INTERNATIONAL COURT OF JUSTICE

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ADVISORY OPINIONS AND ORDERS

CASE CONCERNING EAST TIMOR

(PORTUGAL *v.* AUSTRALIA)

JUDGMENT OF 30 JUNE 1995

1995

COUR INTERNATIONALE DE JUSTICE

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(PORTUGAL c. AUSTRALIE)

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CASE CONCERNING EAST TIMOR

(PORTUGAL *v.* AUSTRALIA)

Treaty of 1989 between Australia and Indonesia concerning the "Timor Gap".

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

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

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

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

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

Rights and obligations of a third State constituting the very subject-matter of the decision requested — The Court cannot exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate on the dispute referred to it by the Application.

JUDGMENT

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

In the case concerning East Timor,

between

the Portuguese Republic,

represented by

H.E. Mr. António Cascais, Ambassador of the Portuguese Republic to the Netherlands,

as Agent;

Mr. José Manuel Servulo Correia, Professor in the Faculty of Law of the University of Lisbon and Member of the Portuguese Bar,
Mr. Miguel Galvão Teles, Member of the Portuguese Bar,

as Co-Agents, Counsel and Advocates;

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,
Mrs. Rosalyn Higgins, Q.C., Professor of International Law in the University of London,

as Counsel and Advocates;

Mr. Rui Quartin Santos, Minister Plenipotentiary, Ministry of Foreign Affairs, Lisbon,
Mr. Francisco Ribeiro Telles, First Embassy Secretary, Ministry of Foreign Affairs, Lisbon,

as Advisers;

Mr. Richard Meese, Advocate, Partner in Frere Cholmeley, Paris,
Mr. Paulo Canelas de Castro, Assistant in the Faculty of Law of the University of Coïmbra,
Mrs. Luisa Duarte, Assistant in the Faculty of Law of the University of Lisbon,
Mr. Paulo Otero, Assistant in the Faculty of Law of the University of Lisbon,
Mr. Iain Scobbie, Lecturer in Law in the Faculty of Law of the University of Dundee, Scotland,
Miss Sasha Stepan, Squire, Sanders & Dempsey, Counsellors at Law, Prague,

as Counsel;

Mr. Fernando Figueirinhas, First Secretary, Portuguese Embassy in the Netherlands,

as Secretary,

and

the Commonwealth of Australia,

represented by

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia,

as Agent and Counsel;

H.E. Mr. Michael Tate, Ambassador of Australia to the Netherlands, former Minister of Justice,
Mr. Henry Burmester, Principal International Law Counsel, Office of International Law, Attorney-General's Department,

as Co-Agents and Counsel;

Mr. Derek W. Bowett, Q.C., Whewell Professor emeritus, University of Cambridge,
Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,
Mr. Alain Pellet, Professor of International Law, University of Paris X-Nanterre and Institute of Political Studies, Paris,
Mr. Christopher Staker, Counsel assisting the Solicitor-General of Australia,

as Counsel;

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

as Advisers,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

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

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

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

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

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

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

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

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

For Portugal: H.E. Mr. António Cascais,
Mr. José Manuel Servulo Correia,
Mr. Miguel Galvão Teles,
Mr. Pierre-Marie Dupuy,
Mrs. Rosalyn Higgins, Q.C.

For Australia: Mr. Gavan Griffith, Q.C.,
H.E. Mr. Michael Tate,
Mr. James Crawford,
Mr. Alain Pellet,
Mr. Henry Burmester,
Mr. Derek W. Bowett, Q.C.,
Mr. Christopher Staker.

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

*

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

On behalf of Portugal,

at the hearing on 13 February 1995 (afternoon):

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

Portugal has the honour to

— Ask the Court to dismiss the objections raised by Australia and to adjudge and declare that it has jurisdiction to deal with the Application of Portugal and that that Application is admissible, and
— Request that it *may please the Court:*

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

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

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

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

(c) is contravening Security Council resolutions 384 and 389 and is in breach of the obligation to accept and carry out Security Council resolutions laid down by the Charter of the United Nations, is disregarding the binding character of the resolutions of United Nations organs that relate to East Timor and, more generally, is in breach of the obligation incumbent on Member States to co-operate in good faith with the United Nations;

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

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

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

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

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

On behalf of Australia,

at the hearing on 16 February 1995 (afternoon):

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

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

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

* * *

11. The Territory of East Timor corresponds to the eastern part of the island of Timor; it includes the island of Atauro, 25 kilometres to the north, the islet of Jaco to the east, and the enclave of Oé-Cusse in the western part of the island of Timor. Its capital is Dili, situated on its north coast. The south coast of East Timor lies opposite the north coast of Australia, the distance between them being approximately 430 kilometres.

In the sixteenth century, East Timor became a colony of Portugal; Portugal remained there until 1975. The western part of the island came under Dutch rule and later became part of independent Indonesia.

12. In resolution 1542 (XV) of 15 December 1960 the United Nations General Assembly recalled "differences of views . . . concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as 'overseas provinces' of the metropolitan

State concerned"; and it also stated that it considered that the territories under the administration of Portugal, which were listed therein (including "Timor and dependencies") were non-self-governing territories within the meaning of Chapter XI of the Charter. Portugal, in the wake of its "Carnation Revolution", accepted this position in 1974.

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

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

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

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

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

General Assembly resolution 3485 (XXX) of 12 December 1975 referred to Portugal "as the administering Power"; called upon it "to continue to make every effort to find a solution by peaceful means"; and "strongly deplore[d] the military intervention of the armed forces of Indonesia in

Portuguese Timor". In resolution 31/53 of 1 December 1976, and again in resolution 32/34 of 28 November 1977, the General Assembly rejected

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

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

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

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

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

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

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

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

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

* * *

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

* * *

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

* *

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

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

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

22. The Court recalls that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties (see *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory*

Opinion, I.C.J. Reports 1988, p. 27, para. 35). In order to establish the existence of a dispute, "It must be shown that the claim of one party is positively opposed by the other" (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328); and further, "Whether there exists an international dispute is a matter for objective determination" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74).

For the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

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

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

* *

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

24. Australia argues that the decision sought from the Court by Portugal would inevitably require the Court to rule on the lawfulness of the conduct of a third State, namely Indonesia, in the absence of that State's consent. In support of its argument, it cites the Judgment in the case concerning *Monetary Gold Removed from Rome in 1943*, in which the Court ruled that, in the absence of Albania's consent, it could not take any deci-

sion on the international responsibility of that State since "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32).

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

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

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

The Court also observes that Australia, for its part, rejects Portugal's claim to the exclusive power to conclude treaties on behalf of East Timor, and the very fact that it entered into the 1989 Treaty with Indonesia shows that it considered that Indonesia had that power. Australia in substance argues that even if Portugal had retained that power, on whatever basis, after withdrawing from East Timor, the possibility existed that the power could later pass to another State under general international law,

and that it did so pass to Indonesia; Australia affirms moreover that, if the power in question did pass to Indonesia, it was acting in conformity with international law in entering into the 1989 Treaty with that State, and could not have violated any of the obligations Portugal attributes to it. Thus, for Australia, the fundamental question in the present case is ultimately whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or with Indonesia.

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

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

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

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

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

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

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

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

legal implications that flow from the reference to Portugal as the administering Power in those texts.

32. The Court finds that it cannot be inferred from the sole fact that the above-mentioned resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. The Court notes, furthermore, that several States have concluded with Indonesia treaties capable of application to East Timor but which do not include any reservation in regard to that Territory. Finally, the Court observes that, by a letter of 15 December 1989, the Permanent Representative of Portugal to the United Nations transmitted to the Secretary-General the text of a note of protest addressed by the Portuguese Embassy in Canberra to the Australian Department of Foreign Affairs and Trade on the occasion of the conclusion of the Treaty on 11 December 1989; that the letter of the Permanent Representative was circulated, at his request, as an official document of the forty-fifth session of the General Assembly, under the item entitled "Question of East Timor", and of the Security Council; and that no responsive action was taken either by the General Assembly or the Security Council.

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

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

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

> "In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application . . . In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim . . . In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru

might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction." (*I.C.J. Reports 1992*, pp. 261-262, para. 55.)

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

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

* *

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

37. The Court recalls in any event that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East

Timor remains a non-self-governing territory and its people has the right to self-determination.

* * *

38. For these reasons,

THE COURT,

By fourteen votes to two,

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

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

AGAINST: *Judge* Weeramantry; *Judge* ad hoc Skubiszewski.

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

(Signed) Mohammed BEDJAOUI,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

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

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

(Initialled) M.B.
(Initialled) E.V.O.