General,

> "to initiate consultations with all parties directly concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem and to report thereon to the General Assembly".

Paragraph 2 of the operative part of the resolution entrusts "the implementation of the present resolution" not to Portugal, but to the Secretary-General, assisted by the Committee of 24. Earlier presentations have referred to the position reached pursuant to this mandate given to the Secretary-General.

Thus Portugal, as one of the States concerned, does not derive from resolution 37/30 any rights of its own in relation to the exercise of self-determination that would entitle it to acquire "standing" vis-à-vis Australia in relation to this case. At most, Portugal derives from resolution 37/30 a right to be consulted and to participate in the negotiations "with a view to achieve a comprehensive settlement of the problem". This right of Portugal is clearly not directed towards any role in relation to restraining the actions of Australia in relation to East Timor.

If Portugal's status as an "interested party" gave it standing, this would mean any such party in a self-determination dispute could bring actions, prior to United Nations acceptance of an act of self-determination, against any other State that has dealings with the authorities in actual control of the self-determination territory. This could lead to instability and confusion in the United Nations oversight of the self-determination process. No doubt this is why Portugal keeps emphasizing its status in the United Nations as Administering Power. However, to allow a name alone to confer standing without having regard to what actual functions such a State is carrying out can also only lead to instability. It would subvert the whole basis for the rules of standing - namely, that a plaintiff State must be able to point to a sufficient legal right of its own. To confer standing on the basis of

a name, without regard to the actual capacity in fact of a State would subvert the purpose of this prudential requirement.

I need not remind the Court that Portugal exercises no administration over the territory in question. This is not a case of an Administering Power acting to protect the territory and interests of a people in relation to which it is in control. This is not a case of an Administering Power acting to protect the integrity of territory for which it was discharging responsibilities by action against some other State which expelled it. This is a situation of a former colonial power seeking, almost 20 years after it abandoned its last link with the territory and rejected such a role, to assert a right to implement and defend the right of self-determination. This in respect of a people over whom it has no form of control whatsoever and who themselves rejected any such role at the time Portugal voluntarily left.

In these circumstances, Portugal has no legal right of its own giving it standing in this case.

II. Portugal is not the repository of the rights of the people of East Timor

The second leg of the Portuguese argument designed to identify the rights supporting its standing, is that Portugal "considers itself still to be the repository of the rights of the people of East Timor" (paragraph 14 of the Application), so that in instituting the present proceedings, Portugal claims to be performing an "international public service" as an agent or representative on behalf of the people of East Timor (paragraph 1 of the Application).

An immediate answer to this claim is that Portugal cannot represent nor be the repository of the rights of that large section of the population of East Timor and the supporting political parties which favour integration with Indonesia. But we must examine the position a little more.

One can accept that in principle there may be circumstances where third parties have a right to bring proceedings to vindicate the rights of another party whose rights cannot be directly asserted. This might particularly be so in the case of certain colonial situations as in the *South West Africa* cases where an Administering Authority is still in a position to exercise the "sacred trust" and can be said to be entrusted by the people themselves with such a task. Contrary to Portugal's contention,

the current claims by it against Australia are not covered by any such principle.

Nor is this a situation of an Administering Power or Administering Authority with any effective capacity to represent the interests of a separate and distinct self-determination unit in relation to the subject matter of the claim. The claims of Portugal to represent the people of East Timor in this case, given its lack of presence in the territory and abandonment of any pretence to administer or have any effective role in relation to the territory or its maritime resources have no greater basis than a similar representative claim by any other State. Yet Portugal denies that it seeks standing on behalf of the people of East Timor merely in its capacity as a Member of the United Nations (PR, p. 206, para. 8.14).

Portugal seeks to gain support for its standing to represent East Timor from cases concerned with protectorates or other separate entities. It makes a lot of these instances (PR, p. 201, paras. 8.06-8.08; CR 95/6, pp. 51-52). Australia demonstrated in its Rejoinder that these examples are misplaced (ARej., paras. 128-129). In all the instances referred to by Portugal, the State bringing the representative action was exercising governmental authority and there was no dispute as to their representative capacity. That is not the case here. The *Right of Passage* case referred to by Portugal involved a territorial dispute, not a representative action. And significantly the Court limited itself in that case to dealing with the period of time during which Portugal actually controlled the territory.

What is important is to examine what particular functions are being discharged by or have been entrusted to the particular State. In the case of East Timor, Portugal's limited functions in 1995 do not extend to allow it to bring a legal action as if it were a colonial power still in control or responsible for the people of its colonial territory.

Ultimately, the only circumstance on which Portugal relies for its capacity to represent the people of East Timor in these proceedings comes from its assertion that it is Administering Power. We are back where we started. But this in itself, as we have already indicated and will elaborate in later submissions, does not entitle or require a general capacity to represent a people. Any such capacity must depend on the particular circumstance of an individual State and the functional

responsibilities accorded to it, not simply an assertion of its status as Administering Power.

Now it may be that despite the rejection of Portugal as a representative by a large section of the population, the United Nations resolutions may in some form have assigned or transferred to Portugal the rights of the people of East Timor or otherwise recognized such rights. However, one would look in vain in the United Nations resolutions on East Timor for such a delegation, assignment or recognition of the rights of the people of East Timor in favour of Portugal.

On the contrary, all General Assembly resolutions since 1976, in particular resolutions 36/50 of 1981, and 37/30 of 1982 very clearly distinguish between Portugal and the representatives of the East Timorese people. Resolution 36/50 of the General Assembly, in paragraph 3, calls 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".

Far from investing Portugal with the rights of the people of East Timor, the representatives of the people of East Timor are named in the resolutions as a distinct party, fully capable of defending their own rights and acting on their own behalf separately from Portugal. And they regularly do this in the Committee of 24 and elsewhere. The General Assembly, in the preambles of resolution 36/50 (1981), as well as in resolution 37/30 (1982), recalls that it had heard "the statements of the representative of the Frente Revolucionário de Timor Leste Independente", the liberation movement of East Timor, and of various East Timor petitioners.

A similar conclusion results if one examines Security Council resolution 384 (22 December 1975), which is one of the corner stones of Portugal's case. It contains no express or implied transfer or delegation of powers and rights of the people of East Timor in favour of Portugal.

Far from containing any delegation of powers and rights in favour of Portugal, Security Council resolution 384 makes, in unprecedented terms, a severe criticism of Portugal's performance as Administering Power of the territory. In the preamble of the resolution the Security Council expresses regret "that the Government of Portugal did not discharge fully its responsibilities as Administering Power of the territory under Chapter XI of the Charter".

It is a far-fetched and cynical interpretation of this strong criticism to read the reference to

Portugal as Administering Power as containing an implicit delegation of rights. What the phrase really intends and means is not that Portugal shall retain its full rights as Administering Power, but that, when it had that capacity, it did not discharge properly its responsibilities as such.

In the light of the whole record of Portugal as Administering Power of the territory, it is difficult to accept the argument advanced in the Reply (paras. 8.15 and 8.16) to the effect that the status of Portugal as "international representative of the people of East Timor", emanates from the "sacred trust", assigned by Article 73 of the Charter.

In 1977, two years after the Security Council resolution, the General Assembly, in resolution 32/34 indicated that the fact-finding functions of the special representative of the Secretary-General were enlarged to comprise certain conciliatory duties. These consisted of:

> "establishing contact with the representatives of the Frente Revolucionário de Timor Leste Independente and the Government of Indonesia, as well as the Governments of other States concerned".

In this resolution, Portugal is not even mentioned by name, although it is comprised within the category of "other States concerned", again separately from the representatives of FRETILIN.

Finally, in paragraph 7 of General Assembly resolution 37/30 in 1982, the last word on the books, the Secretary-General, through his special representative, is requested to "initiate consultations with all parties directly concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem".

Thus, the function of representing and defending the rights of the people of East Timor is fully retained by the United Nations and there is no recognition of such rights in favour of Portugal. Portugal is merely one of the States directly concerned and its rights only exist toward the Secretary-General and are limited to taking part in the processes of conciliation and negotiations going on at present.

Portugal argues that the people of East Timor accept Portugal's capacity of Administering Power and support the introduction of the present proceedings (PR, p. 31, paras. 3.13-3.18; CR 95/3, p. 53). But this is not so. The position taken towards Portugal and the people of East Timor in the United Nations contradicts Portugal's assertion. Mr. Griffith provided details in this regard on

Monday. Portugal acknowledges that until 1984, the people of East Timor had not acknowledged any role for Portugal (PR, p. 31, para. 3.14). Since then, it points to statements by various representatives and petitioners, in particular a 1991 letter from the head of the Timor resistance movement. As a matter of law, unilateral calls to a State to defend the interests of the people cannot amount to an effective delegation of power to such a State to take action in the International Court. All the more as the United Nations has never changed its finding that Portugal was *not* the legitimate representative of the East Timorese people.

Whether Portugal has such a capacity depends on its entitlement to represent the people and this must be determined by an objective examination of its position. Portugal cannot give itself an entitlement it does not otherwise have by getting a letter sent to it, even from the leader of a liberation movement. For the reasons given, the United Nations does not recognize any such entitlement. And as the most recent efforts of the Secretary-General illustrate, an all inclusive intra-East Timorese dialogue is being established. This confirms, yet again, that Portugal cannot speak for the East Timorese people. Only the people of East Timor themselves can do that.

Portugal argues that to deny standing to it to represent the people would leave those people unable to defend their rights. That is not so. The United Nations can do that - including by action in this Court. The *Namibia* and *Western Sahara* cases demonstrate this.

We may conclude, therefore, on this second leg of Portugal's arguments, that there is no basis for its claim to be the repository of the rights of the people of East Timor. Consequently, Portugal does not have standing vis-à-vis Australia, for the purpose of these proceedings, on the basis of these alleged rights of the people of East Timor. Not only is the claim against the wrong party, but it is brought by a plaintiff without the necessary legal right or capacity.

Mr. President, that concludes Australia's arguments on admissibility. Professor Crawford, with your permission, will introduce Australia's arguments in relation to the merits of the case.

The PRESIDENT: Thank you, Mr. Burmester. I now give the floor to Mr. Crawford.

Mr. CRAWFORD: Merci beaucoup, Monsieur le Président. Mr. President, Members of

the Court.

Introduction and overview of arguments as to the merits 1. Australia now turns to the merits of the present case. But as explained by the Agent, Mr. Griffith, in his opening address, this is not its primary claim. The arguments as to the merits of Portugal's claim are made only in the alternative, in the event that the arguments based on jurisdiction or admissibility should fail. The difficulties for the Court in dealing with the abstract and byzantinely-formulated questions presented by Portugal are considerable. In Australia's view they are insuperable. In order to decide Portugal's claims in the tortuous terms in which they have been expressed, the Court will have to engage in an exercise "remote from reality" (cf. *Northern Cameroons* case, *I.C.J. Reports 1963,* p. 15, para. 33). And yet, as the Portuguese Agent made clear last week (CR 95/2, p. 17), the Court's decision will be seen outside the Court as addressing much wider issues, *real* issues directly involving a third State.

2. There is a simple way out of the complex puzzle set for the Court by Portugal - one is inclined to call it a jigsaw with half the pieces missing, or a three-dimensional game of chess without the king. The Court is not required to play games - exercises in unreality. It can simply hold the case inadmissible for reasons given by Australia.

3. Having said that, nonetheless Australia takes this opportunity to respond to Portugal's arguments on the merits as far as possible in their own terms, and using Portugal's own words, whether they take the form of double negatives, single negatives or even occasionally positives.

4. Australia's arguments on this part of the case come under three main headings. *First*, is the complex of arguments relating to self-determination and related issues, and to the alleged consequences of the description of Portugal as Administering Power. A *second* group of arguments relates to Australia's right to negotiate for the protection of its maritime resources, and the alleged violation of the principle of permanent sovereignty over natural resources. A *third* and final group of issues relates to the question of judicial propriety which arises in this case, a question strongly illuminated by considering the remedies sought by Portugal.

Self-determination over East Timor and the position of Portugal as "Administering Power"

5. I turn then to the first group of arguments relating to self-determination, recognition and the alleged consequences of the description of Portugal as "Administering Power".

6. On Monday the Court heard an account by Ambassador Tate of the Australian Government's position with respect to self-determination for the people of East Timor (CR 95/7, pp. 23-32). It may be useful at the outset of the Australian pleading to summarize that position at the level of substance.

7. Australia accepts that the people of East Timor continue to have a right of self-determination. But the question of how self-determination is to be achieved in the territory is, first and last, a matter for the competent United Nations organs to deal with, in conjunction with the "parties directly concerned". The term "parties directly concerned" has been used by the General Assembly to include both Portugal and Indonesia, as well as the representatives of the East Timorese people. It has never included and does not now include Australia. Australia is ready to comply with any decision of the competent United Nations organs as to the future of the territory, and as far as it can to facilitate the work of the Secretary-General in seeking to resolve the dispute. It has been generous in the humanitarian aid which it has provided to the people of East Timor. But as a third party, one which never had nor assumed responsibility for the administration of East Timor, there is little more that Australia is in a position to offer by way of practical assistance, and there is nothing more that international law requires it to do. There has been no recommendation by any United Nations body directed to third parties and calling on them not to deal with Indonesia in respect of East Timor. There has been no United Nations decision requiring them not to do so. In the absence of such a recommendation or decision there is no duty not to deal with Indonesia, which is the firmly established authority in fact controlling the territory of East Timor.

8. In this part of its argument on the merits, Australia will show how the position which I have just summarized is fully supported under international law and is consistent with the practice of States, including, significantly, in other contexts the practice of Portugal itself.

9. Mr. President, as I pointed out yesterday, Portugal does not - I repeat, not - rely on

Indonesia's use of force as a basis for its claim in the present case. It denies

> "that the dispute which is brought before the Court relates to the Indonesian military intervention in East Timor and its consequences for the right of self-determination of the people of East Timor" (PR, p. 209, para. 9.02).

It refers to two categories of obligations of non-recognition, a "first category" which relates to self-determination and to the status of East Timer as a non-self-governing territory, and a "second category" of "obligations not to recognize a *de facto* situation created by force" (PR, p. 24, para. 2.19). It expressly states that "the Portuguese Application solely concerns the infringement, by Australia, of the obligations in the first category" (PR, p. 22, para. 2.20). That is to say the category relating to self-determination. It insists that "Portugal is quite simply not asking the Court to pronounce on the wrongfulness of this [the Indonesian] occupation" (*ibid*.). It further insists that "[t]he Court is not requested to decide on the Indonesian position with regard to the military occupation" (PR, p. 130, para. 5.79). It repeats that its case "does not stand upon the obligation of non-recognition of situations resulting from the unlawful use of force, as such" (PR, p. 146, para. 6.30; see also PR, p. 182, para. 7.28).

10. The position clearly and specifically taken in its written pleadings was repeated before the Court last week (see e.g. CR 95/2, pp. 57-68, Galvão Teles; CR 95/5, pp. 68-70, Dupuy; CR 95/6, p. 29, Galvão Teles). This case was to be judged, Counsel for Portugal repeatedly said, quite apart from the means by which Indonesia acquired control over the territory.

11. No doubt there are good reasons for Portugal to take this position. For one thing, the Security Council, which has primary responsibility in the matter, has been decidedly circumspect in its description of Indonesian action - if "circumspect" is the right word for 20 years of silence. For another thing, the Court cannot be called on now in proceedings between Australia and Portugal to determine the legality, classification and consequences of action taken by a third State nearly 20 years ago, and Portugal's arguments clearly recognize this.

12. Moreover there is a striking discrepancy between the classifications Portugal attaches to Indonesia's conduct and the classifications attached to that conduct by the Security Council and the General Assembly. Portugal's counsel refer to *"l'invasion indonésienne"* (CR 95/2, p. 16, Cascais), to "military invasion" and conquest "*manu militari*" (CR 95/2, p. 22, Correia), to "massive

Indonesian invasion" associated with a "genocidal policy" against the people of East Timer (*ibid.*, p. 28, Correia), to the Indonesian "aggressor" (*ibid.*, p. 30, Correia), to its "armed invasion" (*ibid.*, p. 49, Correia), to its *"occupation illégale"* (CR 95/3, p. 9, Dupuy), to its "illegal occupation" and "illegal intervention" (CR 95/4, pp. 15-23, Higgins).

13. By contrast the Security Council, in its five months of activity in relation to East Timor, referred on one occasion to "the intervention of the armed forces of Indonesia" (Security Council resolution 384 (1975)), and otherwise to "the existing situation" (Security Council resolution 389 (1976)). In its early resolutions the General Assembly referred to "the military intervention of the armed forces of Indonesia" (General Assembly resolution 3485 (XXX), paras. 1, 4; General Assembly resolution 31/53, preambular para. 8), although this language, too, is not found after 1976. Neither organ ever used the terms "invasion", "conquest", "aggression" or "genocide". Neither ever described the Indonesian occupation as "illegal". And this was before the significant change in policy in 1979, after which the General Assembly ceased to call for Indonesian withdrawal at all (see CR 95/7, pp. 51-52, Griffith).

14. It is interesting in this context to recall the description of the Timor conflict given in the influential report on self-determination written by Hector Gros Espiell for the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1980. Gros Espiell describes the events of 1975 in East Timor as "a complex series of developments involving a difference of opinion between the Governments of Portugal and Indonesia" (H. Gros Espiell, *The Right to Self-Determination. Implementation of United Nations Resolutions*, United Nations, doc. E/CN.4/Sub.2/405/Rev.1 (1980), p. 54, para. 24). This accurately reflects the United Nation's overall judgment of the situation in East Timor.

15. And it clearly presents a central dilemma in this case. If Portugal's descriptions are correct then the inactivity of the United Nations, its failure to take action, is *inexplicable*. But Portugal's whole case, at the level both of admissibility and of merits, depends on the operative effect of United Nations classifications. The impact of Portugal's case depends on an unconcealed portrayal of Indonesia's conduct as genocidal, aggressive, involving the suppression by force of a

people. Its legal effect depends entirely on United Nations resolutions which deliberately refrain from using such labels. Portugal relies on United Nations resolutions in order to sustain an outcome those resolutions deliberately refrained from endorsing.

16. It may be thought that, because Portugal does not ask the Court to consider any issue relating to an unlawful use of force by Indonesia, it is unnecessary to consider this question further. On the other hand, Portugal cannot escape so easily. The application of the principles relating to use of force does not necessarily lead to the conclusion that by 1989, when the Treaty was concluded, Australia was under an obligation not to recognize the legality of Indonesia's control over East Timor. The application of those principles in concrete situations is not automatic. Bangladesh was recognized as a State notwithstanding the United Nations criticism of India's use of force in East Bengal. The acquisition of Goa was recognized by third States well before Portugal itself recognized the fact and notwithstanding the use of force by India. Professor Correia attempted to distinguish the Goa case on the ground that it happened under the Portuguese dictatorship (CR 95/3, p. 61). But this is transparently inadequate; international law protects all States against external use of force, whatever their form of government, as the Court pointed out in the *Nicaragua* case (see *Nicaragua, Merits, Judgment, I.C.J. Reports 1986*, p. 14, paras. 131-13, and see further ACM, paras. 350-359; ARej., paras. 217-230). That the government of a State may not be democratic is not a justification for the unilateral use of force.

17. Moreover Portugal's pleading strategy presents enormous difficulties for the Court at the stage of the merits. So much so - the Court will forgive me for the repetition - that Australia believes that the Court ought not to proceed to the merits: the way the Portuguese case is put presents an issue of an unreal and artificial character, one "remote from reality" - as this Court, for different reasons, described the position in the *Northern Cameroons* case (*I.C.J. Reports 1963*, p. 15, para. 33). Since Portugal accepts that the Court cannot decide the case on the basis of Indonesia's unlawful use of force - a use of force that has never been classified as illegal or unlawful by the United Nations - the case has to be dealt with on the assumption that Indonesia somehow came to control the territory lawfully - or at least not unlawfully - so far as the rules relating to the

use of force are concerned. But how can the Court tell what the position of States would have been, or what the position of the United Nations would have been, in that eventuality? The Security Council and the General Assembly were restrained enough as it was. Professor Correia referred to "the earth of so many unmarked graves ... the walls of so many prisons ... the soldiers of the invader who guard over the smallest villages" (CR 95/2, p. 22) and that is a situation, wherever it occurs, that we would all deplore. The Security Council managed to describe the situation - if it is accurate in relation to East Timer - as a "continued situation of tension" (Security Council resolution 389 (1976), preambular paragraph 8), after which it ceased to deal with the situation at all. Can one think what the competent organs of the United Nations would have said if they had been acting on the hypothesis that Portugal now explicitly presents to the Court for its decision, the hypothesis of a denial of self-determination *not* accompanied by use of force?

18. The point is this. Portugal asks the Court to rely on United Nations' appreciations of an overall situation, while disclaiming any reliance on a key legal element of that situation. It thereby puts the Court in an impossible position. How can the Court evaluate the meaning, legal effect or even the validity of resolutions which looked at the situation as a whole, when Portugal denies that the Court can even consider the most important potentially applicable norm?

19. For this reason, as well as for the associated difficulties with the *Monetary Gold* principle, which have already been analyzed, Australia's primary submission is that the Portuguese claim is inadmissible. Portugal seeks through abstraction of issues to escape from impleading a third State, but can only do so by requiring the Court to decide unreal questions. Threatened with impalement on the horn of *Monetary Gold*, it leaps desperately on to the horn of *Northern Cameroons*. There is no escape from that dilemma.

20. However, let us assume - for the sake of argument - that the Court must engage in the mental gymnastics required by Portugal's argument. Let us proceed to address the question that Portugal says the Court is asked to decide. That question may be formulated as follows: was Australia entitled to enter into the 1989 Treaty with Indonesia? And in answering this question, one must do so regardless of whether or not Indonesia came lawfully into possession and control of East

Timor, and regardless of whether or not Australia was under any duty not to recognize Indonesia's sovereignty, or not to deal with Indonesia, by reference to the means by which Indonesia secured control over the territory in 1975. So that is the question, and those are the constraints on the Court answering the question.

Self-determination and the terms of the 1989 Treaty

21. In discussing this issue, the first point to be made is that the terms and effect of the 1989 Treaty are not, as such, inconsistent with the self-determination of the people of East Timor. The Treaty neither prevents nor impedes the exercise of the right of self-determination.

22. Moreover, Australia does not claim - and Portugal does not claim - that the Treaty would be opposable to a newly-independent East Timer (ARej., Part II, Chap. 3). It will be a matter for the authorities of East Timor, in that eventuality, to decide whether to affirm the Treaty or to seek to negotiate another arrangement, or, indeed, to seek to agree a continental shelf boundary between the two States.

23. As I pointed out yesterday, Portugal in its written pleadings did not criticize the terms or effect of the Treaty as such, at all, only the fact that it was concluded with a State other than Portugal (CR 95/8, pp. 63-64). In other words, it accepted that the Treaty would not be a violation of self-determination if made with Portugal (see e.g., PR, para. 5.09). Indeed, it accepted that this would have been the case, even though there was in fact no guarantee that Portugal would have spent any eventual proceeds of exploitation of the continental shelf on the Timorese people, and even though Portugal was itself in breach of the principle of self-determination in relation to East Timer from the inception of that principle right up until it left and from its becoming a Member of the United Nations from 1955 onwards.

24. During oral argument Portugal changed its position to a degree, launching an attack on the Treaty itself, despite the serious difficulties that such an attack presents for the admissibility of the case as a whole (CR 95/8, p. 48, with references to earlier pleadings). But for the reasons I gave yesterday, and do not need to repeat, there is no reason whatever to doubt the position taken by Portugal in its written pleadings (CR 95/8, pp. 63-64). It could have lawfully entered into this

Treaty before 1975 and, accordingly, there is no conflict between the principle of self-determination and the terms of the Treaty. State practice is fully consistent with that conclusion, as Mr. Burmester will show.

Self-determination and the fact of the 1989 Treaty

25. Nonetheless, Portugal argues that the making of the Treaty by Australia was unlawful. It was unlawful for the reason that Australia dealt with a State other than Portugal in respect of East Timor. Portugal says that Australia has breached Portugal's exclusive right to represent the territory. Portugal's complaint, and if the analysis I have just made of the position is correct, its only complaint, is that the 1989 Treaty was not made with it (for confirmation see CR 95/2, pp. 13-14 and 33-34, Correia).

26. Mr. President, Members of the Court, in the remainder of my presentation this morning I will deal with the legal principles relevant to that argument. Mr. Burmester will then undertake an examination of relevant State practice and United Nations decisions, which confirm that States are free to deal with a State effectively in control of a Chapter XI territory, whether or not that State is the State referred to by the United Nations as the Administering Power, except where the United Nations decides to the contrary. Professor Bowett, tomorrow, will examine the relevant United Nations resolutions to show that there has been no such United Nations decision. And Mr. Staker will show that the description of a State by the United Nations as the Administering Power does not have legal consequences of the kind contended for by Portugal, and certainly does not mean that all States must refrain from dealing with any other State relating to the territory.

Sovereignty, recognition and self-determination

27. Before discussing the specific case before the Court, it is helpful briefly to outline the position with respect to territorial sovereignty and the recognition of change of sovereignty as it was when the Charter came into force in 1945, although leaving to one side, as Portugal accepts the Court must do, issues relating to the use of force. Leaving that aside, the principles were as follows:

(1) the sovereignty of States extended to overseas territories conquered and annexed by, ceded to or otherwise acquired by them. On the other hand many colonial territories were not held by

right of sovereignty but under treaties of protection and similar arrangements, as the Court recognized in *United States Nationals in Morocco* (*I.C.J. Reports 1952*, p. 185). Thus although some territories "which were then known to be of colonial type" belonged in sovereignty to the colonizer, others did not;

(2) third States were entitled to recognize changes in sovereignty over territory once those changes were secure and effective, and they did not need to enter into the rights and wrongs of the situation as between the displaced sovereign and the new claimant. In other words, there was no legal duty of non-recognition of territorial change, leaving to one side issues relating to the use of force;

(3) third States were entitled to deal with a State effectively and securely in control of territory, although whether any such dealings would bind or be opposable to a successor was another question;

(4) formal recognition of territorial change, as of new States or governments, was essentially optional and a matter of policy.

28. No doubt this position has changed in a number of respects since 1945. The rules relating to the use of force embodied in the Charter have an important role in issues of recognition. But, as we have seen, Portugal does not and cannot rely on those rules in the present case (CR 95/8, pp. 49-50; and see above, paras. 9-10).

29. In many other respects, however, the legal position has not changed. In particular, recognition is still regarded as an essentially political decision to be taken in the light of the particular facts. Moreover, rather than continue the position under the League of Nations Covenant, where some level of collective action was an immediate and quasi-automatic consequence of a breach of the Covenant, the Charter focuses on collective action to be required or recommended by United Nations organs in the exercise of *discretionary* powers. Chapter VII authorizes the Security Council to act in any situation which may constitute a threat to the peace, or breach of the peace or an act of aggression. But it does not *require* action by the Security Council, and whether we like it or not the fact is that the Security Council has responded only to a proportion of the many situations

which might be thought to call for action under Chapter VII. Within the framework of the Charter, the Security Council acts - or fails to act - in the exercise of a discretionary power, and yet responses of member States are essentially contingent upon its action.

30. It is true of course that this Court may well have a power of appreciation of Security Council resolutions, as Professor Pellet pointed out yesterday (CR 95/8, p. 24). But no-one has ever suggested that this power of appreciation extends to the review of Security Council *inaction*, or that the Court can place itself in the vanguard of collective security in situations where the Security Council has, for whatever reasons, declined to act. Is the position any different with respect to decolonization, where the General Assembly is the relevant organ, the "lead agency", so to speak? Certainly not, as the practice of the Court, which I will analyze in a moment, shows.

31. In the real world, the Indonesian intervention in *East Timor* posed issues relating to the use of force as well as, or even more than, self-determination. But the Security Council never qualified the situation in East Timor as a threat to or breach of the peace - still less an act of aggression - and it ceased to take any action with respect to the situation within a few months of the Indonesian intervention. The General Assembly kept up its involvement for longer, but with sharply declining support, as the Judges will see if you look in your folder at the Table of proportions of States voting in favour of the relevant resolutions. From 1979 onwards the General Assembly too ceased to call for Indonesian withdrawal. And yet Portugal argues that third States were, and are, under an automatic, perpetual and imprescriptible obligation of non-recognition (CR 95/5, p. 26, Higgins). This argument bears no relationship to Charter norms, where the response of member States is in general tied to the response of the relevant organs, and it bears no relationship to the underlying norms of international law.

32. The point has to be emphasized. Under international law, in the absence of a direction from the Security Council, States can decide to recognize a new situation of fact, if they conclude that the situation has stabilized, and leaving to one side, as Portugal insists the Court must do, issues relating to the use of force. Recognition has always been a quintessentially political act. Charles De Visscher referred to acts of recognition as "en droit ... des actes souverainement libres" and such

citations could be multiplied (C. De Visscher, *Les effectivités en droit international public* (1967) p. 39, and see further ACM, paras. 350-359; ARej, paras. 214-216 and 226-228.) In the absence of collective action - and there has been none here, through the competent organs of the United Nations or elsewhere - the decision to recognize is necessarily a matter for each individual State.

33. It must also be emphasized that Portugal does not complain that the decision was taken *prematurely*. It complains that the decision was made at all. For example, Professor Higgins had this to say:

> "Self-determination is a norm of *jus cogens*, which knows of no statute of limitation and which falls exactly into the category of events to which the principle of *ex injuria jus non oritur* applies, thus rendering legally irrelevant any *effectivités* ... [N]either the efflux of time nor the control which Indonesia presently has over East Timor has eroded the right of the peoples of East Timor to self-determination, or the legal consequences for third parties of that right." (CR 95/5, p. 26.)

34. The first point to be made about this passage is that Australia agrees that the people of East Timor have a right of self-determination. What I am discussing, however, is the question of Portugal's territorial rights to East Timor, which is not the same thing - although it may be that Professor Higgins identifies the two, since she refers to the "concomitant legal entitlements of the people of East Timor or of Portugal" (CR 95/5, p. 26). So let us apply her notion of imprescriptibility to *Portugal's* rights, and in order to test the argument, let us assume that the present situation in East Timor continues for a further period of years, perhaps with desultory discussions between successive Secretaries-General, Portugal and Indonesia. It is a very realistic assumption. On that basis, the already existing acquiescence in the territorial status quo would be reinforced. But the Portuguese argument would still apply, unchanged, perpetual. Portugal's argument would apply to the entry into this Treaty not only in 1989 but in 1999, in 2009, and so on - for as long as the 10 United Nations resolutions passed in the period from 1975 to 1982 remained unrepealed. That is what imprescriptibility means for this case. In place of the well-known capacity of third States to recognize new situations firmly established, Portugal seeks to substitute the veto of a former colonial Power.

35. In practice it is doubtful whether non-recognition even of unlawful use of force should have such perpetual consequences. There comes a time - it may be a long time - when facts have to

be faced. This is especially true in the absence of a deliberate policy of collective non recognition - as the case of Goa shows. And Portugal does not rely on any unlawful Indonesian use of force. Instead it relies on the right of self-determination, to which it says that its own substantial status as the State entitled to exercise, as the State *de jure* possessing, sovereign authority in East Timor is attached. The General Assembly described it as a "colonial dominator". Portugal said that a permanent, imprescriptible obligation of non-recognition arises automatically, for the whole world, from a breach of self-determination by any State.

36. Now it is true that there has been a substantial evolution in the field of self-determination, especially in relation to situations of colonial type, although these are not the only situations to which self-determination applies. As this Court observed with respect to self-determination of mandated territories in the *Namibia* Advisory Opinion, "the *corpus iuris gentium* has been considerably enriched" (*I.C.J. Reports 1971*, pp. 31-32, para. 53). But the Court has treated the "subsequent development of international law in regard to non-self-governing territories" as substantially resulting from the application of Charter norms by the political organs, and in particular the General Assembly. No doubt the principle of self-determination derives from the Charter itself (although there is neither express reference to that principle, nor to the term "independence", in Chapter XI). But as the Court pointed out in the *Western Sahara* Advisory Opinion:

> "The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized." (*I.C.J. Reports 1975*, p. 36, para. 71.)

"*Carta ipsa loquitur*", Professor Dupuy wittily said (CR 95/3, p. 13). But this Court seems to have disagreed.

37. Moreover the "forms and procedures" to which the Court referred in *Western Sahara* are not conceived narrowly. How the right of self-determination applies in any case is largely deduced from the practice of the General Assembly. What is crucial, even so far as the Court is concerned, is to look at "the basic principles governing the decolonization policy of the General Assembly" (*I.C.J. Reports 1975*, p. 34, para. 60). And this is true, not just at the level of general principle, it is

true for the application of the principle to each particular case. In relation to any given territory, the specific content of the principle is to be sought, as far as possible, in "those resolutions which bear specifically on the decolonization of" the relevant territory, and in "the different ways in which the General Assembly resolutions... dealt with" that territory as compared with others (*I.C.J. Reports 1975*, p. 34, para. 60). The Court has regard throughout "to the particular circumstances of the case" as seen by the competent political organs (cf. *Certain Phosphate Lands in Nauru*, *I.C.J. Reports 1992*, p. 253, para. 30).

38. There are good reasons for the Court to defer, as far as possible, to the deliberate judgment of the political organs in matters of self-determination, while retaining, of course, its power of legal appreciation of these political acts. An important reason for deferring to the General Assembly's decolonization policy is the sheer variety of cases; decolonization has encompassed, since 1945, a large part of the surface of the globe and a majority of members of the present international community. The territories concerned - approximately 100 of them - have varied greatly in size, resources, political and legal history, and this has had an undeniable influence in the treatment of particular cases (see also ACM, para. 320, citing Judge Petrén).

39. One such variation is of particular significance here. Chapter XI territories have varied markedly in their municipal legal status vis-à-vis the metropolitan power. Chapter XI has been applied to territories with many different legal statuses in national law, whether colonies or departments, provinces or protectorates. Their municipal legal status has never been treated as decisive: a State cannot avoid its international obligations by relying on its national law. Thus the status referred to in Chapter XI is an international status, independent of classifications of national law.

40. This is clear from one of the more important texts in this field, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States, annexed to General Assembly resolution 2625 of 1970 - I will call it hereafter the Friendly Relations Declaration for short. Under the heading of equal rights and self-determination, the Friendly Relations Declaration specifies that:

> "The territory of a colony or other non-self-governing territory has, under the

> Charter, a status separate and distinct from the territory of the State administering it..." (General Assembly resolution 2625 (XXV), 24 October 1970, Annex: Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, Principle 5, para. 6.)

But this independent legal status is precisely a reflection of the continuing right of self-determination of the people of the territory. It is not concerned one way or another with the sovereignty of the State controlling and administering the territory, or with the internal constitutional status of the territory in question.

41. On the one hand, States did not lose their sovereign authority over their Chapter XI territories on becoming members of the United Nations - if sovereign authority is what they had. Rather they were taken to have accepted the developing and evolutionary principle of self-determination, which came to be seen as a right of the peoples concerned (cf. *Namibia, Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 31-32, para. 55).

42. On the other hand, Chapter XI territories did not cease to be non-self-governing merely because they were called - either originally or by subsequent change - provinces, departments or other constitutional units of a given State. The classification of a territory as a "province" (and East Timor was a province of Portugal before 1974) or as a similar component of the Administering State is thus not at all decisive.

43. It is true that under Article 73 *(e)*, "constitutional considerations" are to be taken into account in determining the scope of the obligation to submit information on Chapter XI territories. But this confirms the point, since it relates not to the question whether a territory comes under Chapter XI but whether information should be submitted on it. When Chapter XI wants to treat "constitutional considerations" as relevant it says so expressly.

44. Thus the criteria for the application of self-determination to Chapter XI territories, criteria developed by the General Assembly, are not dependent on whether a State exercises or does not exercise sovereignty or sovereign authority over the territory. The term "sovereignty" is used to refer to the general competence or authority that States have, independent of the consent or licence of any other State, a competence to control amd govern a given territory, and to exclude others from

that territory. This competence is exercised by governments and is, of course, subject both to general international law and to treaty obligations. The point is that it is to be distinguished from the powers of a protecting State over a protectorate, or of a State present on territory with the consent of the sovereign. For present purposes it does not matter whether we refer to the possession or to the exercise of sovereignty or of sovereign rights. It does not matter whether we refer to sovereignty or to sovereign powers. It is the distinction between a State possessing or exercising such powers and a State which neither possesses nor exercises them which is at stake here (see further ARej., paras. 264-267).

45. Thus the right of self-determination of a given people is not dependent on whether the State which controls and governs them does so by virtue of the exercise of sovereignty or of sovereign powers or in some other capacity. And this is clearly reflected in the language of Chapter XI itself, which applies to member States who have, or subsequently assume, "responsibilities for the administration of" non-self-governing territories. It does not matter that those "responsibilities" may not equate to sovereignty or involve the exercise of sovereignty. To have required this would have excluded many territories of colonial type from the scope of Chapter XI.

46. This emerges also from the key General Assembly resolution laying down the criteria for determining non-self-governing territories, General Assembly resolution 1541 (XV) of 1960. That resolution was, incidentally, prompted by Portugal's intransigent refusal to accept that any of its overseas territories were covered by Chapter XI. As a prelude to listing the Portuguese territories, the General Assembly elaborated principles "which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73 *(e)* of the Charter". The resolution refers to territories "of the colonial type ... whose peoples have not yet attained a full measure of self-government" (Principle I). A territory which is geographically separate and ethnically or culturally distinct from the country administering it is prima facie non-self-governing; this presumption is affirmed, *inter alia*, if the territory and its people are "arbitrarily place[d] in a position or status of subordination" (Principles IV, V). Whether there is a position or status of

subordination is essentially a question of fact. The legal classification of the territory under the Administering State's law may be relevant, but it is not decisive. And the resolution nowhere suggests that such territories are limited to those which are under the territorial sovereignty of the Administering State.

47. While on subject of the criteria for the application of Chapter XI and their relationship to the presence or otherwise of sovereign authority, I pause to note the distinction between non-self-governing territories under Chapter XI and trust territories under Chapter XII. Counsel for Portugal tended to equate the two, with the purpose of applying to East Timor the rules about the disposition of territorial authority which apply to trust territories, and by analogy also to mandated territories (e.g., CR 95/3, p. 63, Correia; CR 95/4, p. 46, Higgins). Now at one level these different classes of territory were and to the extent that they still exist are treated in the same way: by a process of development, the principle of self-determination came to apply to them all, as the Court pointed out in *Namibia, (I.C.J. Reports 1971*, p. 31, para. 52). But that principle operated as on *obligation* on the States responsible for the administration of specific territories; it did not transform the underlying dispositive arrangements. Otherwise the procedure that was adopted to identify Chapter XI territories, that is, by the General Assembly calling on States to specify which of their territories met the description in Chapter XI, would be inexplicable. It was totally different from the procedure adopted for allocating mandates and trust territories. There was never any doubt as to the identity of the latter! The point can be put shortly; Chapter XI was a declaration, imposing an obligation in relation to the exercise of *existing* governmental powers; Chapter XII was a delegation, the very basis of title of the Administering Authority. Under Chapter XII, the General Assembly had significant dispositive powers, including in special cases the power to terminate a trusteeship for breach. The Court has never suggested that it had equivalent power to terminate the governmental authority of a State over a Chapter XI territory. That governmental authority derived from general international law and from general recognition.

48. Mr. President, I have been discussing the status of Chapter XI territories with their right of self-determination, and the relationship of that status to general law concepts of recognition and

sovereign authority. I turn now to the question of termination of non-self-governing status.

49. Once a people is accepted as having a right of self-determination, this right subsists until that people becomes independent, or voluntarily accepts integration in a State, or some other status such as free association. This basic principle was elaborated in a series of General Assembly resolutions defining when a Chapter XI territory was to be regarded as having achieved full self-government (see especially General Assembly resolution 742 (VIII) of 27 November 1953). The criteria for the termination of non-self-governing status were spelt out in resolution 1541 (XV), which built on the earlier resolutions, including of course resolution 1514 (XV) itself. Similarly the paragraph of the Friendly Relations Declaration which I have just quoted continues as follows:

> "such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles" (see *Western Sahara*, *I.C.J. Reports 1975*, pp. 32-33, paras. 57-58).

50. Of course the criteria for the termination of non-self-governing status do not apply themselves, any more than the criteria for their identification. They are not automatic or self-operating. Each individual case has to be judged according to its particular circumstances, as resolution 1541 (XV) expressly recognized. At the level of the international community, the primary actor here has been the General Assembly, advised by the Committee of 24 - as the Court also recognized in the *Western Sahara* case (*ibid*., pp. 33-34, paras. 59-60).

51. It may be helpful, Mr. President, if I summarize the argument so far:

(1) first, the present case does not raise the issue of recognition of territory acquired by unlawful use of force, since Portugal expressly disclaims any reliance on principles relating to the unlawful use of force. As the Applicant State it is for Portugal to specify and establish its case;

(2) secondly, and consequently, the Court must approach this case on the basis that the Indonesian presence in East Timor is not unlawful. It has never been declared to be unlawful by a competent organ of the United Nations, and the Court obviously cannot so decide in the present proceedings;

(3) thirdly, on that assumption the case is inadmissible, since either the Court has to decide that

the Indonesian presence is unlawful, and for that reason cannot be recognized - which in these proceedings, in the absence of the relevant United Nations determinations, it obviously cannot do - or it has to deal with the situation on the basis of a hypothetical set of assumptions, remote from reality. There is simply no middle ground;

(4) fourthly, however, making the effort of imagination which Portugal requires, there is no indication in State practice or in the attitude of the General Assembly that States generally are under an obligation to deal exclusively with a displaced administering State in a Chapter XI territory. Whether such a State retains or loses its sovereign authority is a matter not determined by the Charter quite unlike the position so far as the administering authority is concerned in relation to trusteeships under Chapter XII. Instead the position of a State under a Chapter XI territory is determined by general international law. And the general law of recognition does not require third States to continue to recognize a permanently displaced former administering power of a Chapter XI territory;

(5) fifthly, the classification of a territory as non-self-governing or of its people as having a right to self-determination is not a matter to be decided by reference to national law or to the classification of the territory under national law. A people may have a right of self-determination notwithstanding that a particular State claims and exercises sovereign authority over them, and is recognized by other States as doing so;

(6) sixth and finally, once a people is regarded as having a right of self-determination, that right subsists until it is terminated in one of the ways referred to in resolutions 1514 (XV) and 1541 (XV).

The continuing right of self-determination of the East Timorese people

Mr. President, Members of the Court.

52. I turn to the Portuguese argument on these issues. Portugal agrees that there are numerous other States which have entered into treaties with Indonesia which apply to the territory of East Timor as Indonesian territory. But it says that the crucial difference is that Australia has, as part of the process of negotiation and conclusion of the Treaty of 1989, recognized the sovereignty

of Indonesia over the territory (PR, paras. 6.14-6.15). Portugal says that by doing so Australia has dealt with a State other than the Administering Power

> "in terms which concretize a refusal to recognize Portugal's status as an Administering Power and a refusal to recognize East Timor's status as a non-self-governing territory" (PR, para. 6.15).

53. The first point to be made is that the Portuguese characterization of Australia's conduct as unique is wrong in fact. States which have entered into double taxation treaties with Indonesia which apply to East Timor as Indonesian territory have thereby recognized Indonesian sovereignty over East Timor. India, Malaysia, Singapore and Thailand have all stated unequivocally that they regard the people of East Timor as having already exercised their right to self-determination in favour of integration with Indonesia (see ACM, pp. 79-81, 83-86 for details). Such statements cannot amount to anything else than a statement of recognition of Indonesian sovereignty over East Timor. Each of these States has entered into a double taxation agreement with Indonesia applying to East Timor, as Indonesian territory, the entry into that treaty in each case postdates their statements of recognition (see ACM, Ann., pp. A79-A80). In other words, each of these States has dealt with Indonesia in respect of East Timor on the basis that Indonesia exercises sovereignty over East Timor. Why these treaties do not - to use Portugal's language - "concretize" this recognition is completely unclear (PR, para. 6.15).

54. Moreover it is unclear in terms of Portugal's own argument. Portugal says that:

> "The recognition by Australia of the incorporation of East Timor into a third State necessarily implies the non-recognition of the Territory of East Timor as a non-self-governing territory." (PM, p. 64, para. 2.25.)

But as I have demonstrated, self-determination and sovereignty are essentially separate issues. A territory subject to the sovereign authority of a given State, in the accepted sense of that term (see para. 27), may nonetheless be a non-self-governing territory within the meaning of Chapter XI, and its people have a right of self-determination. The fact that the territory is described as a province, department or other constituent unit of the administering State is not decisive.

Mr. President, Members of the Court.

55. Self-determination is a right for the people of East Timor for one primary and simple reason. They had that right before 1975 and did not lose it by reason of the events of 1975. None of the conditions for the termination of non-self-governing status laid down in resolutions 1514, 1541 or 2625 were met in 1975. In Australia's view those conditions have not been met even today. It is true that Australia's view on this is far from being conclusive, since Australia has no special authority and no special say in the matter. It is the primary aim of the Secretary-General's mediation attempts to create conditions in which self-determination can be exercised by agreement between the parties directly concerned.

56. The point for present purposes is this. The role of third parties in relation to the exercise of self-determination is necessarily incidental or peripheral, as the General Assembly's reference to the "parties directly concerned" recognizes. Some States, including influential States in the region, take the view that the consultation exercise conducted by Indonesia in 1976 did satisfy the requirements for an exercise of self-determination. Others disagree. That issue cannot be settled on a bilateral basis by individual third States. It cannot be the case that the people of East Timor had exercised their right of self-determination in 1976 vis-à-vis Malaysia but not vis-à-vis Canada, to take an example. Whatever *opinions* third parties may have had on the matter are essentially irrelevant to the issue, which is one for the competent organs of the United Nations. No doubt Portugal would like to see those organs exercising their powers in different and more strenuous ways. But that is another matter.

57. Thus there was good reason for the General Assembly to affirm the right of the people of East Timor to self-determination, in the resolutions passed in the period up to 1982. But the waning support in the Assembly for those resolutions was not without significance. Notwithstanding Professor Higgins's treatment of them, resolutions are not statutes, valid until repealed (see CR 95/5, p. 17). They are expressions of the position of a collective body, reflecting the views of those who frame and vote for them. And the fact is that there was growing realization by many members of the Assembly - by 1982 a clear majority - that self-determination for the people of East Timor could

only be achieved in co-operation with Indonesia. This is a reality which Australia did nothing to induce, cause or create, and which it can do nothing, individually, to change.

Mr. President, that would be a convenient moment for the break.

The PRESIDENT: Thank you Professor Crawford. I find like you that it is a convenient time to have a break of 15 minutes. The meeting is suspended.

The Court adjourned from 11.25 to 11.40 a.m.

The PRESIDENT: Please be seated. Mr. Crawford.

Mr. CRAWFORD: Thank you, Sir.

The issue of non-recognition

Mr. President, Members of the Court.

58. I turn next to the Portuguese argument that Australia has violated an obligation of non-recognition by the fact of entering into the Treaty of 1989. The question here is whether third States were under a duty not to recognize any act which might contravene the right of self-determination of the people of East Timor.

59. One must assume for the purposes of this argument - and I have already demonstrated - that concluding the Treaty of 1989 did not as such contradict or deny the right of self-determination of the East Timorese people. It was not a matter for Australia to decide how or when that people should be allowed to determine their own future; the Treaty neither prevented them from doing so, nor restricted their options, whether before or after any decision they may have been allowed to make. It may be accepted that the issue of self-determination for East Timor became even more involved following the Indonesian intervention. In 1975 the people of East Timor involuntarily exchanged Portuguese "domination" (to use the General Assembly's description of Portugal's position even after the revolution of 1974) for the control of Indonesia. It was, however, for the United Nations to assess the effects of the respective conduct of Indonesia and Portugal at that time.

And neither the Security Council nor the General Assembly have attached the phrase "domination" to Indonesia. Nor have they used the terms "colonial" or "alien". The Security Council referred to "intervention" (Security Council resolution 384 (1975)), and subsequently used the rather neutral term "situation of tension" (Security Council resolution 389 (1976)). The General Assembly used the term "military intervention" (General Assembly resolution 3485 (XXX), 12 December 1975), later weakened to "the situation in the Territory" (General Assembly resolution 37/30, 23 November 1982). Neither body described the Indonesian occupation as a crime - as the General Assembly had earlier described the activities of Portugal in its colonial possessions.

60. As Mr. Griffith demonstrated on Monday, it seems that the Indonesian incursion may have been *caused* by the Portuguese withdrawal from mainland Timor. However that may be, Indonesia certainly did not cause the Portuguese withdrawal, from the mainland, which occurred in August 1975, and which was final. Moreover, there is every indication that the hasty Portuguese retreat from Atauro, a day after the incursion, can only have been the premeditated result of a policy of abandonment of the territory - "une stratégie de fuite devant ses propres responsabilités", to use Professor Dupuy's words (CR 95/5, p. 66). When Professor Higgins referred to "the purported annexation of East Timor [and] the *consequential* physical withdrawal of Portugal from the territory", she got the chronology seriously wrong (CR 95/5, p. 26, emphasis added).

61. The Court cannot determine such issues of causality in these proceedings, although it can take note of their existence. The question is, rather, whether in the circumstances of the present case there was any automatic and continuing obligation on member States of the United Nations not to recognize or deal with the Indonesian authorities, on the ground that their presence contradicted or impeded the self-determination of the people of East Timor. That is the question. Australia accepts that such an obligation could have been imposed by the competent United Nations bodies and, in particular, by the Security Council. But none was, as Professor Bowett will show.

62. Nonetheless Portugal asserts that international law automatically steps into the breach, imposing on all States an obligation of continuing and indefinite duration not to deal with the Indonesian authorities. Customary international law, according to this view, says what the Security

Council and the General Assembly have deliberately chosen not to say - speaks not on their behalf but in their stead. And it goes on speaking, apparently, for years, for decades, indefinitely (see CR 95/5, p. 26, Higgins).

63. Mr. President, Members of the Court, there would be little point in taking you at this stage of the argument into a detailed account of the literature on the automaticity of non-recognition - if I may so call it - and on its relation to action taken under the Charter. Most of that literature deals with cases where action was taken under the Charter, where a concerted policy of non-recognition was adopted. It is significant than in other cases - Goa, for example - where there was no such policy and no such action, international recognition of the change was forthcoming, and rather quickly. In the case of Goa, it pre-dated the Portuguese recognition of Indian sovereignty, but Portugal's argument in this case implies that that recognition should *never* have been given - and Goa was a case involving the use of force.

64. This Court was also significantly silent on the problem in the *Right of Passage* case, *I.C.J. Reports 1960*, page 6, although it is only fair to add that it was not assisted in that case - any more than it is here - by the restricted way in which Portugal chose to put the issues (see *ibid.*, pp. 30-31). Nor did the Court have to deal with it in the *Western Sahara* case (*I.C.J. Reports 1975*, p. 12).

65. However, there are three authorities which should be referred to in order to determine whether there may be an automatic obligation of non-recognition upon third States in relation to situations of denial of self-determination. This, of course, is on the hypothesis that the Court can determine there is a denial of self-determination as at present, because we are dealing with the merits. These three authorities are: first, the decision of the Court in the *Namibia* Advisory Opinion, secondly, the still incomplete work of the International Law Commission on State crimes and, thirdly, the 1970 Declaration on Friendly Relations. I will take them in turn.

(1) The Namibia *Advisory Opinion*

66. The first and most important source is this Court's decision in the *Namibia* Advisory Opinion (*I.C.J. Reports 1971*, p. 16). The Court was concerned there with a situation on which

both the General Assembly and the Security Council had pronounced, and in no uncertain terms. The continued South African presence in Namibia had been declared by both to be illegal, and member States as well as non-member States had been called on by both not to recognize the legality of the South African administration or of its acts.

67. In dealing with the consequences for States of the illegal situation, the Court was to a large extent acting upon resolutions, including resolutions of the General Assembly, which "within the framework of its competence ... [made] determinations or [had] operative design" (p. 50, para. 105). As to the Security Council, it was essential to the Court's Opinion that the Council had, in resolution 276 (1970), qualified the continuing presence of South Africa in Namibia as illegal (p. 52, para. 111). Having pointed this out, the Court went on to say:

> "It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council ... on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf..." (P. 52, para. 112.)

68. After considering the legal force of the decision, under Article 25, the Court concluded ...

> "that the decisions made by the Security Council ... were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25. The decisions are consequently binding on all States Members of the United Nations, which are thus under an obligation to accept and carry them out." (P. 53, para. 115.)

69. All subsequent discussion by the Court of the extent of the obligations of member and non-member States proceeded on this basis (see e.g., p. 54, paras. 117 and 119). In particular, the Court said, it was precisely *because* of this conclusion, arising from the binding declaration of illegality in Security Council resolution 276, that member States were "under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia" (p. 54, para. 119), and in that passage the Court referred expressly to the earlier conclusion which I have cited, relating to the Security Council's express declaration of illegality (Opinion, para. 115).

70. The Court added that:

> "The precise determination of the acts permitted or allowed - what measures are available and practicable, which of them should be selected, what scope they should be given and by whom they should be applied - is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken by it on the question of Namibia." (P. 55, para. 120; emphasis added.)

71. In the rest of its Opinion the Court

> "confine[d] itself to giving *advice* on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of resolution 276 (1970), because they may imply a recognition that South Africa's presence in Namibia is legal" (p. 55, para. 121; emphasis added).

It was on this basis, and in an expressly advisory mode - advice within the context of an advice! - that the Court went on to spell out the extensive obligations of non-recognition for member States of the illegal presence of South Africa in Namibia (pp. 55-56, paras. 122-127).

72. Thus here, as in other decolonization cases, the Court applied and interpreted international law in a certain sense adjectivally. International law was construed and applied in support and furtherance of authoritative decisions of the competent political organs of the United Nations. And the Court held that the legal consequences for States in terms of non-recognition and its consequences were to be *derived* from those decisions. There is no suggestion in the Opinion that in the absence of Security Council resolutions calling for non-recognition, there would have been a duty of non-recognition flowing automatically from the rules of international law (but see Judge Dillard, separate opinion, pp. 165-167; Judge Petrén (dissenting on this point, pp. 134-137)).

73. If, as Portugal argues, there is an automatic and general duty of non-recognition, how can this be limited, qualified or excluded by United Nations organs? Those organs have a key role in applying the relevant norms - but how are they authorized to dispense with them? The *Namibia* Opinion provides clear support for the view that non-recognition is not an automatic obligation.

(2) *The work of the International Law Commission on State crimes*

74. I turn then to the second possibly relevant authority on the issue of non-recognition, the ILC Draft Articles on State Responsibility. I can deal with it briefly, for the simple reason that,

although it provides the only international authority I have been able to find for an automatic obligation of non-recognition in the context of breach of self-determination, it was not relied on, or even mentioned, by Portugal.

75. Article 19 of Part 1 of the Draft Articles as adopted on first reading enumerates acts which may be considered State crimes, (in fact the term used is "international crime", but for present purposes I will refer to "State crime" to avoid confusion with the quite separate issue of international crimes committed by individuals).

76. The basic definition of a State crime is contained in Draft Article 19(2), which refers to "the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole". Paragraph 3 offers some guidance as to the content of this definition. But the guidance is very limited, since paragraph 3 is expressed to be "subject to paragraph 2", which is the basic definition, "and on the basis of the rules of international law in force".

77. Subject to these provisos - and they are important provisos - paragraph 3 *(b)* says, in part, that:

> "an international crime may result, *inter alia*, from ...
>
> *(b)* a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination ..."

78. Mr. President, the concept of an international crime of State is controversial. Its content, scope and implementation are entirely open questions. The Commission has not yet adopted - indeed its Drafting Committee has not even discussed - any articles spelling out either the legal consequences of an international crime or the procedures for determining whether such a crime has been committed. It cannot be assumed that the eventual outcome will bear any close resemblance to texts proposed earlier. Indeed, Mr. President, that can never be assumed about the Commission.

79. Nonetheless I should refer to Draft Article 14 of Part 2, proposed by a previous Special Rapporteur, Mr. Riphagen. It states *inter alia* that:

> "2. An international crime committed by a State entails an obligation for every State:
>
> *(a)* not to recognize as legal the situation created by such crime ..."

The performance of this obligation, which in terms is automatic, is stated to be "subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security" (para. 3).

80. As it stands, the proposed text, which has never been adopted by the Commission, would only trigger automatic obligations of non-recognition under the rubric of State crimes for third States if the following five determinations or findings were made:

(1) that there had been a "breach [by Indonesia] of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination";

(2) that Indonesia continued to maintain colonial domination by force in 1989;

(3) that the "rules of international law in force" do recognize that breaches of this obligation constitute State crimes;

(4) that the breach was "serious";

(5) that *mutatis mutandis* - and I am sorry I do not know what that means, Mr. President - "the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security" do not require a different solution.

81. As to who would make these determinations, the Draft Articles are completely silent, and neither Mr. Riphagen nor his successor, Mr. Arangio-Ruiz, has proposed any articles to resolve that problem. Can it be determined by one State, or two? Surely not: how is it possible to determine bilaterally legal issues and obligations which directly and by definition concern the international community of States as a whole?

82. It remains to be seen what solution for the substantive difficulties the Commission will eventually propose. The issue is so indeterminate, and there are far too many disagreements about the very concept of State crimes for one to be able to tell what the outcome will be. Acting within the fundamentally bilateral framework of Article 36, paragraph 2, of the Statute, dependent ultimately upon the acceptance of

States parties, the Court can only - it is suggested with respect - act on the basis of existing rules whether at the level of admissibility or of merits.

83. As to the admissibility of the present case, under the *Monetary Gold* principle the Court is in no position to decide such matters as whether Indonesia's conduct in East Timor involved and continues to involve the breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples. Nor is the Court in a position to decide if the breach was a "serious" one for this purpose - even assuming that these formulations reflect existing international law. There is then the difficulty of determining what the formulation means in relation to the United Nations Charter.

84. Moreover, is it conceivable as a matter of the administration of justice that the Court would decide whether Indonesia had committed a crime in relation to East Timor without hearing that State? The International Court of Justice does not conduct trials *in absentia*! The *Monetary Gold* principle applies to ordinary cases of State responsibility. It must apply *a fortiori* to the classification of State conduct as a crime.

85. But if the Court were to decide any such questions, it should surely do so having regard to the actual and expressed attitudes of the international community, that is to say of States acting through the institutional means of the General Assembly and the Security Council. There is no point in talking hypothetically about what the "international community" might have done; the Court can only refer to the expressed will of the international community as it is. And the fact remains that the international community has not condemned the Indonesian presence in East Timor as a State crime, or an act of aggression, or as illegal, or as involving colonial domination. It has not, since 1978, called for the immediate withdrawal of Indonesian forces from the territory (which would be the inevitable corollary of such a condemnation). Since 1979, the international community, divided amongst itself as to what should be done, has done nothing but call for negotiations between the parties directly concerned.

(3) The Friendly Relations Declaration (1970)

86. Finally, I turn to the Friendly Relations Declaration, General Assembly resolution 2625

(XXV), to which the Court referred in the *Western Sahara* Opinion (*I.C.J. Reports 1975*, p. 33, para. 58). Under the principle of equal rights and self-determination of peoples, all that is said for present purposes is that

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of this principle, in order: ...
>
> ...
>
> *(b)* to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."

87. I will deal with the Portuguese argument relating to the "duty to promote" in a moment. What matters for present purposes is that even this rather vague duty, as formulated in the Friendly Relations Declaration, is qualified by the words "in accordance with the provisions of the Charter", and that it is made more specific only by reference to an obligation "to render assistance to the United Nations". There is no mention of an automatic obligation of non-recognition arising from situations which may violate the principle of self-determination.

Conclusion as to non-recognition

88. This review of the authorities shows that there is no basis for invoking an automatic duty of non-recognition in the present case, having regard to the terms in which Portugal's non-recognition argument is put and the necessary assumptions of that argument. The essential foundation for such a duty is lacking - that is to say, a determination by the competent organs of the United Nations that Indonesia's presence in East Timor is unlawful or is a crime.

89. The reason why such a common policy is required as a basis for non-recognition is clear, both at the level of principle and at the level of practice.

90. At the level of principle, the position is that the General Assembly does not have dispositive authority, in the sense of having the power to decide, by whatever majority, that one State or another has or has not sovereignty over territory. Of course, the General Assembly can express an opinion on the issue which is entitled to respect, and to a special respect if it has the

general support of member States, but that is a different matter. By contrast, the Assembly has important dispositive powers in the context of mandates and trust territories. It may also be given those powers in certain cases by agreement of States concerned, as with the future of Libya under the Italian Peace Treaty of 1947. But that only emphasizes its lack of those powers in other cases, including under Chapter XI of the Charter.

91. On the other hand, States parties should co-operate with the General Assembly, and the Assembly has a very important role in co-ordinating State practice. For example it can, through calling on States not to recognize certain effective situations, prevent their consolidation. Resolutions of the General Assembly which have general support from member States and which are complied with can become *the* authoritative articulation of the legal situation. But a resolution passed by 50 votes to 46 with 50 abstentions (as was resolution 37/30 of 1982, ACM, p. A97) shows only the *division* of the international community, and cannot be considered authoritative for the purposes of general international law.

92. The need for an explicit collective basis for non-recognition in a resolution of the Security Council or the General Assembly emerges also at the practical level. Unco-ordinated acts of non-recognition by individual States will not be effective. Moreover, it is unrealistic and unfair to impose on third States the very considerable burdens of non-recognition, both economic and in terms of their relations with the target State, without some assurance that their attitude will be generally adopted, and the risks and burdens of non-recognition may be shared. This is the logic of collective action, the raison d'être of the United Nations. It is the underlying justification for the approach of this Court in *Namibia*, in which the determination of the competent organs is taken to be a declaration on behalf of all member States, which commits them to collective action - the content of which is in turn within "the competence of the appropriate political organs of the United Nations acting within their authority under the Charter" (*Namibia, Advisory Opinion, I.C.J. Reports 1971*, p. 55, para. 120). And it is a corollary of the Court's approach that in this field the *absence* of such a determination, the *unwillingness* of the competent organs to take action, means that there is no foundation for an obligation of non-recognition. In such circumstances, it must be a matter for each

State acting in good faith to assess how to respond to the reality of the particular case.

The consequences for the present case

93. There is, as I have already shown, no analytical difficulty in distinguishing between the continued right of a people to self-determination and the continued status of a former administering State. Sovereign authority and self-determination are separate concepts - legally, historically, functionally. Portugal treats the right of self-determination of the East Timorese people and the continuation of its sovereign authority by whatever name in East Timor as logical correlatives, but there is no reason to accept that. Once the right of self-determination applied to East Timor - as it did well before 1975 - its continuation was not dependent on *Portugal's* rights or position. It is not the function of Chapter XI to *consolidate* the legal status of the colonizer. If, as Portugal infers, the two ideas - Portugal's status and the East Timorese people's right - are tied together "*par necessité logique absolue*" (cf. CR 95/2, p. 36, Correia) then the right of self-determination becomes dependent and derivative. That is not the case; the people of East Timor continue to have a right of self-determination, whatever Portugal may think or do.

94. In other contexts, Portugal accepts that this disjunction may occur. For example, the people of Western Sahara continue to have a right of self-determination whatever the attitude of Spain may be (CR 95/3, pp. 62-63, Correia). They certainly did not lose that right *because* of Spain's abandonment of the territory, any more than the people of East Timor lost their right because of their *de facto* abandonment by Portugal. Spain did not, and does not, dispose of the rights of the Western Saharans.

95. But a State, although it may abandon a territory, does not shed all legal responsibilities - a point on which the Parties here agree. Spain is still listed in United Nations documents as the notional administering authority of Western Sahara, and it cannot simply resign that status. This shows two things: first, that it is a matter for the United Nations to decide, by majority vote, who is the "administering State" for its purposes, and secondly, that being listed as "administering power" under Chapter XI may carry with it very limited powers and rights. It is not equivalent to territorial sovereignty; if it were, the General Assembly could, by majority vote, allocate or reallocate

sovereignty, and this it certainly cannot do. My colleague and - I hope the Court will forgive a personal remark - a brilliant former student of mine, Mr. Staker, will elaborate on these points tomorrow.

Mr. President, Members of the Court:

96. It follows from what I have said that Australia has acted consistently with international law in recognizing *both* that Indonesia has sovereignty over East Timor *and* that the people of East Timor continue to have a right of self-determination. Moreover, given its previous role in East Timor, there is no difficulty in acknowledging that Portugal retains a residual role as the listed Administering Power for the purposes of Chapter XI, in much the same way as Spain does over Western Sahara. But the rights of the people and the rights of the former colonizer are not to be confused, and being listed as Administering Power does not imply any specific governmental powers, let alone substantive territorial authority.

97. As the final conclusion, Mr. President, territorial authority over Chapter XI territories is determined by general international law, not by delegation from the General Assembly. Australia did not breach the international law of self-determination in negotiating and concluding the 1989 Treaty. No doubt Indonesia is bound - like the rest of the world - to respect the right of self-determination of the people of East Timor. But Portugal accepts that Indonesia's compliance with that obligation is not, and could not be, the subject of the present proceedings.

The "duty to promote" self-determination 98. That brings me to one further argument raised by Portugal, that is, that Australia failed in its duty to "promote" the self-determination of the people of East Timor. Portugal argues that by concluding the 1989 Treaty, Australia failed in its obligation to "promote"

self-determination (see e.g., PR, para. 6.17; and see CR 95/2, p. 26).

99. There is in the United Nations Charter no express obligation on States individually to promote self-determination in relation to territories over which they individually have no control. The general obligation of solidarity contained in Article 2, paragraph 5, of the Charter extends only to assistance to the United Nations "in any action it takes in accordance with the present Charter".

A recent commentary on the Charter denies that Article 2, paragraph 5, creates "a general obligation for member States to give assistance to the Organization" and argues that it must have "a restricted scope of application", essentially in the context of Chapter VII (B. Simma (ed.) *The Charter of the United Nations. A Commentary* (Oxford, Oxford University Press, 1994), pp. 129-130).

100. The matter is taken a little further - though not much - in the paragraph of the Friendly Relations Declaration, which I have already quoted (above, para. 86). This contains two elements. First, it says that each State has a duty "to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples". Secondly, it goes on to speak of assistance to the United Nations, in language that reflects and is evidently drawn from Article 2, paragraph 5, of the Charter. I have already dealt with the second element. As to the first element, the obligation to promote realization of the principle, several points may be made. First, an obligation to "promote" the realization of a principle is a highly generalized and flexible obligation. One can only promote something to the extent of one's own power and responsibility, and the ways in which a State individually may promote a principle must largely be left to its own judgement and discretion. It is no doubt for this reason that the emphasis in this paragraph is on "*joint* and separate action", and in particular on co-operation with the United Nations in *collective* action.

101. In particular, Mr. President, there is no indication in the Friendly Relations Declaration that individual third States must persist in taking individual action, in the absence of any joint or collective action which is capable of realizing the principle of self-determination in the given case. States have a wide variety of responsibilities and finite resources. A general obligation to "promote" something as to which the State has no specific authority or responsibility and little or no power, cannot be taken to require costly individual initiatives when the international community itself has chosen another path. And that is the case here.

102. That truth is well reflected in Chapter XI of the Charter. It is, above all, the member States which "have or assume responsibilities for the administration" of non-self-governing territories which must realize the principle of self-determination for those territories. Individually there is not much that third States can do about this - and *a fortiori*, not much that, individually,

they can be *required* to do.

103. So far as collective action is concerned, no United Nations organ has called for assistance from third parties such as Australia. The Security Council in 1975 and 1976 did call on all States to respect the right of self-determination of the people of East Timor, as did the General Assembly in resolution 3485 (XXX) of 12 December 1975, a call which it expressly reaffirmed in 1976, 1977 and 1978. Thereafter the General Assembly addressed itself to the "parties concerned", in 1979, subsequently, in 1980-1982, "the parties directly concerned". After 1982 there was silence.

104. As Professor Bowett will show, there can be no question of any breach or failure on the part of Australia in respect of the various United Nations resolutions, or for that matter of any resolution of a subordinate United Nations body, such as the Committee of 24. In the circumstances, Portugal cannot rely on the general and generic provisions of Article 2, paragraph 5, of the Charter or of the Friendly Relations Declaration to amplify the content of the obligation to promote. This is primarily an obligation of co-operation with the United Nations, and the fact is that, after 1982, all that Article 2, paragraph 5, could do, on any interpretation, at the level of the primary organs of the United Nations, was to amplify a silence. The General Assembly fell silent on Timor and, fearing the consequences of another vote in the Assembly, Portugal acquiesced in that silence.

105. Both at the individual and collective level, Australia did all that it was required to do by the obligation to "promote" self-determination, as Ambassador Tate has shown. I should add that there is not the slightest indication in the record that Australia is co-operating with Indonesia in any suppression of the exercise of the right of self-determination of the people of East Timor - even assuming that this Court can determine judicially in these proceedings that Indonesia is guilty of such suppression, which obviously it cannot do.

106. Nor has the Secretary-General, any other United Nations organ, or any other State, ever suggested that Australia has breached this obligation to promote. The complaint is of strictly Portuguese origin, a bit like an *appellation d'origine*. When it comes to *complaints*, Australia finds itself required to deal only with Portugal!

Permanent sovereignty over natural resources

Mr. President, Members of the Court.

107. I have not dealt in this presentation with the Portuguese argument based on the principle of permanent sovereignty over natural resources. This will be dealt with by my colleagues, Professors Pellet and Bowett, tomorrow, in the framework of discussing the respective claims of the parties and non-parties to continental shelf rights in the region.

108. For present purposes it is necessary only to recall what I said yesterday in the context of admissibility (CR 95/8, pp. 53-54, 63-64). Even more than other aspects of this case, the issue in entangled with questions Portugal accepts that the Court cannot decide; the delimitation of the shelf, the determination that Indonesia has no valid claim to it, Indonesia's compliance with the principle in *its* implementation of the Treaty, and so on.

109. At the level of the merits, as I have said, Australia agrees with the admission made by Portugal in its written pleadings that it would not be inconsistent with the principle of permanent sovereignty to enter into an agreement on natural resources with the State administering a territory, including an agreement such as the 1989 Treaty (see e.g., PR, para. 5.82). And if that is right, the only question is whether it is consistent with the principle of permanent sovereignty to deal with Indonesia rather than Portugal. That is exactly the same question I have just dealt with in relation to self-determination. Portugal's argument based on permanent sovereignty over natural resources merely reiterates that issue in another form (see ACM, para. 377; AReg., paras. 270-271). There is thus nothing more I need to say on the matter, but Mr. Burmester will deal with it in his examination of relevant State practice, including the practice of Portugal itself.

110. I would accordingly ask the Court to call on Mr. Burmester to continue this account of Australia's arguments relating to self-determination and recognition.

Thank you for your patience, Mr. President, Members of the Court.

The PRESIDENT: Thank you, Mr. Crawford. I give the floor to Mr. Burmester.

Mr. BURMESTER:

Self-Determination

Mr. President, Members of the Court.

Professor Crawford has outlined the key legal principles relating to Portugal's argument that Australia's failure to deal with Portugal infringes the right to self-determination. My task is to examine in more detail State practice and United Nations decisions in order to demonstrate that States in a position like that of Australia are free to deal with the State in fact in control of a Chapter XI territory in the absence of any decision to the contrary. I propose to address three principal issues:

(a) the special role in the implementation of self-determination assumed by the political organs of the United Nations;

(b) the practice of States in dealing with administering powers or other territorial authorities as if they had competence to conclude arrangements for purposes such as the exploitation of maritime resources;

(c) that the requirement on States to promote self-determination in general does not require them to refrain from acting to protect their own national interests, and that this is clearly recognized in State practice.

The role of UN organs

The right to self-determination is expressed in general terms in Articles 1, paragraph 2, and 55 of the Charter. As we heard from Professor Dupuy, these references have developed into a significant principle of international law (CR 95/3, pp. 13-14). But Professor Dupuy was silent as to how this principle had been translated into practice. And none of the counsel for Portugal have examined State practice in any detail to show what this principle means in terms of specific obligations for States. Portugal seems to think it is sufficient to establish the existence of the principle. But it must also show that precise obligations on States flow from this principle. This it has not done.

Since 1945 the United Nations General Assembly through its treatment of the many decolonization situations has established a legal principle that depends on the United Nations itself

for practical implementation. Professor Crawford has drawn attention to the importance placed by the United Nations on the need to have regard to the particular circumstances of each relevant territory in determining how the right to self-determination is implemented. In significant resolutions such as the Declaration on the Granting of Independence to Colonial Countries and People (resolution 1514 XV of 14 December 1960) only general principles have been stated. The considerable body of practice reflected in the large number of resolutions dealing with the many different decolonization situations is the translation of these principles into reality.

As we also heard from Professor Dupuy, the General Assembly decided to oversee the implementation of the Declaration by establishing the Committee of 24, as it came to be known, originally by resolution 1654 (XVI) of 27 November 1961 (CR 95/3, p. 18). Prior to this Committee's establishment, there was a Committee on Information from non-self-governing territories. The practice of these two Committees and the numerous General Assembly resolutions on self-determination establish a considerable body of practice which cannot be ignored. An examination of this practice shows that while the right to self-determination is consistently reaffirmed, the determination by the General Assembly as to *how* it is applied in particular cases always has regard to the historical, geographical and political circumstances of the individual situation. There is no universal outcome - whether in terms of ultimate political status or of methodology for ensuring the exercise of the right by a particular people. Instead, this rule of international law, as Hans Blix recognized, is dependent for its proper application on international institutions to assess and apply the rule (see ACM, para. 322; see also Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law* (1990), p. 145).

Mr. President I remind the Court, as Professor Crawford already has, of the *Western Sahara* Advisory Opinion, (ACM, para. 319) which recognized that the General Assembly had "a measure of discretion" as to the forms and procedures by which the right is to be realized. The *Western Sahara* case recognized that different procedures were legitimately to be followed in cases involving special circumstances in order to ascertain the will of the peoples and thus to give effect to the principles (*I.C.J. Reports 1975*, p. 33).

I turn to examine some of this important practice.

The diverse nature of non-self-governing territories is reflected in the different application of the rule in particular cases. There are situations of small territories such as Goa or Ifni. There are territories subject to conflicting claims to sovereignty based on past historical association, such as the Falklands Islands (Malvinas) and Western Sahara. There are territories subject to claims of reintegration such as Gibraltar and Mayotte. And these are only examples - the categories are not closed.

Examination of the extensive United Nations practice leads to one very clear conclusion: the former colonial power in any territory entitled to self-determination cannot expect to be recognized as entitled to any continuing sovereignty or control, unless the people so decide in an act of free choice. There have been instances of options short of independence such as free association and even integration, being chosen. An examination of this United Nations practice indicates that the General Assembly has assumed three distinct functions in relation to self-determination:

(a) to decide which territories are covered by the right;

(b) to decide on the exercise of the right in relation to particular territories; and

(c) to decide on actions to be taken by member States - generally in relation to a situation involving a right to self-determination.

It is accepted that East Timor is covered by the right of the first category. For the purposes of this presentation, therefore, I need only concentrate on the second and third. In relation to the exercise of the right of self-determination in East Timor, the General Assembly has made no decisions as to *how* this might be carried out. I have in my earlier presentation on standing shown that Portugal claims a protagonistic role in this process. But it is mistaken. Pending the outcome of consultations by the Secretary-General it is impossible to say how or when the exercise of self-determination in relation to East Timor will occur. Independence may be one outcome. But there are other possibilities. Portugal's role is uncertain. In the meantime, Indonesia is the government authority in the territory.

I turn then to the third function, the role of the United Nations in deciding on actions to be

taken by States.

Mr. President, the central role of the General Assembly in this regard is demonstrated *par excellence* by its adoption of "Plans of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples".

The first plan was contained in resolution 2621 (XXV) of 12 October 1970. The next plan was contained in resolution 35/118 of 11 December 1980. This was a month after the specific resolution 35/27 was adopted on the question of East Timor. In this plan of action one finds specific reference to, for instance, member States endeavouring to adopt measures to achieve "the cessation of all new foreign investments in and financial loans to South Africa" (para. 5 of Plan). There is a reference to member States opposing "all military activities and arrangements by colonial and occupying Powers in the Territories under colonial and racist domination" (para. 9). There was a call for member States to discourage or prevent the influx of immigrants and settlers into Territories under colonial domination (para. 8). Specific reference is made to South Africa and the need for sanctions and an arms embargo (para. 16).

The key role and overall responsibility of the General Assembly for ensuring the implementation of the right to self-determination is demonstrated in paragraph 17 of the Plan. I quote the key parts:

> "17. The Special Committee shall continue to examine the full compliance of all States with the Declaration ... Where General Assembly resolution 1514(XV) has not been fully implemented with regard to a given Territory, *the Assembly shall continue to bear responsibility for that Territory* until all powers are transferred to the people of the Territory ... and the people concerned have had an opportunity to exercise freely their right to self-determination... The *Special Committee is hereby directed*:
>
> ...
>
> *(e) To assist the General Assembly in making arrangements*, in co-operation with the administering Powers, *to secure a United Nations presence* in the colonial Territories to enable it to participate in the elaboration of the procedural arrangements for the implementation of the Declaration and to observe or supervise the final stages of the process of decolonisation in those Territories." (Emphasis added.)

So here is the General Assembly in a Plan of Action attached to a resolution adopted without a vote, acknowledging that the way in which self-determination is secured in any particular territory rests

not with the Administering Power, nor with individual States but with the General Assembly itself; and one finds specific directions to States about particular self-determination situations.

When one then looks for action, direction, criticism or other statements by the General Assembly in relation to East Timor, following adoption of this Plan, one finds virtually nothing. There are two resolutions in 1981 and 1982. But then silence. There is not, as has been noted, any criticism by the General Assembly of Australia's actions in relation to the Treaty. Yet this is the one action of Australia that Portugal singles out for criticism and which it alleges is contrary to international law and to the right of self-determination of the people of East Timor. One would expect the General Assembly, in discharge of the central role it has asserted for itself in the Plan of Action, to comment on Australia's action and to give directions to other States in relation to such action if it had any concerns about it. But it has not.

There are numerous United Nations calls for States to take specific action in a self-determination situation. For example, resolution 47/82 of 15 March 1993 was adopted on the

> "Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights."

It contains not just general calls for States to take action, but specific calls for action - there are 3 such calls in relation to Palestine, 8 in relation to South Africa, 1 in relation to Comoros and Mayotte and 1 in relation to Namibia - but not a word in relation to East Timor. This is a significant silence. This is the silence Professor Higgins would have the Court gloss over, relying on logical and necessary inference.

In recent years, the General Assembly has also passed a series of resolutions relating to self-determination and the implementation of the Declaration. And, in many of these, the Assembly has singled out particular actions by Administering Powers and other States. It has never relied on mere inference.

One can take the 1993 resolution on Implementation of the Declaration (resolution 48/52 of 10 December 1993) as an example of the United Nations own central role in overseeing the implementation of the self-determination process. I quote several operative paragraphs:

> "6. Calls upon *all State*s, in particular the administering Powers, as well as the

specialized agencies and other organizations of the United Nations system, *to give effect within their respective spheres* of competence *to the recommendations of the Special Committee* for the implementation of the Declaration and other relevant resolutions of the United Nations;

10. Requests the Special Committee to continue to seek suitable means for the immediate and full implementation of the Declaration ... and, in particular:

(a) To *formulate specific proposals* for the elimination of the remaining manifestations of colonialism and to report thereon to the General Assembly at its forty-ninth session;

(b) To *make concrete suggestions* which could assist the Security Council in considering appropriate measures under the Charter with regard to developments in colonial Territories that are likely to threaten international peace and security."

Yet again, the General Assembly affirms the central control and direction which it exercises in determining the actions required of States in self-determination situations.

In the case of territories such as Anguilla, Bermuda, the British Virgin Islands, Guam and Montserrat, the General Assembly regularly adopts a resolution with specific directions to the relevant Administering Power in relation to each particular territory (see e.g., resolution A/48/51 of 10 December 1993). These resolutions call on the relevant Administering Power to undertake particular action required by the circumstances of the territory. However, they also call specifically on member States or the relevant territorial government to take action in relation to particular activities where that is necessary. For instance, in relation to Anguilla in 1992, the General Assembly (resolution 47/27) welcomed the decision by the territorial government to protect and conserve marine resources and control the activities of foreign illegal fishing.

Also, each year the General Assembly adopts a lengthy resolution on activities of foreign economic and other interests which impede the implementation of the Declaration on the Granting of Independence, etc. (see e.g., resolution 48/46 of 10 December 1993). These resolutions contain general calls to States to take action to prevent economic activity detrimental to the interests of the people of non-self-governing territories. When it is necessary to call on States to take particular action this is done. In 1991, for example, resolution 66/46 on this issue singled out for condemnation collaboration with the South African régime in the form of new investments and supply of arms, and called upon governments to take effective measures against oil companies to

terminate the supply of oil to South Africa.

If one reviews the work of both the General Assembly and the Special Committee of 24 in recent years, one is struck by several matters:

- a detailed and extensive consideration given to decolonization situations around the world;
- the acceptance by those two bodies that ultimate supervisory responsibility rests with them for seeing that resolution 1514 (XV) is effectively implemented;
- the willingness when necessary and appropriate to condemn particular actions, or to recommend or urge other action by administering powers and other States; and
- the absence of reliance on inference or logical deduction from any general assertion of the right of self-determination.

In some instances, in recognition of the link between peace and security and decolonization, the Security Council has directed specific action to be taken by States. Australia has set out in Appendix A to its Counter-Memorial examples of United Nations resolutions specifically calling for action by third States in a self-determination context. The practice points to only one conclusion: in the absence of specific direction, States are not required to abstain from dealings with a State involved in a self-determination dispute, particularly where such dealings are primarily designed to protect or further the interests of the first State.

As Mr. Griffith has already reminded the Court, throughout the entire consideration of self-determination issues since 1989, there has been no pronouncement by either the General Assembly or the Committee of 24 on the Timor Gap Treaty. And this is not out of ignorance. Portugal brought the Treaty to the attention of the United Nations very speedily. Portugal addressed a letter, dated 9 November 1988, to the Chairman of the Committee of 24. This letter asserted that

> "the Government of Indonesia lacks the legitimacy to undertake commitments regarding a territory which it occupies illegally ... and which is under the responsibility of Portugal in its capacity as Administering Power".

Portugal requested that its text be circulated as an official document of the Committee. And it was so circulated in a document dated 15 March 1989 (A/AC.109/981, PM, Ann. III.17, Vol. V, p. 194). Further letters were addressed to the Secretary-General of the United Nations, requesting

that their texts be circulated as official documents.

Neither the Committee of 24, nor the General Assembly indicated any agreement with the position of Portugal. Whilst fully aware of the negotiations and conclusion of a treaty between Australia and Indonesia, these bodies expressed no criticism, much less took steps to do anything about it. No suggestion was ever made by these bodies that the conduct of Australia was impeding the Secretary-General's efforts to mediate between the parties concerned, or the people's right to self-determination.

All that the Committee of 24 does each year is to note the information on East Timor and agree to put the item on the agenda for the following year, subject to any direction from the General Assembly. And each year there is no such direction. So far as the United Nations is concerned, the only action in relation to East Timor is to occur as part of the Secretary-General's consultations as mandated by the last substantive resolution on this subject in 1982.

One can contrast this with the specific direction given to States in some self-determination situations, including those involving issues of conflicting claims to sovereignty. To that I now turn.

Arrangements concluded with territorial authorities

Mr. President, I now turn to the second issue identified at the beginning of my presentation - the practice of States in dealing with territorial authorities consistently with respect for the right to self-determination. Examination of this practice confirms the significance of silence by the United Nations in terms of defining limits on actions by States.

The United Nations has recognized the reality of the practical need for States to have dealings and relationships with relevant authorities in non-self-governing territories. What the United Nations has done is to single out particular dealings in particular cases and seek restrictions on them - arms sales, foreign investment. Where appropriate, the United Nations has specifically called on States to refrain from entering into particular relations with State A in respect of territory B. Thus, in the case of Namibia, treaty relations and economic or other forms of dealing which involved South Africa acting on behalf of Namibia were proscribed (Security Council resolution 301). Where the General Assembly, as in the case of Namibia, is prepared to assume

control itself, there may be more wide-ranging demands for States to cease dealing with the authority in control. Or else, as happened in the case of a number of Portugal's African colonies, the United Nations may recognize liberation movements as representative of the people of a territory and direct States to ensure representation of those movements in dealings third States have when dealing with matters pertaining to the territories (e.g., resolution 2918 (XXVII), p. 176 of ARej. and resolution 3113 (XXVIII) on p. 178). In resolution 3294 (XXIX) in 1974 five named bodies were so recognized (PM, Ann. II.8). Those resolutions also called on all States specifically to take certain measures to hinder Portuguese domination of the territories. When the United Nations considers it necessary to do so, it speaks clearly and directly to States about their dealings with the relevant State exercising administration of a territory. But in other situations it makes no such call, no doubt cognizant of the fact that the interests of the people concerned are not always best furthered by the cessation of all relations with the State in control.

The situation of non-self-governing territories where there is a dispute over sovereignty is no different in this regard from a situation of an obstructive administering power. East Timor, of course, must be regarded for these purposes as an example of disputed sovereignty and is similar in this respect to Western Sahara, Gibraltar, Falklands (Malvinas) and Mayotte. One State, Indonesia, is in control of the territory. Another State, Portugal, claims that control is illegitimate and seeks to assert its exclusive right to act on behalf of the territory. Examination of the way in which third States act in situations such as this points to only one conclusion: States deal with the State in control in relation to matters affecting the territory where such dealings are necessary to protect the economic interests of the first State. In none of these cases has there been any United Nations direction preventing such dealings by States. By contrast, in the case of Cyprus, there has been a declaration that the establishment of a separate State of Northern Cyprus is invalid and the Security Council has explicitly called on all States not to recognize the purported Turkish Republic of Northern Cyprus (see Appendix A to ACM, p. 189). But when one examines self-determination situations one finds that this silence is significant - in the absence of any call not to do so, States deal in relation to resources of non-self-governing territories with the territorial authority in control.

Clearly, States by their practice do not regard the silence of the United Nations as without significance. Let me turn, therefore, to examine in more detail these cases of disputed sovereignty where the United Nations has been silent.

In the United Nations itself, it is recognized that such disputes are best handled by direct negotiations by the principal disputants under the auspices of the Secretary-General. When such a process is under way, the Committee of 24 generally takes no substantive action.

In the case of Falklands (Malvinas) in 1994 the Committee of 24 adopted a decision reiterating that "the way to put an end to the special and particular colonial situation" is "negotiated settlement of the dispute over sovereignty". It also reiterated its support for the good offices of the Secretary-General (A/49/23 (Part VIII)). In the case of the Falklands (Malvinas), the General Assembly has not passed a resolution since 1988 (resolution 43/25). That resolution contained no direction to States not to deal with the United Kingdom. In the absence of such direction, States deal with the relevant administration in control, including in relation to its resources. And this is the case, whatever the eventual resolution of the sovereignty dispute may turn out to be.

Western Sahara

Mr. President, the position of Western Sahara is of particular interest for the present case and I hope the Court will forgive me for examining it in a little more detail.

One must be cautious about drawing legal conclusions in this area from the practice in any other case, as each territory has its own peculiar features. Nevertheless, the closest analogy to East Timor among other self-determination territories is probably that of Western Sahara. The Western Sahara example shows that pending a final resolution of the issue, third States are not prevented from practical arrangements with the State in actual control of the territory. Such arrangements (even those relating to resources) have not been criticized by the General Assembly.

I do not propose to rehearse the history of the Western Sahara dispute. But this dispute has a Portuguese element. No doubt this was why Portugal's counsel sought cursorily to dismiss the relevance of the 1988 and 1992 Fisheries agreements between Morocco and the European Community (CR 95/4, p. 66). Some of the background to the dispute is set out at paragraphs 211-

213 of the Rejoinder. Prior to 1975, Spain was recognized by the United Nations as the "Administering Power" of this non-self-governing territory (then called Spanish Sahara). However, Spain terminated its presence in Western Sahara in February 1976. In 1979 Morocco purported to incorporate the area into the Kingdom of Morocco as a new province. This claim has never been accepted by the General Assembly, which in subsequent resolutions has repeatedly made clear the continuing application of resolution 1514 (XV) to Western Sahara and reaffirmed the right of the people of Western Sahara to self-determination and independence. No resolution of any United Nations organ has ever purported to terminate the status of Spain as the Administering Power of the territory, or has indicated that a State other than Spain is the Administering Power. Indeed, the last time that the General Assembly mentioned Spain in a resolution on Western Sahara, resolution 3458A (XXX) of December 1975, it expressly referred to Spain as the "Administering Power" with "responsibility ... with regard to the decolonization of the territory".

More recently the Secretary-General has been undertaking consultations in exercise of his good offices as between Morocco and the Frente Polisario. Among the issues under discussion has been the arrangements for a referendum on self-determination (see the most recent Working Paper prepared by the Secretariat of the Committee of 24, A/AC109/1194 of 29 June 1994). But arrangements for a referendum have not been settled (see CR 95/5, p. 25). At the same time there has been regular consideration of the issue in both the Security Council (resolutions 621(1988), 658(1990), 690(1991), 725(1991), 809(1993)) and the General Assembly (see e.g., 47/25 (1992), 48/49 (1993)). This is of course not the case in relation to East Timor.

Throughout the period from 1976, Morocco has been in control of the whole exploitable part of the territory. There has been a competing government, established by Polisario, that is the Sahrawi Arab Democractic Republic (SADR), recognized by many States and a member of the OAU. Yet no call has been made by the United Nations to States not to deal with Morocco nor to impose any other sanctions against it. Thus even though the United Nations rejected Morocco's claim that the people had decided in favour of incorporation, even though the United Nations was critical of Morocco's presence in the territory and even though some States have recognized the

SADR, there have been no calls for States not to deal with Morocco.

And, in the absence of any such calls, States have had dealings with Morocco as the State in effective control of the territory in respect of the natural resources of the territory. These States include Portugal. Yes, I repeat, these States include Portugal!

I refer the Court in particular to the fisheries agreements between the EC and Morocco which have operated since 1988 and which were clearly intended to include the waters pertaining to Western Sahara (ARej., para. 212). These agreements extend to resources which are located within the waters of the Western Sahara.

In fact, there have been two agreements between the European Community and Morocco concerning fisheries, one in 1988 and one in 1992. The texts of these agreements, appear in the Official Journal of the European Communities and have been made available to the Court.

The 1988 Agreement in Article 1 makes clear that the Agreement applies to the fishing activities of vessels flying the flag of a member State of the community in "the waters over which Morocco has sovereignty or jurisdiction". Somewhat ambiguous, you may say. But there is no such ambiguity when one examines the fine print. In particular I refer the Court to Point G of Annex 1, which forms an integral part of the Agreement (Art. 14). That provides that:

> "The fishing zones to which the community shall have access are the waters referred to in Article 1 of the Agreement, Article 1 of Protocol No. 1 and Article 1 of Protocol 2 beyond the following limits."

Then set out are various limits for different types of vessels. Protocol 2 is of no relevance for our purposes. If one goes to Protocol 1 one finds the possibility for fishing defined by reference to areas north and south of the parallel 30º40'N. The Court has in the folder we provided, an illustrated map which the Court may find useful in following this part of my argument. In the waters south of the 30°40'N line the Agreement restricts fishing for certain species between those two parallels but not other species. In other words, for some species fishing is allowed generally south of 30°40'N. For other species, fishing is restricted between 30°40'N and 28°44'N. The Agreement makes no sense therefore if the Agreement does not apply south of 28°44'N to waters off the Western Sahara controlled by Morocco. And the public understanding at the time was that these

waters were covered by the Agreement (ARej., fn 350, p. 118).

The European Commission, in answer to a question concerning the unilateral suspension by Morocco of fisheries operations off the Sahara coast in 1990, said that it could not "take up any position in regard to the geographical boundaries" of the zone covered by the Treaty, in particular as regards waters off the coast of Western Sahara (answer to question by Mr. Marin, 22 November 1990 - OJofEC 23.3.91, C79/20). Portugal seeks to rely on this (CR 95/4, p. 66). But this is mere obfuscation. Everyone knew that vessels from certain European countries were fishing off Western Saharan waters pursuant to the 1988 Agreement.

This attempt to hide the obvious whatever its possibility in relation to the earlier 1976 and 1977 Portugal and Spanish Agreements and the 1988 EC Agreement cannot be maintained once one examines the 1992 Agreement. The 1992 Agreement in Article 1 again defines the relevant waters as those over which Morocco has sovereignty or jurisdiction. However, the Agreement now clarifies that this expression in fact means what everyone understood it to mean. In point H of Annex 1 of that Agreement, dealing with the inspection of vessels there is provision for the vessels to call at a number of ports. The text says: "Not more than once a year ... any vessel authorized to fish must, at the request of the Moroccan authorities, put in at one of the ports listed".

In French: "l'un des ports *marocains*".

The ports listed are:

- Agadir, Casablanca, *Dakhla* and Tangier. Dakhla is, of course, in Western Sahara (OJ, 31.12.92, doc. 407/10).

Examination of the consideration given to the Agreement by the European Commission also confirms beyond doubt the application of the Agreement to the waters of the Western Sahara. In fact, there was some opposition to and some embarrassment in the European Parliament about the Agreement because of this fact. I need not detain the Court with all the detail. I refer simply to the Explanatory Statement attached to the Report to the European Parliament on the Agreement. A copy has been provided to the Court. It says:

> "The Commission and Council should seek guarantees from the Kingdom of Morocco that it will not implement the provisions of the fisheries agreement with the Community which concern the territorial waters of the Western Sahara and the port of

> Dakhla until the process of self-determination on the basis of the referendum prepared and supervised by the United Nations is concluded." (PE 202.501, 4 December 1992.)

This call by the European Parliament was ignored and the Agreement was signed after unanimous approval by the Council and entered into force (Reg. 3954/92 of 19 December 1992). Under that Agreement fishing vessels, principally from Spain but also from Portugal are fishing in the waters off Western Sahara.

Thus all members of the European Union, including Portugal, are doing exactly what Portugal claims in this case that no State should do. They are dealing with a State other than the Administering Power denominated as such by the United Nations.

This conduct provides the most powerful support for Australia's position in the present case.

Mr. President, I will stop there today.

The PRESIDENT: Thank you Mr. Burmester. The Court will resume these oral pleadings tomorrow at 10 o'clock. The meeting is over.

The Court rose at 1.00 p.m.
