DISSENTING OPINION OF JUDGE WEERAMANTRY

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INTRODUCTION

I respectfully agree with the first part of the Court's decision, wherein the Court dismisses Australia's objection that no real dispute exists between itself and Portugal. It is my view that such a real dispute does exist and I support the Court's Judgment on this point.

I am also in agreement with the Court's observations in regard to the right to self-determination of the people of East Timor, their right to permanent sovereignty over their natural resources, and the *erga omnes* nature of these rights. The stress laid by the Court on self-determination as "one of the essential principles of contemporary international law" (Judgment, para. 29) has my complete and unqualified support.

However, I regret that my conclusions in regard to the second part of the Judgment differ from those of the great majority of my colleagues, who have held that the Court cannot adjudicate on Portugal's claim in the absence of Indonesia. In deference to their opinion and in recognition of the importance of the issue, I feel obliged to set out in some detail the reasons for my conclusion that the absence of Indonesia does not prevent the Court from considering Portugal's claim.

Apart from its being a crucial factor in this case, the principle involved is important to the jurisprudence of the Court, for it concerns the Court's jurisdictional reach in the wide range of third-party-related disputes which are increasingly brought before it in a more closely interrelated world.

Had the Court ruled differently on the preliminary issue of jurisdiction, there are numerous other issues of great importance which it would have considered in its Judgment. In view of its preliminary ruling, the Court's Judgment stops, so to speak, "at the threshold of the case"[1]. It therefore does not examine such seminal issues as the duties flowing to Australia from the right to self-determination of the people of East Timor or from their right to permanent sovereignty over their natural resources. It does not examine the impact of the Timor Gap Treaty upon their rights. It does not examine the *jus standi* of Portugal to institute this action on behalf of the people of East Timor.

The preliminary objection to the *jus standi* of Portugal calls into question the adequacy of the entire protective structure fashioned by the United Nations Charter for safeguarding the interests of non-self-governing territories, not yet in a position themselves to look after their own interests.

Australia's submission that it is not in breach of any international duty

[1] To use the language of Judge Jessup at the commencement of his dissenting opinion in *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 325.

necessitates a consideration of State obligations implicit in the principle of self-determination, the very basis of nationhood of the majority of Member States of the United Nations. It raises also the important juristic question of the nature of international duties correlative to rights *erga omnes*. Are they limited to mere compliance with specific directions and prohibitions, or are they set in the context of an overarching principle, transcending specific directions and prohibitions?

The jurisdictional objections raised by Australia require some consideration also of the status and legal consequences of resolutions of the General Assembly and the Security Council. In addition, there are several questions relating to judicial propriety which were stressed by Australia in its submissions.

Linkage between Jurisdiction and the Merits

Since these issues were fully argued by both sides, since they are all of deep significance, and since the view I take crosses the jurisdictional threshold into the substance of the case, my judicial duty compels me to address these questions[1]. In any event, the view I take of the jurisdictional objection upheld by the Court requires a consideration of all these matters, quite apart from their relevance to the merits. There is in this case such a close interlinkage between the preliminary objections and the merits that the former cannot be considered apart from the latter.

At a meeting convened by the President of the Court on 1 June 1992, in terms of Article 31 of the Rules of Court, the Parties agreed that questions raised by Australia regarding jurisdiction and admissibility were inextricably linked to the merits, and should therefore be heard and determined along with the merits. There was therefore a full hearing, both on the preliminary issues and on the merits.

This was in line with the position stated in the Australian Counter-Memorial that:

> "these bars to the Court's right to hear the claim are, in this case, inextricably linked with the merits so that it could be difficult to deal with them separately and to establish that they possess an exclusively preliminary character" (Counter-Memorial, para. 20).

In the result, this case does not present that sharp division between questions of jurisdiction and admissibility, and questions relating to the

[1] See Judge Jessup, in *South West Africa*: "Since it is my finding that the Court has jurisdiction, . . . I consider it my judicial duty to examine the legal issues in this case . . ." (*I.C.J. Reports 1966*, p. 325.)

merits, that is often present in cases before this Court, such as the *South West Africa* cases.

The Background

A short preliminary recital of some of the surrounding circumstances will place in context the ensuing legal discussions.

Portugal's long colonial occupation of East Timor, which had commenced in the sixteenth century, came to an end more than four centuries later in 1975, when the Portuguese administration withdrew from the Territory. Initially the Portuguese administration withdrew from the mainland to the island of Atauro, also a part of the Territory, on 27 August 1975. Three months after the Portuguese evacuation of the mainland, on 28 November 1975, FRETILIN (Frente Revolucionária de Timor-Leste Independente), a group seeking independence for the Territory, declared independence. A few days later, on 7 December 1975, Indonesian military forces entered East Timor. The next day the Portuguese administration withdrew from Atauro.

Indonesia has been in control of the Territory since the entry of its military forces, and enacted a law on 17 July 1976 incorporating East Timor into its national territory, on the basis that the people of East Timor had on 31 May 1976 requested Indonesia to accept East Timor as an integral part of Indonesian territory. However, this incorporation has not thus far been accepted or recognized by the United Nations which, in the language of the Secretary-General, is engaged in the search for "a comprehensive and internationally acceptable solution to the question of East Timor"[1]. The question of East Timor, still not the subject of the internationally acceptable solution sought by the Secretary-General, receives continuing attention in the reports of the Secretary-General. It is also kept by the General Assembly as an item on its agenda from year to year.

Several resolutions of the Security Council and the General Assembly refer to the circumstances in which the Portuguese withdrawal and the Indonesian occupation occurred. It will suffice to refer at this point to two Security Council resolutions — resolutions 384 and 389 of 22 December 1975 and 22 April 1976, respectively.

The first of these noted that General Assembly resolution 3485 (XXX) of 12 December 1975 had requested the Committee of Twenty-Four (the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples) to send a fact-finding mission to East Timor, and expressed grave concern at the deterioration of the situation in that Territory.

[1] Progress Report of 11 September 1992, A/47/435, para. 1 (see Reply, Vol. II, Ann. I.8). See, to the same effect, Report of the Secretary-General on the Work of the Organization, 2 September 1994, A/49/1, para. 505.

Expressing grave concern also at the loss of life in East Timor, it deplored the intervention of the armed forces of Indonesia in East Timor. The resolution further expressed regret that the Government of Portugal had not discharged fully its responsibilities as administering Power in the Territory under Chapter XI of the Charter.

Against this background, it:

> "1. *Calls upon* all States to respect 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);
>
> 2. *Calls upon* the Government of Indonesia to withdraw without delay all its forces from the Territory;
>
> 3. *Calls 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;
>
> 4. *Urges* all States and other parties concerned to co-operate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the Territory."

The second resolution again reaffirmed:

> "the inalienable right of the people of East Timor to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December 1960"

and called upon all States:

> "to respect 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)".

It also called upon the Government of Indonesia "to withdraw without further delay all its forces from the Territory".

Australia was heard before each of these Security Council resolutions was passed.

Six days before the first resolution, at the 1865th meeting of the Security Council, held on 16 December 1975, the Australian representative, invited by the President to make a statement, observed:

> "The immediate requirement as we see it, is for a cease-fire, to spare the people of Timor further bloodshed and to create a climate in which a constructive programme of decolonization can be resumed" (United Nations, *Official Records of the Security Council,*

Thirtieth Year, 1865th Meeting, 16 December 1975, para. 99; see Memorial, Vol. II, Ann. II.24)

and he concluded his statement as follows:

> "In conclusion, I would once again emphasize, as indeed the General Assembly did in its resolution 3485 (XXX), that the purpose and aim of the United Nations, underlying any action which the Council may decide, is to enable the people of the Territory freely to exercise their right to self-determination. The main question now is to establish conditions in which the people of Timor can make its own free choice." (*Ibid.*, para. 106; Memorial, *ibid.*)

Eight days before the second resolution, at the 1909th Meeting of the Security Council held on 14 April 1976, the Australian representative, again invited by the President to make his statement, said:

> "In my last statement to the Council on East Timor [1865th meeting] I emphasized that the Australian Government and people were most conscious that a stable settlement in East Timor could rest only on the free choice by the people concerned. It remains the firm policy of the Australian Government that the people of the Territory should exercise freely and effectively their right to self-determination, and, if their decision is to have any validity, it must be made in the full knowledge of the alternatives from which they are to make their choice. My Government does not, however, presume to lay down any precise formula or modalities for self-determination. We should prefer to respond to the wishes of the Timorese people themselves as to the best means by which they might genuinely exercise their right of self-determination." (United Nations, *Official Records of the Security Council, Thirty-first Year*, 1909th Meeting, 14 April 1976, para. 38; see Memorial, Vol. II, Ann. II.25.)

It is not necessary at this point to recapitulate the terms of the several General Assembly resolutions (eight in all), each of which stressed the importance of East Timor's right to self-determination, and proceeded on the basis that that right had yet to be exercised. They will be referred to in due course later in this opinion.

Portugal, claiming that it is still the administering Power of East Timor, seeks relief in this case against Australia in relation to a Treaty entered into on 11 December 1989 between Australia and Indonesia. The Treaty related to the resources lying between the coastal littorals of East Timor and Australia. This Treaty has been referred to in the proceedings as the Timor Gap Treaty, from the circumstance that the delimitation of the continental shelf between Australia and Indonesia stopped short on either side of that portion of the shelf lying between the south coast of East Timor and the north coast of Australia. This undelimited part of the

continental shelf is referred to as the Timor Gap (Memorial, Vol. I, para. 2.01).

It should be added that the jurisdiction of this Court is based upon Australia's declaration under Article 36 (2) of the Statute, by which Australia has submitted to the jurisdiction of this Court. Indonesia has not filed a declaration under Article 36 (2).

A word needs also to be said about Portugal's past colonial record, concerning the legal relevance of which there will be more discussion in a later part of this opinion. Australia has argued that it has left much to be desired. Portugal had indeed resolutely opposed the principle of self-determination for its colonies. It should be noted, however, that after the change of régime in Portugal on 25 April 1974, the Portuguese Government reaffirmed its obligations under Chapter XI of the Charter and, on 24 July 1974, the Council of State of Portugal approved a constitutional law abrogating the former territorial definition of the Republic of Portugal and acknowledging the right of self-determination, including independence, for Territories under Portuguese administration (Memorial, Vol. II, Ann. II.6).

The Timor Gap Treaty

This Treaty, entered into on 11 December 1989 between Australia and Indonesia, is alleged by Portugal to infringe the rights of the people of East Timor. It is titled "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and northern Australia" (Application, Ann. 2, text of the Agreement of 11 December 1989). The preamble recites the desire of the Parties to

> "enable the exploration for and exploitation of the petroleum resources of the continental shelf of the area between the Indonesian Province of East Timor and northern Australia yet to be the subject of permanent continental shelf delimitation between the Contracting States".

These petroleum reserves have been estimated, according to Portugal, at between 500 million and 5,000 million barrels[1]. Whatever their precise extent, they may safely be assumed to be of considerable value.

Under the Treaty, a joint Australian/Indonesian régime was set up for exploiting the oil resources on the continental shelf between Australia and East Timor. The Treaty expressed the desire of the parties that "exploration for and exploitation of these resources proceed without delay", and provided for a sharing of these resources as between the two

[1] Memorial, Vol. 1, para. 2.02 (citing *Australian Yearbook of International Law*, 1981-1983, Vol. 10, p. 135). Some estimates, according to a source cited in the Portuguese Memorial, arrive at a figure of "up to 7,000 million barrels, as well as a million barrels of distillates" (*Petroleum Gazette*, No. 3, 1988, p. 18).

Governments in a Zone of Cooperation between the "Indonesian Province of East Timor" and northern Australia, comprising three areas, A, B and C, on the following basis:

> "*(a)* In Area A, there shall be joint control by the Contracting States of the exploration for and exploitation of petroleum resources, aimed at achieving optimum commercial utilization thereof and equal sharing between the two Contracting States of the benefits of the exploitation of petroleum resources, as provided for in this Treaty;
>
> *(b)* In Area B, Australia shall make certain notifications and share with the Republic of Indonesia Resource Rent Tax collections arising from petroleum production on the basis of Article 4 of this Treaty; and
>
> *(c)* In Area C, the Republic of Indonesia shall make certain notifications and share with Australia Contractors' Income Tax collections arising from petroleum production on the basis of Article 4 of this Treaty." (Application, Ann. 2, text of the Agreement of 11 December 1989, Art. 2.)

Article 33 provides that the Treaty shall remain in force for an initial period of 40 years from the date of its entry into force. Unless the two Contracting States agree otherwise, it shall continue in force after the initial 40-year term for successive terms of 20 years, unless by the end of each term, including the initial term of 40 years, the two States have concluded an agreement on the permanent continental shelf delimitation in the area covered by the Zone of Cooperation.

The preambular paragraph to the Treaty recites that they are provisional arrangements which "do not jeopardize or hamper the reaching of final agreement on the delimitation of the continental shelf".

To give effect to this Treaty, the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (No. 36 of 1990) was passed by the Parliament of Australia. Article 3 states that the object of the Act is to enable Australia to fulfil its obligations under the Treaty. Under Article 8:

> "A person must not undertake petroleum operations in Area A of the Zone of Cooperation except under and in accordance with a production sharing contract, or with the approval of the Joint Authority" (Application, Ann. 2),

established under Article 7 of the Treaty.

The internal legislative measures taken by Australia for the implementation of the Treaty are among the acts which are alleged by Portugal to infringe the rights of the people of East Timor, the powers of Portugal as

administering authority, the relevant Security Council resolutions and the obligations incumbent on Member States to co-operate in good faith with the United Nations.

Scheme of Opinion

This opinion will analyse in Part A the third party rule, concentrating on what has been described as the principle in *Monetary Gold Removed from Rome in 1943*, which has been urged by Australia as presenting a preliminary objection to the Court's jurisdiction. This principle is the basis on which Portugal's action is dismissed by the Court. The purpose of this analysis is to ascertain whether Australia's actions, taken by themselves, can be viewed as constituting a breach by Australia of its own duties under international law, quite apart from the duties and actions of Indonesia. If the answer to this question is in the affirmative, an independent cause of action would be maintainable against Australia, without any necessity to pass judgment upon the legal duties and conduct of Indonesia.

Part B will deal with the objection relating to Portugal's status to institute these proceedings. Among the matters arising under this head are the protective structure of the United Nations Charter in relation to non-self-governing territories, the legal force of the relevant United Nations resolutions, and the question whether Portugal needed prior United Nations authorization to maintain this Application.

The question of jurisdiction depends on whether a cause of action can be made out against Australia, based upon Australia's individual obligations under international law, and Australia's individual actions, quite independently of Indonesia. For this purpose, it will be necessary in this opinion to examine the rights of East Timor under international law, and the international obligations of Australia in relation to those rights.

Part C therefore examines the rights of self-determination and permanent sovereignty over natural resources enjoyed by the people of East Timor. These are the principles on which Portugal's substantive case depends. Granted the applicability of these principles to East Timor, the central question for determination is whether the actions of the Respondent State are in accordance with those principles.

Part D will analyse the international obligations of Australia. It will scrutinize the juristic nature of the general legal duties lying upon all States in respect of self-determination, and the particular legal duties lying upon Australia vis-à-vis East Timor. It will then examine whether, through its conduct in entering into the Timor Gap Treaty, Australia was in breach of its international legal duties.

Part E deals with matters relating to judicial propriety, on which a many-faceted argument was presented by Australia. This opinion does

not deal with Australia's submission regarding the absence of a justiciable dispute, as that has been dealt with in the Court's Judgment. However, it considers briefly some of Australia's other contentions — such as the contentions that the proceedings are a misuse of the processes of the Court, that they have an illegitimate object, and that they have been instituted before an inappropriate forum.

This opinion does not touch upon any matter which travels outside the scope of the preliminary objections raised by Australia. Nor does it touch upon any actions or conduct of Indonesia, apart from the circumstance of Indonesia's military intervention, which has been referred to also in the Judgment of the Court (para. 14).

PART A. THE POSITION OF THIRD PARTY STATES

1. The Jurisdictional Issue

(i) *The contentions of the Parties*

In seeking relief against Australia in respect of this Treaty, is Portugal entering judicial ground not traversable except in the presence of Indonesia? Is this in fact a contest between Portugal and Indonesia under guise of a contest with another State which is not the true respondent? If the answers to these questions are in the affirmative, Australia's submissions must be accepted, and Portugal's claim must be dismissed.

Australia invokes *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954*, p. 19) as a central authority on which it rests its contention that the Court lacks jurisdiction to entertain Portugal's claim. Australia's contention is that a determination against Australia necessarily involves as a prerequisite a determination against Indonesia in regard to the illegality of its occupation of East Timor. Since Indonesia is not before the Court, it is argued that the principle of *Monetary Gold*, which decided that the Court could not adjudicate upon Italian and United Kingdom claims to a certain quantity of Albanian gold in the absence of Albania, operates as a jurisdictional barrier to Portugal's claim.

Portugal, on the other hand, submits that its claim is not against Indonesia, but against Australia, that the wrongdoing it alleges is not against Indonesia, but against Australia, and that the totality of its case is made up only of elements drawn from Australia's own international obligations, and Australia's own unilateral actions. It submits that Indonesia may well be affected by the Judgment, but that it is Australia's, and not Indonesia's, conduct that is the very subject-matter of the case.

(ii) *The circumstances before the Court*

The question of jurisdiction is not an isolated question of law, but a mixed question of law and fact.

As observed in a well-known treatise on the Court's power to determine its own jurisdiction:

> "The power of the International Court to determine its jurisdiction has therefore two aspects: the interpretation of the jurisdictional instruments and the interpretation (and characterization) of the facts of the dispute itself. In fact, the jurisdiction of the Court can result only from the interaction of the elements involved in this process."[1]

It becomes necessary, therefore, as a backdrop to the ensuing discussion, to refer briefly to some of the salient facts.

The circumstances which are either admitted by Australia, or manifest on the documents, or of sufficient notoriety for the Court to take judicial notice of them, are as follows:

(a) the people of East Timor have a right to self-determination which Australia is obliged to recognize (see Part C below);

(b) the people of East Timor have a right to permanent sovereignty over the natural resources of the Territory, which Australia is obliged to recognize (for a fuller discussion, see Part C below);

(c) among these resources are a share of the maritime resources of the Timor Gap area, i.e., the portion of sea situated between the opposite coasts of East Timor and Australia — a resource they share with Australia;

(d) those resources continue to belong in law to East Timor, so long as East Timor remains a non-self-governing territory;

(e) Australia has admitted throughout the case that East Timor still remains a non-self-governing territory[2];

(f) the United Nations still regards East Timor as a non-self-governing territory;

(g) this area is extremely rich in oil and natural gas potential. Whatever its extent, it forms in all probability the principal economic asset of the East Timorese people, awaiting them at such time as they achieve self-determination;

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[1] Ibrahim F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, 1965, p. 299.

[2] Australia's agent stated in the proceedings, on 16 February 1995:

> "Australia recognizes that the people of East Timor have the right to self-determination under Chapter XI of the United Nations Charter. East Timor remains a non-self-governing territory under Chapter XI. Australia recognized this position long before Portugal accepted it in 1974. It has repeated this position, both before and after its recognition of Indonesian sovereignty and it says so now." (CR 95/14, p. 13.)

(h) Portugal, the former colonial authority, has left the Territory, but is still considered by the United Nations to be the administering authority;

(i) no other power has been recognized by the United Nations as having authority over the Territory;

(j) on 7 December 1975, Indonesian military forces occupied the Territory, and Indonesia is now in full control thereof;

(k) Indonesia has not, to this date, been recognized by the United Nations as having authority over the Territory, and, nearly twenty years after the Indonesian occupation, the United Nations is still engaged in a search for an "internationally acceptable solution to the question of East Timor" (Reply, Vol. II, Ann. I.8, para. 1);

(l) Australia has entered into a Treaty with Indonesia, dividing between Australia and Indonesia the resources of the Timor Gap area;

(m) in that Treaty, Australia expressly recognizes East Timor as "the *Indonesian Province* of East Timor";

(n) confronted with the legitimate need to exploit its own resources, and needing, for this purpose, a treaty with the opposite coastal State, Australia did not seek directions or authorization from the United Nations before entering into this Treaty, despite the facts that East Timor was still a non-self-governing territory, and that the United Nations had not recognized the incorporation of the Territory into Indonesia. No suggestion was made before the Court that any such direction or authorization was sought;

(o) this Treaty has been entered into for an initial period of 40 years, with possible renewals for 20 years at a time;

(p) the Treaty makes no provision for any proceeds of exploitation of the area to be earmarked for the people of East Timor whenever their status is determined;

(q) the people of East Timor have never at any stage, either directly or through any duly constituted legal representative, given their consent to the Treaty;

(r) while Australia is entitled to its share of the resources of the Timor Gap area, no delimitation, in a manner recognized by law, has thus far taken place between Australia and East Timor. Till such time, the exact division between Australian and East Timorese resources must remain unclear. The possibility must therefore exist of some benefit to Australia from East Timorese resources which, upon another division according to law, might have been allotted to East Timor;

(s) Australia has joined in a Treaty under which a non-renewable natural resource would, to the extent of its exploitation under the Treaty, be permanently lost to the people of East Timor. Over a period of 40 years, the entire resource could well be lost for ever;

(t) Portugal cannot, in law, obtain any financial benefits for itself from

this action, if successful, and will need to report to the United Nations and to act under United Nations supervision.

The entirety of the opinion that follows does not travel beyond the circumstances itemized above.

(iii) *Do the circumstances of the case attract any necessity to consider a third State's conduct?*

It is against this specific background of admitted or manifest circumstances that the preliminary objection must be considered as to whether the "*Monetary Gold* principle" presents a barrier to the consideration of Portugal's claim. It has been strenuously argued that *Monetary Gold* does present such a barrier. Having regard to the multiplicity of circumstances set out above, which relate to Australia's obligations and actions alone, I regret very much that I am unable to agree. In my view, all the essentials necessary for the Court to adjudicate upon Portugal's claim against Australia are present, without the need for any adjudication against Indonesia.

Australia is party to a treaty which deals, *inter alia*, with resources acknowledgedly belonging to the East Timorese people, who are acknowledgedly a non-self-governing people. So long as they continue to be a non-self-governing people, those resources will continue to belong to them by incontrovertible principles of the law of nations. At such time as they achieve self-determination, they may deal with these resources in such manner as they freely choose. Until such time, the international legal system protects their rights for them, and must take serious note of any event by which their rights are disposed of, or otherwise dealt with, without their consent. Indeed, the deepest significance of the right of a non-self-governing people to permanent sovereignty over natural resources lies in the fact that the international community is under an obligation to protect these assets for them.

The Respondent fully acknowledges that East Timor is still a non-self-governing territory and so, also, does the United Nations, which is the appropriate authority on these matters. While the United Nations still awaits "an internationally acceptable solution" to the question, the Court must examine whether it accords with the international rule of law that any Member State of the United Nations should be in a position:

(a) to enter into a treaty with another State, recognizing that the territory awaiting self-determination has been incorporated into another State as a province of that State; and

(b) to be party to arrangements in that treaty which deal with the resources of that territory, without the consent either of the people of the territory, or of their authorized representative.

That is the dominant issue before the Court. It centres on the actions of the Respondent and not of the third State.

In the light of the totality of incontrovertible circumstances outlined earlier in this section, the Court does not need to enter into an enquiry into the lawfulness of the conduct of that third State or of its presence in East Timor.

If East Timor is still a non-self-governing territory, every member of the community of nations, including Australia, is under a duty to recognize its right to self-determination and permanent sovereignty over its natural resources. If this is so, as is indubitably the case, the Court would be in possession of all the factual material necessary for the Court to pronounce upon the responsibility of the Respondent State, which is in fact before it. Nor would it, in the slightest degree, be encroaching upon the prohibited judicial territory of making a judicial determination in relation to an absent third party.

(iv) *Is the Court under an obligation to reinvestigate matters dealt with in the United Nations resolutions?*

Australia submits that, despite the United Nations resolutions calling upon the Government of Indonesia to withdraw its military forces from East Timor, reaffirming the right of the people of East Timor to self-determination, and rejecting the claim that East Timor has been incorporated into Indonesia, the Court would itself have to determine the question of the legality of Indonesia's control over East Timor, were it to proceed with this case. In the absence of such a determination, according to the Australian submission, the Court cannot hold that Indonesia could not lawfully enter into the Treaty and, without such a finding, the Court cannot hold that Australia has acted wrongfully in entering into the Treaty.

To enter upon such an enquiry would be to enter upon an immense factual and political investigation. It would call for an examination *de novo* of voluminous evidence regarding the circumstances of Indonesia's military entry into and subsequent control over East Timor and of the numerous intricate military, political and diplomatic activities involved in any such military intervention, followed by continuing occupation. Upon this evidentiary material, the Court would be required to reach a judicial determination. Nor is it possible in any event to engage in such an enquiry in the absence of Indonesia.

Such an argument disregards the fact that the materials essential to decision are already before the Court. It disregards the practicalities of the judicial process. It disregards the scheme of the United Nations Charter which distributes appropriate tasks and responsibilities among the principal organs of the United Nations. By postulating a virtual impossibility as a prerequisite to justice, it denies justice, however legitimate the claim.

The Court cannot be reduced to inaction in this fashion by throwing upon it a burden duly discharged by the appropriate United Nations organs, acting within their proper authority. Such a position seems too artificial and removed from reality to be the law or the procedure under which this Court functions.

Of course, this Court, as the principal judicial organ of the United Nations, can in appropriate circumstances be called upon to consider whether a particular organ of the United Nations has acted beyond its authority or in a manner not authorized by law. Such issues have been brought before this Court in cases such as *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Libyan Arab Jamahiriya* v. *United States of America)* (*I.C.J. Reports 1992*, p. 3 and p. 114, respectively). No suggestion has been made of any such circumstances in the present case. The only grounds on which the force of the resolutions has been attacked is that, owing to a supposedly diminishing support for them upon a counting of votes and, owing to the lapse of time since their adoption, they have in some way lost their authority. There is no warrant in United Nations law for either of these contentions, as more fully discussed later.

In short, the substantive and procedural principles governing this Court's jurisdiction cannot operate so restrictively as to prevent it from reaching a determination in a case such as this, where all the ingredients necessary to such a decision are before it and where that decision can be reached without trespassing upon the rule enshrined in the Court's Statute that its jurisdiction flows only from consent. That the judgment will *affect* the interests of a third party State is not a factor which, according to the well-established jurisprudence upon this matter, operates as a barrier to jurisdiction. Such effects upon third parties are always part of the judicial process and are manifesting themselves increasingly as the world contracts into a more closely interknit community.

These aspects are more fully considered later in this opinion.

* * *

The purpose of the foregoing discussion has been to show that the circumstances of this case render the *Monetary Gold* principle inapplicable, in that the claim against the Respondent State does not in any way necessitate the investigation of the conduct of a third party State and, least of all, a judicial finding against it.

However, in view of the great importance attached to it in the argument before the Court, and in deference to the Court's reliance on the principle, this opinion turns now to a more detailed consideration of the *Monetary Gold* case to ascertain whether, even if it were applicable, it would present any barrier to Portugal's claim.

2. *The* Monetary Gold *Principle*

(i) *Subject-matter*

One of the matters at issue in *Monetary Gold* was whether Albanian gold should be awarded to Italy on the basis of Albanian wrongdoing. It was clearly impossible for the Court to determine this question in the absence of Albania, whose property and wrongdoing *were the very subject-matter on which the Italian claim was based.*

The present case presents a totally different picture. The obligations and the conduct of Indonesia are *not* the very subject-matter of this case. The obligations and the conduct of Australia are, and Australia is before the Court.

Independently of an enquiry into the conduct of Indonesia, the preceding section of this opinion has shown that the Court has before it sufficient materials relating to the duties, the responsibilities and the actions of Australia, to enable it to make a pronouncement thereon. It does not need to open up vast expanses of enquiry into Indonesia's conduct, or military operations or any other items which may have provoked international concern, to decide this matter. Far less does it need to *adjudicate* upon these. The sharp focus upon Australia's acts and responsibilities which is necessary for a determination of these issues can only be blurred by such an undertaking.

(ii) *Parties*

In *Monetary Gold* the two States *between whose rights* the Court was called upon to adjudicate were Italy and Albania in the first claim, and the United Kingdom and Albania in regard to the second (see para. (iv) below). Albania, the State whose property was sought to be appropriated, and whose wrongdoing was alleged, was not before the Court. In the present case, unlike in *Monetary Gold*, no claim is made against an absent third party. The two States *between whose rights* the Court has to adjudicate are Portugal and Australia, both of whom are before the Court.

In *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections* (*I.C.J. Reports 1992*, p. 240), likewise, the two parties *between whose rights* the Court had to adjudicate were Australia and Nauru, both parties before the Court. In both *Nauru* and the present case, other parties are affected, but in neither case is that factor an obstacle to jurisdiction.

(iii) *Rationale*

Two of the most often cited pronouncements of principle in *Monetary Gold* are the following:

> "In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania." (*I.C.J. Reports 1954*, p. 32.)
>
> "Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding on any State, either the third State, or any of the parties before it." (*Ibid.*, p. 33.)

The Court was stressing, quite naturally, that Albania's interests would not merely be affected by the decision, but would be *the very subject-matter* of the decision, and that "the vital issue" to be settled concerned *the international responsibility of Albania itself.* The generality of the phraseology adopted by the Court has sometimes led to a tendency to cite these passages as authority for propositions far wider than were warranted by the extremely limited circumstances of the case — namely, that Albanian property could not be appropriated on the basis of Albanian wrongdoing in the absence of Albania. In the present case, no claim is being made against Indonesia, no decision is sought against Indonesia, and the vital issue is not the international responsibility of Indonesia.

Indonesia's legal interests may be affected by the decision, but they are not the very subject-matter of the decision, in the sense that Albanian gold was the actual subject-matter of *Monetary Gold.*

The Court's determinations on matters pertaining to Australia's obligations and actions may indeed have consequences, not only for Indonesia but for other countries as well, for Australia has, in the course of its submissions, informed the Court that several countries have dealt with Indonesia in respect of East Timor (CR 95/10, pp. 20-21). If the Judgment of the Court raises doubts about the validity of those treaties, those other countries who have acted upon the validity of the treaty may well be affected. Yet, it cannot be suggested that they be all joined, or that, for that reason, the Court is not competent to hear the claim before it.

The broad dicta in *Monetary Gold* must not be stretched beyond what the context of the case allows.

(iv) *Italian and United Kingdom claims distinguished*

An analysis of the two claims in *Monetary Gold* brings its underlying principle into clearer relief.

The first claim in *Monetary Gold* related to Italy's contention that the Albanian gold should be delivered to Italy in partial satisfaction of the damage caused to Italy by the Albanian law of 13 January 1945, which

had expropriated certain Italian assets. The second related to Italy's claim to priority over the claim of the United Kingdom to receive the gold in partial satisfaction of the Judgment in the *Corfu Channel* case.

The first claim, based upon an Albanian action alleged by Italy to be wrongful, could not, quite clearly, be decided in the absence of Albania. Albanian rights and Albanian wrongdoing were integral to its very substance. The judgment on this point was unanimous.

The decision on the second claim, though also soundly based on legal principle, could perhaps be differentiated in the sense that, though the competing claims here were between Italy and the United Kingdom, the United Kingdom claim against Albania was already *res judicata* in terms of the Judgment of this Court in the *Corfu Channel* case. Albania's judgment debt to the United Kingdom, being *res judicata*, did not need to be proved afresh, and could not be contested by Albania. However, the fact that Italy too had claims upon the gold raised questions of priority (see *I.C.J. Reports 1954*, p. 33) which complicated the issue.

It may be noted, in passing, that judgment on the second point was not unanimous, for Judge Levi Carneiro registered a dissent, holding that the Court could, and should, have adjudicated upon the second submission of Italy, independently of the first, on the basis that the only States directly interested in the question of the priority issue, namely, Italy and the United Kingdom, were before the Court (*ibid.*, p. 43, para. 7), and that it could be resolved simply in the light of legal rules (*ibid.*, para. 8).

(v) *The third party principle and the judicial duty to decide*

The opinion of Judge Carneiro is significant in that it represented a concerned attempt to conserve the Court's jurisdiction without violating the third party rule. This points to an important concern, always before the Court, that, while the third party rule is important, and must at all times be respected, there is also another principle within which the Court functions, namely, the judicial duty to *decide* the cases brought before it within its jurisdictional competence.

As in many areas of the law, the dividing line between the operation of the two competing principles is not always discernible with clarity. There will in many cases be an area of doubt, in which the case could well fall within the operation of one principle or the other. In these areas, the Court is the judge of its own jurisdiction — a position expressly accorded to it by Article 36 (6) of its Statute.

A distinguished line of precedents, stretching back to the *Alabama Arbitration* (1872) and beyond[1], has established that: "The fundamental

[1] For these precedents, see Ibrahim Shihata, *op. cit.*, pp. 12 *et seq.*

principle of international law governing these aspects is that an international tribunal is master of its own jurisdiction."[1] In exercising that jurisdiction, a tribunal will naturally not view the mere presence of a doubt, however slight, as a reason for declining jurisdiction.

It is by striking a balance between these principles that the Court's jurisdiction can be best developed, rather than by focusing attention upon the third party principle, to the exclusion of the other. While the consensual principle must always furnish the basis of jurisdiction, "It is a matter of common sense that too rigid an attraction to that principle will paralyse any international tribunal."[2] The inadequacies of Article 36 as it exists[3], and the need for "a well-defined functional and teleological approach to questions of jurisdiction"[4] justify such an approach to the problem[5].

It was thus for very good reason that, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court expressed a note of caution against undue extensions of *Monetary Gold*, in terms that its circumstances "probably represent the limit of the power of the Court to refuse to exercise its jurisdiction" (*I.C.J. Reports 1984*, p. 431, para. 88; see, also, *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Judgment, I.C.J. Reports 1992*, p. 260, and *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, p. 116, para. 56)[6].

As this Court observed in *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene*: "it must be open to the Court, and indeed its *duty, to give the fullest decision it may in the circumstances of each case . . .*" (*I.C.J. Reports 1984*, p. 25, para. 40; emphasis added). This compelling obligation to *decide* the dispute before the Court distinguishes the judge, properly seised of jurisdiction, from many other functionaries, who are not charged by their office with the *obligation* to reach a decision on every contentious matter properly referred to them within the scope of their authority. Literature on the nature of the judicial function is replete with emphasis on the judicial duty to *decide*. The Statute of the Court itself gives expression to this concept in Article 38, which stipulates that the Court's "function is to *decide* in accordance with international law such disputes as are sub-

[1] Shabtai Rosenne, *The Law and Practice of the International Court*, 1985, p. 438.
[2] *Ibid.*, p. 439.
[3] *Ibid.*, p. 316.
[4] *Ibid.*
[5] See, also, the discussion in Section 3 (vii) below.
[6] See D. H. N. Johnson ("The Case of the Monetary Gold Removed from Rome in 1943", *International and Comparative Law Quarterly*, 1955, Vol. 4, at p. 110) to the effect that careful consideration should be given "before the already limited jurisdiction of the Court is limited still further" by unduly wide interpretations of the third party rule.

mitted to it"[1] (emphasis added). Indeed, that is *the* function of the Court, around which all the other provisions of the Statute are built[2].

If, therefore, too restrictive an interpretation be given to the Court's jurisdiction, in consequence of which the Court does not decide a dispute properly referred to it within its jurisdiction, there can be a non-performance of its express statutory obligation.

While it is important, then, that objections based on lack of third party consent must receive the Court's most anxious scrutiny, there is to be weighed against it, in areas of doubt, the other consideration, equally important, of the Court's statutory duty to decide a dispute properly brought before it within its judicial authority. Too strict an application of the first principle can result in an infringement of the second.

In the international judicial system, an applicant seeking relief from this Court has, in general, nowhere else to turn if the Court refuses to hear it, unlike in a domestic jurisdiction where, despite a refusal by one tribunal, there may well be other tribunals or authorities to whom the petitioner may resort.

As Fitzmaurice observes:

> "Since the national law will normally ensure that there is *some* domestic forum competent to hear and determine all cases involving breaches of that law, or the assertion of rights under it, it follows that domestic jurisdictional issues are of secondary importance, because a claimant who fails on jurisdictional grounds in one forum can start again in the correct one. Thus, as a general rule, there is no avoiding a determination on the merits if the claimant persists, and the defendant obtains no ultimate advantage by raising jurisdictional issues. It is far otherwise in the international field where a jurisdictional objection, if successful, will normally dispose of the case entirely, and rule out any further proceedings, not only before the tribunal rendering the jurisdictional decision, but before any

[1] See *Nuclear Tests (Australia* v. *France)* (*I.C.J. Reports 1974*, p. 271) for a confirmation of this principle, and for the limited circumstances in which the Court may legitimately decline to decide, as where no dispute exists.

[2] In *The Republic of El Salvador* v. *The Republic of Nicaragua*, the Central American Court of Justice remarked, in regard to the third party rule, that:

> "many questions that might arise among or between Central American Governments would be excluded from its cognizance and decision if weight be given to the trivial argument that a third nation . . . possesses interests connected with the matters or questions in controversy.
>
> To admit that argument would be to render almost negligible the judicial power of the Court, since the fact of invoking interests connected with a third nation would detract from the Court's judicial mission . . ." (*American Journal of International Law*, 1917, Vol. 11, p. 699.)

other. In the international field therefore, such issues assume a far greater, and usually a fundamental importance."[1]

It is an important circumstance relating to all jurisdictional questions that this Court is the international system's place of ultimate resort for upholding the principles of international law, when all other instrumentalities fail.

(vi) *The test of reasonableness*

It is sought, in this case, to interpret *Monetary Gold* as meaning that the Court has no jurisdiction because it cannot determine the question before it, without first determining the legality or otherwise of Indonesia's presence in the Territory. In short, this proposition would mean that, where a claim by State A against State B cannot be made good without demonstrating, as a prerequisite, some wrongful conduct on the part of State C, State B can avoid an enquiry into its own conduct, however wrongful, by pointing to C's wrongdoing as a precondition to its own liability.

A time-honoured test of the soundness of a legal interpretation is whether it will lead to unreasonable, or indeed absurd, results. That this proposition could lead to manifestly unreasonable results will be evident from the following illustrations, in each of which A is the applicant State, B the respondent, and C the third party State, whose wrongdoing must be established as a precondition to the claim or the defence. In each illustration, B has subscribed to the Court's jurisdiction, but not C, for which reason C is not before the Court:

— After A and B enter into a mutual defence pact, C commits an act of aggression against A. B does not come to A's relief. In an action by A against B, it is necessary, preliminarily, for A to prove C's act of aggression[2]. Since C is not before the Court, A's claim must be dismissed.
— Between A and C, there lies a narrow corridor of B's territory. C discharges a large quantity of radioactive waste into B, whence it flows into A. A sues B. B seeks to prove that the matter is beyond its control, inasmuch as the noxious material has come from C and, once on its territory, could not be contained. Since it is necessary for B to

[1] Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. II, p. 438; emphasis in original.
[2] For this illustration, see Johnson, *op. cit.*, p. 110.

prove this wrongful conduct on the part of C, B's defence will be shut out.

— In furtherance of B's plans to gather military intelligence regarding A, B persuades a potential ally, C, to overfly A's territory for unlawful aerial surveillance. While overflying A's territory, C's plane crashes over a crowded city, causing immense damage and loss of life. A takes B to Court for damage caused. A is in possession of material proving B's instigation of C's unlawful act. B can have the claim dismissed for lack of jurisdiction, on the basis that a precondition to the claim is proof of C's unlawful act.

— C makes a raid against A and plunders, *inter alia*, a historic object belonging to A. B acquires the object from C. A sues B to recover it and needs, as a prerequisite, to prove that it was the identical object taken away in the raid by C. A cannot maintain the action in the absence of C, for proof of C's wrongdoing is a prerequisite to A's claim. (The example does not take into account any special treaty provisions relating to the return of cultural or historical treasures.)

— A State corporation owned by A runs an industrial establishment in the territory of C. C wrongfully confiscates its highly specialized plant and factory, and invites B, which commands special expertise in the relevant field, to participate in running it with C as a joint profit-sharing venture. B agrees and participates. A sues B, alleging the illegality of the whole enterprise. The claim must be rejected because the action is not maintainable without proof of the wrongful act of C.

Examples could be multiplied.

In each case a third party's wrongdoing must be established as a prerequisite to the claim or defence. In each case the rule excluding it produces manifest injustice and an unreasonable result. It is difficult to imagine that such a rule can truly represent a "well-established" principle of international law, built into the Statute of the Court — a principle on the basis of which the fundamental question of jurisdiction is decided, on which in turn depend the ultimate rights of parties in matters of great moment.

The conclusion is compelling that an interpretation of *Monetary Gold* to produce such a result clearly extends the decision far beyond its permissible limits. Indeed, such an interpretation seems contrary to the principle of individual responsibility of each State for its own acts. The mere allegation of a third party's wrongdoing as a prerequisite to the proof of one's own cannot deflect the course of justice and steer it away from the

principle of a State's individual responsibility for its individual actions. (On this, see, further, Section 3 (ii) below.)

(vii) *Prior jurisprudence*

In *Monetary Gold*, the Court stated that:

> "To adjudicate upon the international responsibility of Albania without her consent would run counter to a 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." (*I.C.J. Reports 1954*, p. 32; emphasis added.)

It is noteworthy that there was no citation of precedent in *Monetary Gold*. It was a decision that formulated no new principle, and made no new advances. The decision made no greater claim than that it was applying a principle already embodied in the Court's Statute.

It would be helpful, therefore, to look at some prior cases.

(a) *Advisory Opinions*

Two well-known prior cases are *Status of Eastern Carelia (P.C.I.J., Series B, No. 5)* and *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (*I.C.J. Reports 1950*, p. 65), both Advisory Opinions, where similarly strong statements were made in similar language.

In the first case, the Permanent Court found that it was "impossible" to give an opinion which bears on an actual dispute between Finland and Russia, as the Russian Government was not before the Court. Using the same expression later used in *Monetary Gold* (*I.C.J. Reports 1954*, p. 32), that case too described as "well established in international law" the principle that no State could, "without its consent, be compelled to submit its disputes . . . to mediation or to arbitration" (*P.C.I.J., Series B, No. 5*, p. 27).

In *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, as well, the Court referred to the

> "well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent" (*I.C.J. Reports 1950*, p. 71).

If these cases were a basis on which this Court described the third party rule as a "well-established" principle in international law, the point needs to be made that advisory opinions rest upon a different judicial basis from contentious proceedings. The Court's decision as to whether

to proceed with a matter is clearly taken on different bases in advisory proceedings, where the Statute may perhaps give the Court somewhat more discretion as to whether it will render an opinion (Statute, Art. 65). Precedents deriving from advisory opinions, where the Court declines to give an opinion in consequence of third party involvement, are not therefore of direct applicability to jurisdictional decisions in contentious proceedings.

It is significant moreover that in *Status of Eastern Carelia*, the Court described it as "*very inexpedient* that the Court should attempt to deal with the present question" (*P.C.I.J., Series B, No. 5*, p. 28; emphasis added) and again stated "it is certainly *expedient* that the facts upon which the opinion of the Court is desired should not be in controversy" (*ibid.*; emphasis added).

The jurisprudence on this matter deriving from advisory opinions can thus be distinguished[1]. Whether or not considerations of "expediency" can be taken into account in advisory opinions, they have no place in contentious litigation where the Court *must* reach a decision one way or the other (see para. (v) above)[2].

(b) *Contentious cases*

As for the jurisprudence deriving from contentious proceedings, the manner in which the Court handled the *Corfu Channel* case, just a few years earlier, is not in line with the general proposition formulated in *Monetary Gold*.

In that case, the United Kingdom claimed that the minefield which caused damage to its shipping was laid by Albania. As an alternative argument it claimed that the minefield was laid by Yugoslavia, with the connivance of the Albanian Government. As the Court observed:

> "This would imply collusion between the Albanian and the Yugoslav Governments, consisting either of a request by the Albanian Government to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines." (*I.C.J. Reports 1949*, p. 16.)

In so far as concerned this alternative argument, the principal wrongdoer was Yugoslavia. Yugoslavian wrongdoing was the prerequisite to

[1] See D. H. N. Johnson:

> "The Court's judgment gives the impression that certain dicta, properly applicable to the question whether or not the Court should exercise a discretion in favour of giving an advisory opinion, were applied somewhat too literally to the different circumstances of a contentious case." (*Op. cit.*, p. 110.)

[2] See, also, *Anglo-Iranian Oil Co.* (*I.C.J. Reports 1952*, p. 103), and *Rights of Minorities in Upper Silesia (Minority Schools)* (*P.C.I.J., Series A, No. 15*, p. 22), for other cases which held that the jurisdiction of the Court "depends on the will of the Parties".

the alleged Albanian wrongdoing, very much in the manner of Indonesian wrongdoing being the prerequisite to alleged Australian wrongdoing, as argued by Australia.

In proof of this collusion the United Kingdom Government placed evidence before the Court and, in the Court's own words:

> "The Court gave much attention to this evidence and to the documentary information supplied by the Parties. It supplemented and checked all this information by sending two experts appointed by it to Sibenik: Commodore S. A. Forshell and Lieutenant-Commander S. J. W. Elfferich." (*I.C.J. Reports 1949*, p. 16.)

> "Apart from Kovacic's evidence, the United Kingdom Government endeavoured to prove collusion between Albania and Yugoslavia by certain presumptions of fact, or circumstantial evidence, such as the possession, at that time, by Yugoslavia, and by no other neighbouring State, of GY mines, and by the bond of close political and military alliance between Albania and Yugoslavia, resulting from the *Treaty of friendship and mutual assistance signed by those two States on July 9th, 1946*." (*Ibid.*, p. 17; emphasis added.)

The Yugoslav Government was not a party to the proceedings but it authorized the Albanian Government to produce certain Yugoslav documents.

Sir Hartley Shawcross for the United Kingdom made the following statements, among others, implicating Yugoslavia, not merely peripherally, but indeed, in this part of the case, as the principal participant in the international wrongdoing alleged:

(a) that it was well known that, at the relevant time, there was the closest association and collaboration between Albania and Yugoslavia (*I.C.J. Pleadings, Corfu Channel*, Vol. III, p. 239);

(b) that members of the Albanian Forces were sent to Yugoslavia for training (*ibid.*, p. 240);

(c) that Yugoslavia, under a decree contained in the Yugoslav Official Gazette, was given "a virtual monopolistic position in regard to coastal traffic between the two countries" *(ibid.)*;

(d) that Yugoslavia conducted practically the whole of Albania's foreign relations and "had naval, military and air-force missions in Albania guiding the organization of the military arrangements of that country" *(ibid.)*;

(e) that Yugoslavia had the relevant GY type of German mines, which were laid in the Corfu Channel *(ibid.)*;

(f) that the suspicion that Yugoslav ships laid these mines is "converted into certainty" by the evidence of Lieutenant-Commander Kovacic, formerly of the Yugoslav navy *(ibid.)*;

(g) that the mines were hurriedly loaded onto two Yugoslav ships which "silently steamed away" during the night to lay them in Albanian waters (*I.C.J. Pleadings, Corfu Channel*, Vol. III, p. 243);

(h) that there was a stock of GY mines at Sibenik and the mines loaded on the vessels came from that stock *(ibid.)*;
(i) that the ships were seen again 4 days later, but the mines were not upon them (*ibid.*, pp. 243-244); and
(j) that there was evidence that the duty carried out by the ships was to lay a field of mines in Albanian territorial waters (*ibid.*, p. 244).

The Court did not dismiss these suggestions as beyond its jurisdiction to investigate, but in fact, by its Order of 17 January 1949 (*I.C.J. Reports 1949*, p. 151), instructed naval experts nominated by it to carry out investigations on the spot at Sibenik, Yugoslavia, and in the Corfu Channel area. For two days, at Sibenik, the experts inspected the actual geographical layout of the spot where Kovacic testified he had seen the two Yugoslav minelayers being loaded with mines[1].

Clearly this was a very specific allegation of an internationally wrongful act by a third State not before the Court. Indeed, it provoked a strong response from Albania in the following terms:

> "How could the Court decide on the facts of alleged complicity and on the demand for reparations against 'the accomplice' without having given a decision against 'the principal offender' accused arbitrarily and without proof by the British Government?"[2]

The Court held, in fact, that "the authors of the minelaying remain unknown" (*I.C.J. Reports 1949*, p. 17). Had the Court accepted the United Kingdom's submissions, it would have been making a clear finding of the commission of an illegality by Yugoslavia. The fact that such a wrongful act was alleged against a third party did not deter the Court from considering the alternative argument placed before it.

The *Corfu Channel* case was thus a stronger instance of third party involvement than the present case. It may even be characterized as a case-

[1] For the arrangements regarding this visit, see *I.C.J. Pleadings, Corfu Channel*, Vol. V, pp. 257-274. See, also, for a more detailed study, Il Yung Chung, *Legal Problems Involved in the Corfu Channel Incident*, 1959, pp. 146 *et seq.*

[2] *I.C.J. Pleadings, Corfu Channel*, Vol. II, p. 353, para. 102, Rejoinder, Government of Albania.

> "Comment la Cour pourrait-elle statuer sur les faits de prétendue complicité et sur la demande de réparations introduite contre 'le complice', sans avoir rendu une décision contre 'l'auteur principal' accusé arbitrairement et sans preuve par le Gouvernement britannique?" (Original French.)

which went to the very edge of the principle, or even, conceivably, somewhat beyond it, but it does not support the suggestion in *Monetary Gold* of a steady stream of prior authority.

If the proposition be correct that an application should be dismissed where the illegal act of a third party State lies at the very foundation of the claim, the Court would have indicated to the United Kingdom that this alternative claim was unsustainable in the absence of Yugoslavia and would have dismissed this aspect of the case *in limine*.

If, far from taking such a course, the Court "gave much attention" to the evidence, checked the documentary information and sent experts to investigate it, it was not governing itself by the principle which Australia argues is fundamental and well established. It even permitted the United Kingdom Government to attempt to prove collusion with the absent third State, to the extent not only of possession of the mines, but also of a military alliance resulting from a treaty of friendship and mutual alliance. The attitude of the Court in *Corfu Channel* is thus in sharp contrast to the Court's decision in the present case.

The *Ambatielos* case (*I.C.J. Reports 1953*, p. 10) may also be mentioned as an instance where the position of third parties not before the Court was likely to be affected by the decision the Court was invited to make.

In the merits phase of that case, the Greek Government, in a case between itself and the United Kingdom, invited the Court to consider certain articles of treaties between the United Kingdom and Denmark, the United Kingdom and Sweden and the United Kingdom and Bolivia. The United Kingdom Government, without objecting to the reference to those treaties, questioned the correctness of the English translations of certain of the provisions invoked. The Court was invited to place a construction upon these treaties which would have helped the Government of Greece in the interpretation it sought to place upon its treaty with the United Kingdom. No exception seems to have been taken to the reference to these treaties[1].

(viii) *Subsequent jurisprudence*

A substantial jurisprudence has built up over the years in which, although the principle in *Monetary Gold* has been invoked as a bar to

[1] See, also, the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1952*, p. 93) where a contention of the United Kingdom was that, upon the coming into force of the Iranian-Danish Treaty on 6 March 1935, Iran became bound, by the operation of the most-favoured-nation clause, "to treat British nationals on her territory in accordance with the principles and practice of international law" (*ibid.*, p. 109).

jurisdiction, the Court has held the principle within its proper confines, refusing to allow it to be unduly extended. This accords with the Court's view, already cited, that *Monetary Gold* had gone to "the limit of the power of the Court to refuse to exercise its jurisdiction" (*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).

Among the cases so decided by the Court are *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Continental Shelf (Libyan Arab Jamahiriya/Malta), Frontier Dispute (Burkina Faso/Republic of Mali)* and *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*.

Principles that have received elaboration in the Court's developing jurisprudence on this point are that it did not suffice that a third party was affected (*Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990*, pp. 115-116, para. 55); that the interests of the third State must be a part of "the very subject-matter of the decision" (*ibid.*, pp. 121-122, paras. 72 and 73); that the "test is not merely one of sameness of subject-matter but also of whether, in relation to the same subject-matter, the Court is making a judicial determination of the responsibility of a non-party State" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 296, Judge Shahabuddeen, separate opinion); that joint wrongdoers may be individually sued (*ibid.*, pp. 258-259); and that the circumstance that a third party would be affected by the Judgment is not by itself sufficient to bring *Monetary Gold* into operation (*ibid.*, pp. 261-262).

Particular reference should be made to *Certain Phosphate Lands in Nauru* (*I.C.J. Reports 1992*, p. 240), which is in a sense closest to the principle involved in the present case. In that case, although the administration of Nauru was entrusted jointly to three trustee Powers — Australia, New Zealand and the United Kingdom — and any finding of breach of trust by Australia would, it was alleged, necessarily mean a finding against its partners as well, the Court was not deterred from dismissing that objection and setting the case down for hearing on the merits. The Court held that the interests of New Zealand and the United Kingdom did not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application. The Court rejected Australia's contention that there would be a *simultaneous* determination of the responsibility of all three States and that, so far as concerns New Zealand and the United Kingdom, such a determination would be precluded by the fundamental reasons underlying *Monetary Gold* (*I.C.J. Reports 1992*, p. 261, para. 55). The fact that the Court's judgment would clearly affect third parties not before the Court does not thus deter the Court

from adjudicating upon the dispute between the parties who are in fact before it[1].

The undoubtedly necessary and unimpeachable principle enunciated in *Monetary Gold* has thus been kept within the ambit of its rationale by a steadily developing body of jurisprudence of this Court. With the greatest respect to the Court's decision in this case, it would appear that it will step back from that stream of development and, in so doing, both expand the limited principle of that case and diminish the area of the Court's jurisdiction. The *Monetary Gold* principle, thus applied, would be discharging a function very different to what it did in the case in which it was formulated.

3. Other Relevant Factors

(i) *Third party safeguards*

In *Military and Paramilitary Activities in and against Nicaragua*, the Court observed that, in appropriate circumstances, it would decline, as in *Monetary Gold*, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings "'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)" (*I.C.J. Reports 1984*, p. 431, para. 88).

Thereafter the Court went on to note the safeguards available to third parties in the following terms:

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[1] Reference may be made, in this context, to the situation, rather similar to that before the Court in the instant case, which confronted the Central American Court of Justice in *The Republic of El Salvador* v. *The Republic of Nicaragua*. El Salvador complained that the Bryan-Chamorro Treaty concluded by Nicaragua with the United States for the construction of an inter-oceanic canal was repugnant to previous Treaties of Washington between El Salvador and Nicaragua. Nicaragua's position was that the Bryan-Chamorro Treaty was with a State not subject to the jurisdiction of the Court and hence that the Court lacked jurisdiction. The Central American Court of Justice observed:

> "What may be called the fundamental argument: that the Court has no jurisdiction over the subject-matter of this suit because it involves interests of a third nation that is not subject to the authority of the Court, is also unsound in the opinion of the judges." (*American Journal of International Law*, 1917, Vol. 11, p. 698.)

The Court went on to declare that the Government of Nicaragua was under the obligation to re-establish and maintain the legal status that obtained prior to the Bryan-Chamorro Treaty (*ibid.*, p. 730), but it refused to go so far as to declare the Bryan-Chamorro Treaty void, as that would involve the rights of a third party who had not submitted to the jurisdiction of the Court. Thus,

> "The Central American Court did not allow the consideration that it might have to pass upon issues closely concerning a third State without that State's consent to deter it from giving a decision between the two States actually parties to the dispute before the Court." (Johnson, *op. cit.*, p. 109.)

> "Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated . . . other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention." (*I.C.J. Reports 1984*, p. 431, para. 88.)

Third party protection, which follows also from the general principles of international law, is entrenched, so far as the Court's jurisdiction is concerned, by Article 59 of its Statute.

Indeed, this concern for the protection of third States is carried even further by Article 62 which ensures that, should a State consider that it has an interest of a legal nature which *may be affected* by the decision in the case, it may request that it be permitted to intervene.

When the Court's Statute was designed, it was no doubt clearly foreseen that a judgment of the Court could well make an impact on the rights of third parties. The Statute therefore embodied these carefully structured safeguards protecting the interests of third party States which *may be affected* by a decision — a structure which both protects them and enables them to intervene. *Monetary Gold* did no more than give effect to these statutory provisions. It was scarcely meant to be erected into an independent principle in its own right, constituting a third and further protection, travelling even beyond the Statute itself.

It is to be remembered, moreover, that, while in domestic jurisdictions where the doctrine of *stare decisis* applies, the other parties in transactions of an identical nature may find themselves bound by a principle of law laid down in a case to which they are not parties, in international law, third parties have the further safeguard of the absence of a doctrine of *stare decisis*.

(ii) *The principle of individual State responsibility*

Principles of State responsibility, based on the autonomous and individual nature of each State, require that where two States are accessory to a wrongful act, each State must bear international responsibility for its own internationally wrongful act.

This principle was well formulated by Portugal at the oral hearings:

> "the security and the smooth running of the Organization are collective under the Charter, because each member has duties that it owes to the others and to the Organization itself, inasmuch as it constitutes their corporate union. In other words, it is because the system is universal that, within it, each member retains individual

> responsibility for its acts and a duty to respect the principles common to all. It follows that none of the members can shelter behind the fact that a situation has been created by another in order to avoid itself reacting to that situation in pursuance of the rules of law enshrined in the common Charter." (CR 95/5, p. 72.)

In the Seventh Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, that distinguished rapporteur treated as axiomatic the proposition that a breach of international responsibility by a State would engage that State's responsibility, irrespective of another State's participation in the act. The report observed:

> "It need hardly be said that, if the actions constituting participation by a State in the commission of an internationally wrongful act by another State constituted a breach of an international obligation in themselves, they would on that account already engage the international responsibility of the State which performed those actions, irrespective of any consequences that might follow from the part taken in the internationally wrongful act of another State."[1]

On these principles, the Respondent State must answer separately for its own acts.

This separation of responsibility was illustrated also in this Court's decision in *Nauru*, where, although the mandate and trusteeship in question were given to the same three Governments "jointly", the Court permitted the case to proceed against one of the three trustees, despite the implications this might have had upon the liability of others. The Court there pointed out that it was not precluded from adjudicating upon the claims submitted to it:

> "provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. Where the Court is so entitled to act, the interests of the third State which is not a party to the case are protected by Article 59 of the Statute of the Court, which provides that, 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' " (*I.C.J. Reports 1992*, p. 261, para. 54.)

It would be even more inappropriate that a State which has not accepted the Court's jurisdiction can use the very fact of its non-accept-

[1] Chap. IV, "Implication of a State in the Internationally Wrongful Act of Another State", *Yearbook of the International Law Commission*, 1978, Vol. II (Part One), A/CN.4/307 and Adds.1 and 2, para. 52, footnote 99; Reply, Vol. I, paras. 7.35-7.37; see, also, Ian Brownlie, *State Responsibility* (Part I), 1983, p. 190.

ance as a means of preventing States that have accepted jurisdiction from settling their disputes according to law.

Australia's submission that its responsibility "could at all events be no more than consequential, derived from the responsibility of Indonesia" (CR 95/8, p. 8) does not accord with basic principles of State responsibility, for, to use again the language of the same rapporteur:

> "One of the principles most deeply rooted in the doctrine of international law and most strongly upheld by State practice and judicial decisions is the principle that any conduct of a State which international law classifies as a wrongful act entails the responsibility of that State in international law." [1]

Even if the responsibility of Indonesia is the prime source, from which Australia's responsibility derives as a consequence, Australia cannot divert responsibility from itself by pointing to that primary responsibility.

(iii) *Rights* erga omnes

Australia has very rightly stated that it "does not dispute that the right to self-determination is an *erga omnes* principle" (Rejoinder, para. 78). This position has been many times repeated in the oral submissions. The concept of rights and obligations *erga omnes* is further discussed in Part D.

An *erga omnes* right is, needless to say, a series of separate rights *erga singulum*, including *inter alia*, a separate right *erga singulum* against Australia, and a separate right *erga singulum* against Indonesia. These rights are in no way dependent one upon the other. With the violation by any State of the obligation so lying upon it, the rights enjoyed *erga omnes* become opposable *erga singulum* to the State so acting.

To suggest that Indonesia is a necessary party to the adjudication of that breach of obligation by Australia is to hamper the practical operation of the *erga omnes* doctrine. It would mean, very much along the lines of the illustrations in Section 2 (vi) above, that Indonesia could protect any country that has dealings with it in regard to East Timor from being impleaded before this Court, by Indonesia itself not consenting to the Court's jurisdiction. In the judicial forum, the right *erga omnes* could to that extent be substantially deprived of its effectiveness.

Moreover, in any event, Indonesia would be protected against any suggestion of *res judicata* against it. The right *erga omnes*, when asserted against Australia, becomes a right *erga singulum* which, in turn, becomes a *res judicata erga singulum* against Australia, in the event of the success

[1] Ago, *Yearbook of the International Law Commission*, 1971, Vol. II (Part One), p. 205, para. 30.

of the claim. It would have no adjudicatory quality against Indonesia, thus preventing the "*Monetary Gold* principle" from operating to bar the action against Australia.

(iv) *Increasingly multilateral nature of modern international obligations*

Reference has already been made to the fact that the multilateral aspect of obligations is gaining increasing significance in modern international law. Any instrumentality charged with administering international law in this context needs to take account of this aspect so as not to restrict the development of international law in keeping with this trend.

Foremost among the sources of multilateral obligations is the United Nations Charter, under which all States alike are vested with rights and responsibilities which all others must recognize.

In this network of interlocking international relationships, each State which is impugned by another for failure to abide by its international obligations must answer for itself, in accordance with the principle of individual responsibility already outlined. It cannot plead another State's responsibility as an excuse for its own failure to discharge its own responsibility. That other State will answer for itself when the appropriate situation arises and may perhaps be affected by the judgment the Court renders in the case before it.

If, for example, the Court held with Portugal in this case, this finding would have repercussions on many other States which may or may not have acted in accordance with their individual obligations to recognize the rights of East Timor. This Court cannot concern itself with all those ramifications of a finding which it delivers in accordance with binding norms of international law. The Court cannot anticipate them all, in a world order of criss-crossing multilateral obligations.

As Judge Shahabuddeen observed in his separate opinion in *Certain Phosphate Lands in Nauru*:

> "It has been correctly pointed out that '[a]s interstate relationships become more complex, it is increasingly unlikely that any particular dispute will be strictly bilateral in character' (L. F. Damrosch, "Multilateral Disputes", in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 1987, p. 376)." (*I.C.J. Reports 1992*, p. 298.)

(v) *The distinction between a treaty and the unilateral acts from which it results*

It is self-evident that while a treaty is a bilateral or multilateral instrument, it comes into existence through the fusion of two or more unilateral acts, as the case may be. What the Court is invited to consider in this

case is not the unlawfulness of the bilateral Treaty, but the unlawfulness of the Respondent's unilateral actions which went into the making of that Treaty.

It is a clear principle in the domestic law of obligations that the unlawfulness of a contract and the unlawfulness of the conduct of the parties to it are different concepts. A similar principle is to be found in the law of treaties, where there could, for example, be a valid treaty even though one party acts unlawfully by its domestic law in entering into it (Vienna Convention, Art. 46), or when a representative acts in violation of a specific restriction validly placed upon him by his State (Art. 47). The treaty is nevertheless binding.

The Court is not called upon to pronounce upon the unlawfulness or otherwise of the Treaty, or upon the unlawfulness or otherwise of Indonesia's conduct, but upon the unlawfulness or otherwise of Australia's unilateral act in entering into it. What are the legal obligations of a particular party, what are its acts, to what extent do those acts contravene its obligations — those are the questions bearing upon the unilateral conduct of one party, which the Court is called upon to decide. The invalidity of the Treaty, or of the other party's conduct, is not the *precondition*, as Australia suggests, for the Court's finding on the unlawfulness of Australia's conduct.

The acts of a contracting State, such as the decision to sign, the decision to accord *de jure* recognition, the decision to ratify, the decision to implement, the decision to legislate, are all unilateral acts upon which the Court can adjudicate.

(vi) *Has the wrong party been sued?*

Australia's position is that the true respondent in this case is Indonesia. According to this submission, Portugal's real opponent is Indonesia, Portugal's grievance is against Indonesia and Portugal's true cause of action is only against Indonesia.

At the oral hearings, Australia summarized its case in this regard in the following terms:

> "— on the one hand, Australia heartily subscribes to the legal settlement of international disputes which lend themselves to it; but it also subscribes to the principle of consent to jurisdiction (at least, until a consensus in favour of the universal, compulsory jurisdiction of the Court has been achieved); and it considers that this forum should not be diverted to ends not properly its own; as a sovereign State, Indonesia has chosen not to accept the optional clause; that is its business;
> — on the other hand, Australia does not mean to be used as a scapegoat, whose principal function would be to salve the conscience of Portugal which, being unable to join issue with Indonesia, is attacking a State which, in reality, . . . can do nothing about the matter and whose alleged responsibility — a com-

> plete fabrication for the purposes of the case — could at all events be no more than consequential, derived from the responsibility of Indonesia"[1].

If Indonesia had in fact been before this Court, one could see that Portugal would probably have pleaded its case against Indonesia in very different terms from its claim against Australia. A larger segment of factual material pertinent only to Indonesia may have been placed before this Court, which is not germane to the case against Australia. It may even be said that, had both Indonesia and Australia been available as respondents, Portugal's claim against Indonesia may have been the more important of the two.

Another way of approaching the submission that the wrong party has been sued is perhaps as follows:

If Indonesia had been a party before the Court, Portugal's case against Indonesia would either be the identical case, namely, that it too acted unlawfully in entering into the identical treaty, or it would be a more substantial case, involving other items of alleged illegal conduct against Indonesia. In case of the first alternative, if it were the identical case, the situation would be directly covered by the *Nauru* decision where the claim against absent parties would have been identical, had they been sued, to the claim actually before the Court. On the clear jurisprudence of this Court, the Court would have jurisdiction. In case of the second alternative, the case against Indonesia would be one of a different order, involving a different range of evidence and a different set of issues. The case against Australia depends upon Australia's obligations and their violation by entering into the Treaty. The case against Indonesia would relate to the circumstances of Indonesia's entry into East Timor, the political and administrative arrangements that have followed, and numerous other details pertinent to alleged unlawful conduct by Indonesia. It would, in short, be a totally different case. Such a situation would run directly contrary to the Australian contention that the case brought against Australia is in reality a case against Indonesia, brought against the wrong respondent.

All that this Court is concerned with is whether a legally supportable

[1] Public sitting of 7 February 1995, CR 95/8, p. 8. The French original of the (second) translated paragraph of these oral submissions is as follows:

> "— d'autre part, l'Australie entend ne pas être utilisée comme un bouc émissaire dont la principale fonction serait d'apaiser la mauvaise conscience du Portugal qui, faute de pouvoir s'en prendre à l'Indonésie, s'attaque à un Etat qui, vraiment, ... n'en peut mais et dont la prétendue responsabilité, forgée de toutes pièces pour les besoins de la cause, ne pourrait, de toute manière, qu'être consécutive, dérivée, de celle de l'Indonésie".

claim has been made against Australia. If this be so, it matters little whether or not a more important or substantial claim could have been made against Indonesia had Indonesia consented to the jurisdiction.

The answer therefore to the contention that the wrong party has been sued is that the Court needs only to go so far as to find that there is a legally sustainable claim against the party that has in fact been sued.

(vii) *Historical background*

As a postscript to this discussion, it would not be out of place to look back upon the deliberations at the League of Nations regarding the particular clause of the Court's Statute upon which this entire case has turned.

In regard to consulting *travaux préparatoires* regarding certain important provisions of the Covenant of the League of Nations, Judge Jessup observed:

> "In my opinion, it is not necessary — as some utterances of the two international courts might suggest — to apologize for resorting to *travaux préparatoires* as an aid to interpretation. In many instances the historical record is valuable evidence to be taken into account in interpreting a treaty." (*South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 352; dissenting opinion.)

The First Assembly of the League, on 13 December 1920, the day of adoption of the Statute, was discussing the optional jurisdiction principle, embodied in Article 36, paragraph 2, of the Statute of the Permanent Court, which, subject to minor variations, became Article 36 (2) of the Statute of this Court. What were the expectations attending the adoption of this clause, and how was it expected to work?

Some delegates criticized the principle of consent as a basis of the Court's jurisdiction — for example, Mr. Tamayo (Bolivia) observed that this was unstable and perishable material out of which to build the edifice of justice[1].

Others saw the Statute, and the principle of consent on which jurisdiction was based, as an instrument which, through the experience of their operation, would enable the new concept of international *adjudication*, never in previous history available for universal recourse[2], to grow in usefulness and international service. That background of lofty purpose always attends the work of this Court.

[1] *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, p. 248.

[2] The Court was seen at the time of its creation as "the greatest instrument which the world has ever yet been able to contrive for seeing that international justice is carried out" (Mr. Balfour (British Empire), *ibid.*, p. 247).

Developing further the principle of progressive development, Mr. Balfour stated:

> "if these things are to be successful they must be allowed to grow. If they are to achieve all that their framers desire for them, they must be allowed to pursue that natural development which is the secret of all permanent success in human affairs . . ."[1]

The inadequacy of Article 36 was recognized in 1945 as well, when the Statute for the present Court came under discussion, but no agreement was possible as to how to rewrite it[2].

Three-quarters of a century have passed since the adoption of the provision under discussion. This period has been rich in the experience out of which this Court and its predecessor have been fashioning an interpretation harmonious with the needs which the Statute intended it to serve. Observing that "the very notion of a more broadly based conception of the jurisdiction of the Court is gaining ground"[3] and that "[t]he principle that the jurisdiction of an international tribunal derives from the consent of the parties has long been subject to a process of refinement"[4], Rosenne goes on to observe: "The result is that the application of the principle is less rigid than may be inferred from the manner in which it is enunciated."[5]

As shown in Section 2 (viii) above, the jurisprudence of this Court in relation to absent third parties has indeed been growing along the path of the gradual and steady development envisaged at the time of the adoption of the principle of consent as a basis of jurisdiction.

A continuous thread that runs through the jurisprudence that has evolved around the "*Monetary Gold* principle" is the Court's concern, while giving due weight to the interests of third parties, at the same time, to prevent an extended application of that principle from hampering it in the legitimate and proper exercise of its jurisdiction. Consistent with this approach, and for the reasons already discussed, the Court should, in my respectful view, have proceeded to adjudicate upon this case. I am of the view, again expressed with the greatest respect for the contrary opinion of the Court, that the present Judgment represents a break in the course of steady development that has thus far elucidated and refined the application of the "*Monetary Gold* principle".

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[1] *Documents concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court*, p. 247. In more dramatic terms, another speaker observed:

> "We must begin by building a little chapel, and in the course of time the League of Nations will be able to build a cathedral. Already . . . we hear the noise of the hammers of those who are building." (Mr. de Aguerro (Cuba), *ibid.*)

[2] Rosenne, *op. cit.*, p. 316.
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*, p. 317.

(viii) *Conclusion*

In the result, the Australian objections based on the contentions that the *Monetary Gold* principle stands in the way of the Court's competence, that the Court would be required to make an adjudication on the conduct of Indonesia, and that the wrong party has been sued should all be rejected. The reasons for these conclusions have been sufficiently set out. Australia's obligations under international law and Australia's actions such as negotiating, concluding, and initiating performance of the Treaty, taking internal legislative measures for the application thereof, and continuing to negotiate with the State party to that Treaty are justiciable on the basis of Australia's legal position viewed alone and Australia's actions viewed alone.

PART B. THE *JUS STANDI* OF PORTUGAL

If the Court has jurisdiction to hear this case, as indicated in Part A of this opinion, the matter cannot proceed further without a consideration of the important Australian objection that Portugal lacks the necessary legal status to act on behalf of East Timor.

(i) *The respective positions of the Parties*

Australia challenges the *locus standi* of Portugal to bring this action. It asserts that since Portugal has lost control over the Territory several years ago, and another Power, namely Indonesia, has during all those years been in effective control, Portugal lacks the status to act on behalf of the Territory.

Moreover, with specific reference to its treaty-making powers, Australia submits that Portugal totally lacks the capacity to implement any treaty it may make relating to East Timor. Lacking this capacity, it lacks the ability to enter into any meaningful treaty regarding the Territory, or to complain that a treaty has been entered into without reference to it by another Power which is in effective control.

In support of this position, Australia points to the absence of any General Assembly resolution recognizing the status of Portugal since 1982, and the absence likewise of any resolution of the Security Council since 1976. Australia consequently argues that, even if resolutions before these dates validly recognized such a status at one stage, they have since fallen into desuetude and been overtaken by the force of events. Australia points, moreover, to the fact that successive votes in the General Assembly in relation to East Timor have revealed a decreasing proportion of United Nations membership in favour of the resolutions recognizing the position of Portugal.

Portugal argues, on the other hand, that, although it has physically left the Territory and no longer controls it, it is nonetheless the administering Power, charged with all the responsibility flowing from the provisions

of Chapter XI of the United Nations Charter, and has been recognized as such by a series of General Assembly and Security Council resolutions. It submits further that there has been no revocation at any stage of Portugal's authority as administering Power, no limitation placed upon it, and no recognition of any other Power as having authority over East Timor.

(ii) *Structure of United Nations Charter provisions regarding dependent territories*

A discussion of the status of Portugal to maintain this action necessitates a brief overview of the structure of the United Nations Charter provisions framed for the protection of dependent territories.

The Charter was so structured that the interests of territories not able to speak for themselves in international forums were to be looked after by a Member of the United Nations entrusted with their welfare, who would have the necessary authority for this purpose. In other words, its underlying philosophy in regard to dependent territories was to avoid leaving them defenceless and voiceless in a world order which had not yet accorded them an independent status.

This is not to be wondered at when one has regard to the high idealism which is the essential spirit of the Charter — an idealism which spoke in terms of a "sacred trust" lying upon the Powers assuming responsibilities for their administration, an idealism which stipulated that the interests of their inhabitants were paramount. Translating this idealism into practical terms, the Charter provided for United Nations supervision of the responsible authorities through a requirement of regular transmission of information to the Secretary-General (Art. 73 *(e)*). They were further required to ensure the political, economic, social and educational advancement, just treatment and protection against abuses of the inhabitants thus placed under their care.

It is against the background of such an overall scheme that the Australian submissions in this case need to be tested. The submission under examination is no less than that an administering Power's loss of physical control deprives it of the status and functions of an administering authority, and that the protective and reporting structure, so carefully fashioned by the United Nations Charter can thus be brushed aside.

This is a proposition to be viewed with great concern. It means that, whatever the reason for the administering Power's loss of control, that loss of control brings in its wake a loss of legal status.

The proposition can be tested by taking an extreme example, at a purely hypothetical level, of a non-self-governing territory being militarily overrun by a third Power, anxious to ensure not the "political, economic, social and educational advancement" of the people, but anxious rather to use it as a military or industrial base. Suppose, in this hypo-

thetical example, that this invading Power completely displaces the legal authority of the duly recognized administering Power. If the administering Power cannot then speak for the territory that has been overrun and the people of the territory themselves have no right of audience before an international forum, that people would be denied access to the international community, whether directly, in their own right, or indirectly, through their administering Power. The deep concern for their welfare, which is a primary object of Chapter XI of the Charter, and the "sacred trust" notion which is its highest conceptual expression, would then be reduced to futility; and the protective structure, so carefully built upon these concepts, would disintegrate, in the presence of the most untenable of reasons — the use of force. In that event, the use of force, which is outlawed by the entire scheme of the United Nations Charter, would have won its victory, and would indeed have won it over some of the loftiest concepts enshrined in the Charter. It is difficult to subscribe to a view that thus encourages and, indeed, rewards the use of force.

This example, offered at a purely hypothetical level, has been aimed at testing the practical efficacy of a legal proposition that seems to run counter to the entire scheme of the United Nations Charter. As so often in the law, the hypothetical example assists in the understanding of the practical rule.

Grave reservations must be registered regarding any interpretation of the Charter which leaves open so serious a gap in its scheme of protection and so undermines the central tenets which are its very foundation.

Three major legal concerns arise from this argument. The first concern, already referred to, is that it seems to concede that whatever the means through which that control has been lost, the important factor is the physical loss of control. This is a dangerous proposition which international law cannot endorse.

Secondly, the precedents in the matter do not lend support to the Australian argument. An instance that comes to mind is the case of Rhodesia, in respect of which it was nowhere suggested that loss of United Kingdom physical control over the territory meant a loss of United Kingdom legal authority in respect of the territory. United Nations action was based entirely on the assumption of the continuing status of United Kingdom authority.

Thirdly, there is more to the status of administering Power than mere physical control. An administering Power is charged with many duties relating to the welfare of the people of the territory. It may lose physical control but, with that loss of physical control, its duties do not fade away. The administering Power is still obliged to extend such protections as are still available to it for the welfare of the people and the preservation of their assets and rights. The conservation of the territory's right to permanent sovereignty over its natural resources is thus a major responsibility of the administering Power, including particularly the preserva-

tion of its major economic asset, in the face of its possible extinction for all time. Such legal responsibilities remain the solemn duty of the administering Power, even though physical control may have been lost.

(iii) *Is the United Nations a substitute for a displaced administering Power?*

In answer to such a line of reasoning, it may perhaps be suggested that the General Assembly and the Security Council can, in such an event, take over the responsibilities of the administering Power.

It is true indeed that the General Assembly and the Security Council, in all their plenitude of power, preside over the great task of decolonization and protection of dependent peoples. Yet, with all respect, they are no substitutes for the particular attention to the needs of each territory which the Charter clearly intended to achieve. Protection from internal exploitation and external harm, day-to-day administration, development of human rights, promotion of economic interests and well-being, recovery of wrongful loss, fostering of self-government, representation in world forums, including this Court — all these require particular attention from a Power specifically charged with responsibility in that regard. Moreover, the supervision of the United Nations depends also on transmission of information under Article 73 *(e)* and, in the absence of an administering Power, there would be a total neglect of that function and hence an impairment of United Nations supervision. The Charter scarcely envisaged that a dependent people should be left to fend for themselves, denied all this assistance. Least of all can it be envisaged that the use of force could deprive them of these rights. The basic protective scheme of the Charter cannot thus be negated.

(iv) *The right of representation*

Australia's contention that Portugal, by having lost control over the Territory for a period of years, has lost the right to represent the people of East Timor is untenable for the same reasons. Any other view would result in the anomalous situation of the current international system leaving a territory and a people, who admittedly have important rights opposable to all the world, defenceless and voiceless precisely when those rights are sought to be threatened or violated. Indeed, Counsel for Portugal put this well in describing the nexus provided by the administering Power as "the umbilical cord" which ties East Timor to the international community.

While recognizing that Portugal has not in this case sought to base its *locus standi* on any footing other than that of an administering Power, this anomaly can also be illustrated in another way. In *South West Africa, Second Phase* (*I.C.J. Reports 1966*, p. 6), two States which had no direct connection with the territory in question sought to bring before the Court various allegations of contraventions by South Africa of the League of Nations Mandate. There was no direct nexus between these States and South West Africa. Their *locus standi* was based solely on their membership of the community of nations and their right as such to take legal action in vindication of a public interest.

The present case is one where the Applicant State has a direct nexus with the Territory and has in fact been recognized by both the General Assembly and the Security Council as the administering Power.

This case has similarities with *South West Africa* in that there is here, as there, a territory not in a position to speak for itself. There is here, as there, a Power which is in occupation by a process other than one that is legally recognized. There is here, as there, another State which is seeking to make representations on the territory's behalf to the Court. There is here, as there, an objection taken to the *locus standi* of the Applicant.

A vital difference is that here, unlike there, the Applicant State has a direct nexus with the Territory and enjoys direct recognition by the United Nations of its particular status vis-à-vis the Territory. The position of the Applicant State is thus stronger in the present case than the position of the States whose *locus standi* was accepted by half the judges of the Court in the *South West Africa* Judgment *(ibid.)*, and, indeed, by the majority of the judges in the earlier phase of that case (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 319).

(v) *Resolutions recognizing Portugal's status as administering Power*

The Court is called upon to decide, in regard to these resolutions, whether the General Assembly resolutions are devoid of legal effect. As a prelude to a discussion of this legal question, the content of these resolutions is briefly set out.

The resolutions of the General Assembly are the following: 3485 (XXX), 31/53, 32/34, 33/39, 34/40, 35/27, 36/50 and 37/30.

Some of these resolutions expressly recognize the status of Portugal as the administering Power (resolutions 3485 (XXX), 34/40, 35/27, 36/50 and 37/30) and not one of them recognizes a legal status in Indonesia. Rather, some of them (resolutions 31/53, 32/34, 33/39) reaffirm the Security Council resolutions and draw the attention of the Security Council to the critical situation in East Timor, and recommend that it take all effective steps for the implementation of its resolutions, with a view to secur-

ing the full exercise by the people of East Timor of their right to self-determination. Some of them *request* the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to keep the situation in East Timor under active consideration (resolutions 31/53 and 32/34 of 28 November 1977); *reject* the claim that East Timor has been integrated into Indonesia inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence (resolution 32/34 of 28 November 1977); *declare* that the people of East Timor must be enabled to determine freely their own future within the framework of the United Nations (resolution 35/27 of 11 November 1980); *welcome* the diplomatic initiative taken by the Government of Portugal as the first step towards the free exercise by the people of East Timor of their right to self-determination and independence *(ibid.)*; *urge* all parties directly concerned to co-operate fully with a view to creating the conditions necessary for the speedy implementation of General Assembly resolution 1514 (XV) *(ibid.)*; *declare* that the people of East Timor must be enabled freely to determine their own future on the basis of the relevant General Assembly resolutions and internationally accepted procedures (resolution 36/50 of 24 November 1981); and *invite* Portugal as the administering Power to continue its efforts with a view to ensuring the proper exercise of the right to self-determination and independence by the people of East Timor *(ibid.)*.

Since there is no diminution in any of the resolutions of Portugal's status as administering Power, one must therefore regard Portugal as continuing to be vested with all the normal responsibilities and powers of an administering authority. It is to be stressed, of course, that whatever powers an administering Power is vested with are powers given to it solely for the benefit of the territory and the people under its care and not for the benefit in any way of the administering Power. This is a truism and is mentioned here only because some suggestions were made in the oral submissions that Portugal has instituted this case for reasons other than a desire to conserve the interests of the Territory and people of East Timor.

Not only will any success Portugal may achieve from this case be held strictly for the benefit of the people of East Timor, but it will be held strictly under United Nations supervision. The Australian argument that Chapter XI of the United Nations Charter "is not a colonial charter intended legally to entrench the rights of the former colonial State . . ." (CR 95/10, p. 65) loses its thrust in such a context.

Australia submits that Portugal not only has a poor colonial record

but, in fact, abandoned the people of East Timor. Whatever may have been the facts regarding these aspects, they were not unknown to the General Assembly, which nevertheless *invited* Portugal to continue its efforts. The body best able to assess Portugal's conduct having decided, notwithstanding all the information at its disposal, to issue such an invitation, this Court must respect that decision. It is to be observed further that, in extending that invitation, the General Assembly placed no restrictions on Portugal's status as administering Power, nor has it done so since then. It is significant also that, in resolution 384 (1975), the Security Council in fact censured Portugal for its failure to discharge its responsibilities fully as administering Power, but yet continued to recognize Portugal as the administering Power.

The resolutions of the Security Council, resolution 384 (1975) and resolution 389 (1976), have been quoted earlier in this opinion. Recognizing and reaffirming the inalienable right of the people of East Timor to self-determination, the Security Council, in both resolutions, calls upon *all States* to respect the territorial integrity of East Timor, as well as the inalienable right of its people to self-determination, and urges *all States* and other parties concerned to co-operate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the Territory.

These two resolutions of the Security Council have not at any stage been revoked, nor have they been superseded by later resolutions rendering them inapplicable.

Security Council resolution 384 expressly referred to Portugal as the administering Power and specifically imposed upon it the duty of co-operating fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination. The resolution thus contained a clear indication to Portugal of its duties in safeguarding this right of the East Timorese people. Since economic sovereignty is an important element of the concept of sovereignty, there was thus imposed upon Portugal, by Security Council resolution, apart from Charter provisions, the duty to safeguard the Territory's most valuable economic asset until the right to self-determination was freely exercised.

As with the General Assembly, so also with the Security Council, Portugal's prior colonial conduct did not prevent it from giving to Portugal the status it did and imposing upon it the duties that went with that status.

That status thus recognized by the Security Council receives repeated recognition in later resolutions of the General Assembly (see resolutions 35/27 (1980), 36/50 (1981) and 37/30 (1982)).

After these general observations, it is necessary to examine the legal effects of the relevant resolutions in greater detail.

(vi) *Legal force of the resolutions*

(a) *General Assembly resolutions*

Very early in the history of the United Nations, the General Assembly's competence in regard to non-self-governing territories was recognized. Thus Kelsen refers to:

> "the competence the General Assembly has with respect to non-self-governing territories not under trusteeship in accordance with Article 10 and (together with the Security Council) under Article 6"[1],

and suggests that the General Assembly may discuss the non-fulfilment by a Member of its obligations under Chapter XI, leading even to the imposition of sanctions, along with the Security Council, under Article 6 (see, also, *American Journal of International Law*, 1954, Vol. 48, p. 103).

After the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the General Assembly in 1960, it established a committee to follow up the implementation of the Declaration, thus "bringing all non-self-governing territories under a form of international supervision comparable to that of the trusteeship system"[2]. So much are all aspects of self-determination regarded by the General Assembly as pertaining to its sphere of authority that there has been a tendency "to consider that no aspect of 'colonialism' should be treated as a matter falling 'essentially' within the domestic jurisdiction of a State"[3].

The Assembly maintains a vigilant eye over all aspects relating to non-self-governing territories through the Fourth or Decolonization Committee[4] and the Committee of Twenty-Four. Questions of the termination of dependent territory status upon the exercise of the right of self-determination have thus long been matters recognized as being within the scope of the General Assembly's authority. In resolution 1541 (XV) of 15 December 1960, it specifically addressed (in Principle VI) the question

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[1] *The Law of the United Nations*, 1950, p. 553, footnote 1.

[2] Goodrich, Hambro and Simons, *Charter of the United Nations*, 3rd and rev. ed., 1969, p. 70. On the development of the practice in this regard, see further, Bruno Simma (ed.), *The Charter of the United Nations*, 1994, pp. 925-928.

> "In the course of time, the General Assembly succeeded in subjecting the colonies to a similar system of supervision to that provided for trust territories, even though, according to the wording of Art. 73 *(e)* of the UN Charter, the control is restricted to the General Assembly's entitlement to have statistical and technical information . . ." (*Ibid.*, p. 925.)

[3] Goodrich, Hambro and Simons, *ibid.*

[4] Renamed the Special Political and Decolonization Committee, after its merger with the Special Political Committee, by resolution 47/233 of 17 August 1993.

whether a non-self-governing territory can be said to have reached a full measure of self-government.

When, therefore, the General Assembly determines that a particular dependent territory has not exercised the right of self-determination or that a particular State is recognized as the administering Power over a dependent territory, the Assembly is making a determination within the area of its competence, and upon a review of a vast range of material available to it. Legal consequences follow from these determinations.

Of course there are resolutions of the General Assembly which are of an entirely hortatory character. Many resolutions of the General Assembly are. But a resolution containing a decision within its proper sphere of competence may well be productive of legal consequences. As this Court observed in *Namibia*, the General Assembly is not "debarred from adopting, . . . within the framework of its competence, resolutions which make determinations or have operative design" (*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*, p. 50, para. 105).

Even more is this so when those resolutions have been expressly accepted and endorsed by the Security Council, which is the case in relation to the resolutions on the status of Portugal as administering Power.

Thus resolutions of the General Assembly which expressly reject the claim that East Timor has been integrated into Indonesia (32/34 of 28 November 1977) declare that the people of East Timor must be enabled to determine their own future freely within the framework of the United Nations (35/27 of 11 November 1980) and expressly recognize Portugal as the administering Power (3485 (XXX), 34/40, 35/27, 36/50 and 37/30) are resolutions which are productive of legal effects.

Article 18 of the Charter makes it clear that, on "important questions", the General Assembly may make "[d]ecisions". Adverting to this provision, this Court has observed:

> "Thus while it is the Security Council which, exclusively, may order coercive action, the functions and powers conferred by the Charter on the General Assembly are not confined to discussion, consideration, the initiation of studies and the making of recommendations; they are not merely hortatory. Article 18 deals with *'decisions'* of the General Assembly 'on important questions'. These 'decisions' do indeed include certain recommendations, but others have dispositive force and effect." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 163; emphasis in original.)

Waldock, in his General Course (*Recueil des cours de l'Académie de*

droit international de La Haye, 1962, Vol. 106, p. 26), referring to this judicial pronouncement, stressed the General Assembly's competence to make decisions having dispositive force and effect[1].

In more than one of its resolutions, the General Assembly has referred to its competence

> "to *decide* whether a Non-Self-Governing Territory has or has not attained a full measure of self-government as referred to in Chapter XI of the Charter" (resolution 748 (VIII) of 27 November 1953, relating to Puerto Rico; and resolution 849 (IX) of 22 November 1954, relating to Greenland; emphasis added).

The General Assembly has also asserted this power in relation to Suriname and the Netherlands Antilles, Alaska and Hawaii[2]. The General Assembly has not hesitated to use this power as, for example, when Portugal and Spain, following their admission to United Nations membership, asserted that they did not administer any territories covered by Chapter XI. In 1960, the General Assembly declared that the territories of Portugal were non-self-governing "within the meaning of Chapter XI of the Charter" (resolution 1542 (XV) of 15 December 1960). It asserted its powers in this regard even more strongly the following year, condemning Portugal for "continuing non-compliance" with its obligations under Chapter XI and for its refusal to co-operate with the Committee on Information from Non-Self-Governing Territories, and established a special committee authorized to receive petitions and hear petitioners on this matter (General Assembly resolution 1699 (XVI) of 19 December 1961). United Nations practice has not questioned the General Assembly's competence so to act as the appropriate United Nations organ for determining whether a non-self-governing territory has or has not achieved self-determination.

In a treatise on *Legal Effects of United Nations Resolutions*, Castañeda makes a juristic analysis of this power, observing that a General Assembly resolution does not express a duty, but rather establishes in a definite manner the hypothesis or condition from which flows a legal consequence, which makes possible the application of a rule of law. "By its nature, this consequence may be an order to act or not to act,

[1] On the role of the General Assembly in the formulation of international law see, further, Gaetano Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *Recueil des cours de l'Académie de droit international*, 1972, Vol. 137, p. 421; Obed Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, 1966; and Christoph Schreuer, "Recommendations and the Traditional Sources of International Law", *German Yearbook of International Law*, 1977, Vol. 20, pp. 103-118.

[2] See Goodrich, Hambro and Simons, *op. cit.*, pp. 460-461, and the references therein cited to the relevant resolutions.

an authorization, or the granting or denial of legal competence to an organ."[1]

The foregoing observations have a bearing on the definitive effects of General Assembly resolutions regarding Portugal's status, East Timor's status as a non-self-governing territory, and East Timor's right to self-determination. Additionally, since the General Assembly is the appropriate body for recognition of the Power holding authority over a non-self-governing territory, the absence of any General Assembly resolution recognizing Indonesia's authority over East Timor is also a circumstance from which a legal inference may be drawn. The General Assembly resolutions also have a bearing on the responsibility of all nations to co-operate fully in the achievement of self-determination by East Timor. The various resolutions of the General Assembly relating to this right in general terms, which have helped shape public international law, and are an important material source of customary international law in this regard[2], are specifically strengthened so far as concerns the situation in East Timor, by the particular resolutions relating to that Territory.

(b) *Security Council resolutions*

These resolutions are also confirmatory of the status of Portugal. They are dealt with in Part D in the context of the substantive obligations of Australia.

(vii) *Does Portugal need prior United Nations authorization to maintain this action?*

Portugal's authority as administering Power has not been subject to any limitation by the United Nations in the resolutions recognizing Portugal's status. Australia's submission that Portugal needs United Nations authority to bring this action (Rejoinder, paras. 136, 144) suggests a limitation on an administering Power's authority which does not seem to be envisaged in the United Nations Charter.

There is another aspect as well to be considered, namely, that it is the duty of an administering Power to conserve the interests of the people of the territory. As part of their fiduciary duties, administering Powers recognize in terms of Article 73 of the Charter "the obligation to promote *to the utmost* . . . the well-being of the inhabitants of these territories" and, to that end, "to ensure . . . their . . . economic . . . advancement" (Art. 73*(a)*; emphasis added) and "to promote constructive measures of

[1] Jorge Castañeda, *Legal Effects of United Nations Resolutions*, 1969, p. 121.
[2] Simma, *op cit.*, p. 240.

development" (Art. 73*(d)*). Such obligations necessitate the most careful protection of the economic resources of the territory. Such a duty cannot be fulfilled without a legal ability on the part of the administering Power to take the necessary action for protecting those interests. If the administering Power receives information that the economic interests of the territory are being dealt with by other entities, to the possible prejudice of the interests of the territory's people, it is the administering Power's *duty* to intervene in defence of those rights. Indeed, failure to do so would be culpable.

To suggest that the Charter would impose these heavy responsibilities upon administering Powers and, at the same time, deny them the right of representation on behalf of the territory, is to deprive these Charter provisions of a workable meaning. Such a restrictive interpretation of the authority of an administering Power receives no support, so far as I am aware, from United Nations practice or from the relevant literature.

Supervision of the administering Power is amply provided for in the Charter and it is difficult to see any warrant in law or in principle for further fettering a fiduciary Power in the proper and effective discharge of its duties under the Charter.

Further, the power given by the Charter under Chapter XI is clearly the power of a trustee. The power derives expressly from the concept of "a sacred trust", thus underlining its fiduciary character. The very concept of trusteeship carries with it the power of representation, whether one looks at the common law concept of trusteeship or the civil law concept of *tutela*. A trustee, once appointed, always carries out his or her duties under supervision, but is not required to seek afresh the right of representation each time it is to be exercised, for that is part and parcel of the concept of trusteeship itself.

(viii) *Are the resolutions affected by diminishing United Nations support?*

One of Australia's contentions was that the progressively lessening vote in favour of the General Assembly resolutions cited by Portugal showed that those resolutions were of a diminishing level of authority. This suggestion in effect calls upon this Court to venture into the uncertain area of the political history of resolutions of the General Assembly and to indulge in a vote-counting exercise to assess the strength of a particular resolution. Speculation on the possible meaning of voting procedures in the General Assembly is not the province of this Court. Rather the Court's concern is whether that General Assembly resolution has been duly passed by that principal organ of the United Nations within the ambit of its legal authority. Once thus passed, it commands recognition and it is part of the courtesy due by one principal organ of the

United Nations to another to respect that resolution, irrespective of its political history or the voting strength it reflects.

As Judge Lauterpacht has observed:

> "Whatever may be the content of the recommendation and *whatever may be the nature and the circumstances of the majority by which it has been reached*, it is nevertheless a legal act of the principal organ of the United Nations which Members of the United Nations are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly." (*Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, p. 120, separate opinion; emphasis added.)

Indeed, this Australian submission has grave implications in the circumstances of this case, for the resolutions which Australia would have the Court ignore are resolutions affirming the important principle of self-determination which is a well-established principle of customary international law. A heavy burden would lie upon a party contending that the validity of such a resolution has been affected by declining support for it in the United Nations.

(ix) *Have the resolutions lapsed through desuetude?*

Another Australian submission which was strenuously advanced is the suggestion that a long period of years during which similar resolutions are not passed discounts in some way the value and obligatory nature of such resolutions. Resolutions of the General Assembly or of the Security Council do not have to be repeated to retain their validity. Once these resolutions are duly passed, it is to be presumed that they would retain their validity until duly revoked or superseded by some later resolution.

The proposition that lapse of time wears down the binding force of resolutions needs to be viewed with great caution. In cases where resolutions in fact impose obligations at international law, this Court would then, in effect, be nullifying obligations which the appropriate organ of the United Nations, properly seised of that matter, has chosen to impose. More especially is caution required from the Court in regard to resolutions dealing with obligations *erga omnes* and rights such as self-determination which are fundamental to the international legal system. The Court would, in the absence of compelling reasons to the contrary, show due respect for the valid resolutions duly passed by its sister organs.

It is to be noted that Australia's argument that the resolutions of the

Security Council have fallen into desuetude cannot be accepted for a further reason.

The argument of desuetude breaks down before the fact that the Committee of Twenty-Four, which is the General Assembly's organ for overseeing the matter of decolonization, has kept the East Timor question alive on its agenda year after year. Moreover, the Committee has in its report to the General Assembly referred to this in successive years. The Committee would not be expected to keep this matter on their books if it is, as Australia has suggested, a dead issue.

The Secretary-General's progress reports to the General Assembly continue to this date. In his Report of 11 September 1992 (A/47/435, para. 1; Reply, Vol. II, Ann. I.8), he refers to the search for "a comprehensive and internationally acceptable solution to the question of East Timor", and, in his most recent Annual Report of 2 September 1994, he states: "I have continued to provide my good offices in the search for a just, comprehensive and internationally acceptable solution to the question of East Timor." (A/49/1, 2 September 1994, para. 505.) The General Assembly's action in keeping this item on its agenda from year to year is also a clear indication that the situation has not thus far proved acceptable to the international community.

The argument of desuetude, implying as it does that the matter is a dead issue, cannot succeed if the United Nations itself elects to treat the issue as live[1].

(x) *Have the resolutions been nullified by supervening events?*

Similar considerations apply to this submission of Australia. If supervening events have nullified duly passed resolutions of the Security Council or the General Assembly, it is for those bodies to take note of the altered situation and to act accordingly. Those bodies do not appear, as stated already, to have treated the issues as dead.

(xi) *Is Portugal's colonial record relevant?*

Australia has suggested that Portugal's colonial record has been such as to disentitle it to maintain this action. The past colonial record of Portugal leaves much indeed to be desired, and Portugal's counsel have freely conceded no less. One recalls that, in *Namibia*, it was noted that, when the General Assembly passed its resolutions against *apartheid*, these resolutions received the unanimous support of the entire Assembly,

[1] See Thomas M. Franck ("Fairness in the International Legal and Institutional System", *Recueil des cours de l'Académie de droit international*, 1993, Vol. 240, p. 165), to the effect that this activity concerning East Timor "at a minimum, keeps the item alive and helps keep it on the agenda".

with only two exceptions — Portugal and South Africa (*I.C.J. Reports 1971*, p. 79; Judge Ammoun, separate opinion). Further comment is scarcely necessary regarding the past colonial attitudes of Portugal.

However, when the status at law of an administering Power has been duly recognized as such by the appropriate political authority, this Court cannot take it upon itself to grant or withhold that status, depending on whether it had a good or bad colonial record. Most colonial Powers would fail to qualify on such a test, which could make the system of administering Powers unworkable. The legal question for this Court is whether, in law, it enjoys that status.

At the commencement of this opinion, reference was made to the change that has occurred since 1974 in regard to Portugal's attitude towards self-determination of its colonies[1].

It bears re-emphasizing that the question at issue is the protection of the rights of the people of East Timor, and not the question of Portugal's record of conduct. The contention seems untenable that a protected people or territory, blameless in this respect, should be denied representation or relief owing to the fault of its administering Power.

Such a contention contradicts basic principles of trusteeship and tutelage, which always accord paramount importance to the interests of entities under fiduciary or tutelary care. This is so in international, no less than in domestic, law.

* * *

The several grounds on which Australia sought to impugn Portugal's status to maintain this action seem thus, on examination, to be unsustainable. Charter principles combine with well-established fiduciary principles and principles of tutelage to underline the paramount importance of the interests of the non-self-governing territory over all other interests. That priority of interest is not easily defeated. It is the function of the administering Power to watch over it, and the function of international law to ensure its protection.

It does not serve the Territory's interest that an administrator, duly recognized by the United Nations, and legally accountable to it, should be viewed as having been displaced by another Power, neither recognized by the United Nations, nor legally accountable to it. Power over a

[1] The Supplement to the Portuguese Constitution, contained in Annex II.6 of Portugal's Memorial, and dated 27 July 1974, provides by Article 2 that

> "Recognition of the right to self-determination, with all its implications, comprises acceptance of the independence of the overseas territories and the waiving of the corresponding part of Article 1 of the Political Constitution of 1933."

Portugal is thus unequivocally committed to acceptance of the principle of self-determination of its former colonies.

non-self-governing people, without accountability to the international community, is a contradiction of the Charter principle of protection.

PART C. THE RIGHTS OF EAST TIMOR

The central principle around which this case revolves is the principle of self-determination, and its ancillary, the principle of permanent sovereignty over natural resources. From those principles stem whatever rights are claimed for East Timor in this case.

(i) *East Timor is a territory unquestionably entitled to self-determination*

The Court is not in this case confronted with the difficulty of entering into the much discussed area of defining which are the entities or peoples entitled to self-determination. Australia has at all times admitted that East Timor was and is a non-self-governing territory[1]. It was specifically mentioned in the list of non-self-governing territories, within the meaning of Chapter XI of the Charter, contained in General Assembly resolution 1542 (XV) of 15 December 1960 (Memorial, Vol. II, Ann. II.4)[2].

One must therefore address the question of self-determination in this case from the firm foundation of a territory unquestionably entitled to self-determination. The question for examination is what consequences follow from that fact.

(ii) *The principle of self-determination*

The Judgment of the Court (para. 29) has categorically reaffirmed the principle of self-determination, pointing out that it has evolved from the Charter and from United Nations practice, and observing further that the normative status of the right of the people of East Timor to self-determination is not in dispute. This opinion sets out, from that base, to examine the manner in which practical effect is to be given to the principle of self-determination, in the circumstances of the present case.

Australia has accepted the existence of the principle, but placed a somewhat limited view upon the State obligations which follow.

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[1] Australia has, in its pleadings (Counter-Memorial, para. 322), referred, in another context, to the uncertainty attending the question of which people are entitled to self-determination (citing H. Blix, *Sovereignty, Aggression and Neutrality*, 1970, pp. 13-14). This uncertainty has no applicability to East Timor for the reasons stated.

[2] In regard to the word "self-government" in Article 73 *(b)*, this term "should today only be understood in the meaning of unrestricted self-determination" (Simma, *The Charter of the United Nations, op. cit.*, p. 928, citing, *inter alia*, *Namibia* and *Western Sahara*.

For example, it has advanced the argument, at the oral hearings, that:

> "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'." (CR 95/9, p. 64.)

In its pleadings, it has taken up such positions as that there is no independent basis for a duty of non-recognition which would prevent the conclusion of the Timor Gap Treaty (Counter-Memorial, paras. 360-367); that there has been no criticism by the international community of States (including Australia) which have recognized or dealt with Indonesia in respect of East Timor (*ibid.*, paras. 368-372); and that, in concluding the Timor Gap Treaty, Australia did not impede any act of self-determination by the people of East Timor that might result from such negotiations (*ibid.*, paras. 373-375). Although it has recognized East Timor as a province of Indonesia in the Treaty, Australia contends that, "By concluding the Timor Gap Treaty with Indonesia, Australia did nothing to affect the ability of the people of East Timor to make a future act of self-determination." (*Ibid.*, para. 375.)

All of these submissions make it important to note briefly the central nature of this right in contemporary international law, the steady development of the concept, and the wide acceptance it has commanded internationally. Against that background, any interpretations of that right which give it less than a full and effective content of meaning would need careful scrutiny.

In the first place, the principle receives confirmation from all the sources of international law, whether they be international conventions (as with the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights), customary international law, the general principles of law, judicial decisions, or the teachings of publicists. From each of these sources, cogent authority can be collected supportive of the right, details of which it is not necessary to recapitulate here.

Secondly, it occupies a central place in the structure of the United Nations Charter, receiving mention from it in more than one context.

Enshrined in Article 1 (2) is the principle that friendly relations among nations must be developed by the United Nations on the basis of equal rights and self-determination. Developing such friendly relations is one of the Purposes of the United Nations — central to its existence and mission. There is thus an inseparable link between a major Purpose of the United Nations and the concept of self-determination. The same conceptual structure is repeated in Article 55, which observes that respect for

equal rights and self-determination is the basis on which are built the ideal of peaceful and friendly relations among nations.

Article 55 proceeds to translate this conceptual structure into practical terms. It recognizes that peaceful and friendly relations, though based on the principle of equal rights and self-determination, need conditions of stability and well-being, among which conditions of economic progress and development are specified.

Since the development of friendly relations among nations is central to the Charter, and since equal rights and self-determination are stated to be the basis of friendly relations, the principle of self-determination can itself be described as central to the Charter.

The Charter spells out its concern regarding self-determination with more particularity in Chapter XI. Dealing specifically with the economic aspect of self-determination, it stresses, in Article 55, that stability and well-being are necessary for peaceful and friendly relations, which are in their turn based on *respect* for the principle of equal rights and self-determination. With a view to the creation of these conditions of stability and well-being, the United Nations is under a duty to promote, *inter alia*, "conditions of *economic . . . progress and development*" (emphasis added).

This is followed by Article 56 which contains an *express* pledge by every Member "to take joint and separate action, in co-operation with the Organization for the achievement of the purposes set forth in Article 55". This is a solemn contractual duty, expressly and separately assumed by *every* Member State to promote conditions of economic progress and development, based upon respect for the principle of self-determination.

With specific reference to non-self-governing territories, Article 73 of the United Nations Charter sets out one of the objects of the administration of non-self-governing territories as being:

> "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions . . ." (Art. 73 *(b)*).

This responsibility is imposed upon the administering Power under the principle that the interests of the inhabitants of these territories are paramount. The solemn nature of this responsibility is highlighted in its description as a "sacred trust".

The central importance of the concept, and the desire to translate it into practical terms, are thus built into the law of the United Nations. Its Charter is instinct with the spirit of co-operation among nations towards the achievement of the Purposes it has set before itself. Integral to those

Purposes, and providing a basis on which they stand, is the principle of self-determination.

Thirdly, the basic provisions of the Charter have provided the foundation upon which, through the continuing efforts of the United Nations, a superstructure has been built which again aims at practical implementation of the theoretical concept. Through its practical contribution to the liberty of nations, the world community has demonstrated its resolve to translate its conceptual content into reality.

Indeed, the General Assembly's special concern to translate this legal concept into practical terms has been unwavering and continuous, as reflected in its appointment of the Committee on Information from Non-Self-Governing Territories and the conversion of the Committee into a semi-permanent organ as a result of a General Assembly resolution of December 1961. The Special Committee (the Committee of Twenty-Four) on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples keeps this concern alive as a successor to the Committee of Information. That Committee has consistently retained the case of East Timor on its list of matters awaiting a satisfactory solution.

Landmark declarations of the United Nations on this matter have strengthened the international community's acceptance of this principle. The Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 20 December 1960), and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970) are among these Declarations. The International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966), constitute an unequivocal acceptance by treaty of the obligation to recognize this right.

The importance accorded to this right by all sections of the international community was well reflected in the discussions in the United Nations which preceded the acceptance of the Declaration of Friendly Relations. A recent study of these discussions[1] collects these sentiments in a form which reflects the central importance universally accorded to this principle. As that study observes, the principle was variously characterized at those discussions as "one of the most important principles embodied in the Charter" (Japan); "one of the foundation stones upon which the United Nations was built" (Burma); "basic to the United Nations Charter" (Canada); "one of the basic ideals constituting the *raison d'être* of the Organization" (France); "the most significant example of the vitality of the Charter and its capacity to respond to the changing conditions of international life" (Czechoslovakia); "a universally recog-

[1] V. S. Mani, *Basic Principles of Modern International Law*, 1993, p. 224.

nized principle of contemporary international law" (Cameroon); "one of the fundamental norms of contemporary international law" (Yugoslavia); "a fundamental principle of contemporary international law binding on all States" (Poland); "one of paramount importance in the present era of decolonization" (Kenya); and "indispensable for the existence of [the] community of nations" (United States of America).

Reference should be made finally to this Court's contribution, which has itself played a significant role in the establishment of the concept on a firm juridical basis (*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*, p. 16; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12).

Such is the central principle on which this case is built. In adjudging between the two interpretations of this right presented to the Court by the two Parties, this brief survey of its centrality to contemporary international law is not without significance.

On the one hand, there is an interpretation of this right which claims that it is not violated in the absence of violation of an express provision of a United Nations resolution. It is pointed out, in this connection, that there are no United Nations resolutions prohibiting or criticizing the recognition of East Timor as a province of Indonesia. On the other hand, it is argued that being party to an agreement which recognizes the incorporation of a non-self-governing territory in another State and deals with the principal non-renewable asset of a people admittedly entitled to self-determination, before they have exercised their right to self-determination, and without their consent, does in fact constitute such a violation. The history of the right, and of its development and universal acceptance make it clear that the second interpretation is more in consonance with the content and spirit of the right than the first.

Against this background, it is difficult to accept that, in regard to so important a right, the duty of States rests only at the level of assistance to the United Nations in such specific actions as it may take, but lies dormant otherwise.

(iii) *The principle of permanent sovereignty over natural resources*

As the General Assembly has stressed, the right to permanent sovereignty over natural resources is "a basic constituent of the right to self-determination" (resolution 1803 (XVII) of 14 December 1962). So, also, in resolution 1515 (XV) of 15 December 1960, the General Assembly recommended that "the sovereign right of every State to dispose of its wealth and its natural resources should be respected".

Sovereignty over their economic resources is, for any people, an important component of the totality of their sovereignty. For a fledgling nation, this is particularly so. This is the wisdom underlying the doctrine

of permanent sovereignty over natural resources, and the wisdom which underlies the protection of this resource for a non-self-governing people until they achieve self-determination.

In the present case, it is impossible to venture a prediction as to how long it will be before the East Timorese people achieve self-determination. It may be a very brief period or it may take many years. The matter has remained unresolved already for nearly twenty years, since the Indonesian military intervention.

Should a period of years elapse until such time, and the Treaty is in full operation in the meantime, a substantial segment of this invaluable resource may well be lost to East Timor for all time. This would be a loss of a significant segment of the sovereignty of the people.

This is not a situation which international law, in its present state of development, can contemplate with equanimity.

At such time as the East Timorese people exercise their right to self-determination, they would become entitled as a component of their sovereign right, to determine how their wealth and natural resources should be disposed of. Any action prior to that date which may in effect deprive them of this right must thus fall clearly within the category of acts which infringe on their right to self-determination, and their future sovereignty, if indeed full and independent sovereignty be their choice. This right is described by the General Assembly, in its resolution on Permanent Sovereignty over Natural Resources, as "the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests . . ." (General Assembly resolution 1803 (XVII)). The same resolution notes that strengthening permanent sovereignty over natural resources reinforces the economic independence of States.

Resolution 1803 (XVII) is even more explicit in that it stresses that:

> "The exploration, development and disposition of such resources . . . should be in conformity with the rules and conditions which the peoples and nations *freely consider* to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities." (I, para. 2; emphasis added.)

The exploration, development and disposition of the resources of the Timor Gap, for which the Timor Gap Treaty provides a detailed specification, has most certainly not been worked out in accordance with the principle that the people of East Timor should "freely consider" these matters, in regard to their "authorization, restriction or prohibition".

The Timor Gap Treaty, to the extent that it deals with East Timorese resources prior to the achievement of self-determination by the East Timorese people, is thus in clear violation of this principle.

Further, resolution 1803 (XVII) states:

> "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations . . ." (I, para. 7.)

Australia has submitted (Counter-Memorial, paras. 379-380) that, even assuming that in exercising their right to self-determination the people of East Timor become in the future an independent State, it would be for the new State to decide whether or not to reject the Treaty. The Court has been referred in this connection to the observation of the Arbitration Tribunal in the dispute between Guinea-Bissau and Senegal to the effect that a "newly independent State enjoys a total and absolute freedom" to accept or reject treaties concluded by the colonial power after the initiation of the process of national liberation[1].

While this proposition is incontrovertible, it seems purely academic in the present context as it loses sight of three facts. In the first place, it may be many years before East Timor exercises the right of self-determination. Secondly, the Treaty is set to last for an initial period of 40 years, and thirdly the resources dealt with are of a non-renewable nature. By the time the East Timorese people achieve this right, those resources or some part of them could well have been lost to them irretrievably. Had the resources dealt with been renewable resources, it might have been arguable that a temporary use of the resource would not amount to a permanent deprivation to the owners of the resource which is rightfully theirs. That argument is not available in the present case.

When, against this firm background of legal obligation, a Treaty is entered into which expressly describes East Timor as an Indonesian province, and proceeds without the consent of its people to deal with the natural resources of East Timor in a manner which *may* have the effect of compromising or alienating them, there can be no doubt that any nation that claims rights under that treaty to what *may* be the resources of East Timor is in breach of obligations imposed upon it by general principles of international law.

A further consideration is that with the increasing international recognition of the right to development, any action that may hinder the free exercise of this right assumes more importance now than in the past.

(iv) *The relevance of United Nations resolutions on self-determination*

The various resolutions cited provide more than sufficient reason, both in express terms and by implication, for the Court to proceed on the basis

[1] *International Law Reports*, 1989, Vol. 83, p. 26, para. 44.

that the right of self-determination has not been exercised. It is a corollary to that proposition that the right of permanent sovereignty over natural resources has, likewise, not been exercised, for self-determination includes by very definition the right of permanent sovereignty over natural resources. Any act dealing with those resources, otherwise than by the East Timorese people or their duly constituted representative, thus points inexorably to a violation of a fundamental principle, both of general international law and of the United Nations Charter.

(v) *Australia's position in relation to self-determination*

The Australian position in regard to self-determination is that Australia fully recognizes this right in the people of East Timor and continues to support that right. Australia has drawn the Court's attention in this regard to the prominent role played by Australia at the San Francisco Conference in relation to the inclusion of Chapter XI in the Charter (Rejoinder, footnote 209) and to Australia's strong affirmation that the advancement of all colonial peoples was a matter of international concern. This valuable contribution by Australia to the concept of self-determination has no doubt played a significant role in elevating the doctrine to its current status. In those early days, when this concept was as yet in its formative stage, the conceptual and political support thus given to them was crucial.

In full accordance with the high recognition accorded to self-determination in international law, Australia continues to express support for the continuing rights of the people of East Timor to self-determination. Implicit in this Australian stance is a recognition that, for whatever reason, the people of East Timor have not thus far exercised that right in the manner contemplated by international law and the United Nations Charter.

At the oral hearings, Australia submitted that:

> "before and after 1975 Australia repeatedly, and strongly, supported the right of the East Timorese to an informed act of self-determination. Australia's position was put bluntly to Indonesia, was clearly stated at the United Nations, and was repeated by Australian Prime Ministers and Foreign Ministers, and elsewhere as public statements of Australia's policy." (CR 95/14, p. 12.)

In contrast with this unimpeachable position there is the fact that Australia has accorded *de facto* recognition to the annexation of East Timor by Indonesia and, indeed, gone beyond that to what appears to be an unreserved *de jure* recognition of Indonesia's rights over East Timor. The explicit statement in that Treaty, which presumably represents the common ground of *both* parties, is that East Timor is an "Indonesian Prov-

ince". Indeed, the preamble to the Treaty recites that Australia and the Republic of Indonesia are "Determined to cooperate further for the mutual benefit of *their peoples* in the development of the resources of the area of the continental shelf" (emphasis added). The people of East Timor are not included among those for whose benefit the Treaty is entered into.

(vi) *The incompatibility between recognition of Indonesian sovereignty over East Timor and the recognition of East Timor as a non-self-governing territory*

The inconsistency between Australia's stated position and its practical actions is, in the submission of Portugal, so fundamental as to negative Australia's recognition of the East Timorese right to self-determination. There is an inconsistency here which has not been adequately explained, either in the pleadings or in the oral submissions. As Portugal pointed out, it is not possible to meet the obligation of respecting the territorial integrity of East Timor by merely so asserting, while, in fact, recognizing it as annexed by Indonesia (CR 95/4, p. 29).

Australia has stated (Rejoinder, para. 267) that recognition of Indonesian sovereignty over East Timor does not involve a denial of its status as a non-self-governing territory. It has also stated (*ibid.*, para. 263) that, while noting that Indonesia has incorporated East Timor into the Republic of Indonesia, the Australian Government has expressed deep concern that an internationally recognized act of self-determination has not taken place in East Timor. Australia further submits that recognition of Indonesian sovereignty over East Timor does not by logical necessity signify that Australia no longer recognizes East Timor as a non-self-governing territory or its people as having a right to self-determination (*ibid.*, para. 264). I must confess to some difficulty in understanding these positions.

Such submissions seem moreover to overlook the distinction between the nature of the authority exercised by an administering Power and the nature of the authority of Indonesia, implicit in the recognition of East Timor as a province. The character of Portugal's authority was clearly distinguishable in at least three major respects:

(a) the authority of Portugal was entirely of a fiduciary or tutelary nature;
(b) the authority of Portugal was under the supervision of the United Nations; and
(c) the authority of Portugal was by its very nature co-terminous with its fiduciary or tutelary status.

These distinctions are further affirmed by the relevant United Nations resolutions discussed in this opinion.

It may be noted also in this context that Australia, in the course of its oral arguments, submitted that, "In 1975 the people of East Timor *involuntarily exchanged* Portuguese 'domination' . . . for the control of Indonesia." (CR 95/9, p. 49, para. 59; emphasis added.) What this means is unclear, but it is manifestly in contradiction of the voluntariness which is a central feature of self-determination.

Portugal has also referred the Court to some variations in the positions taken up by Australia at the United Nations when resolutions on East Timor came before the General Assembly. In 1975, though with some initial reservations, it voted for the resolution calling upon Indonesia to desist from further violation of the territorial integrity of East Timor and to withdraw its forces without delay to enable the people to exercise their right of self-determination (resolution 3485 (XXX) of 12 December 1975). In 1976, it abstained from voting on General Assembly resolution 31/53, rejecting the Indonesian claim of annexation. It abstained again in 1977, but in 1979, voted against the resolution that "the people of East Timor must be enabled freely to determine their own future, under the auspices of the United Nations" (resolution 34/40). It repeated its contrary vote in 1980, 1981 and 1982.

However this may be, the central issue before the Court is whether the acceptance of this right of East Timor accords with the conclusion of a Treaty recognizing East Timor as a province of Indonesia, and whether that act of concluding the Treaty militates against such rights as East Timor may enjoy to the natural resources that are dealt with by the Treaty. There is no qualification anywhere in that Treaty of the recognition it accords to Indonesian sovereignty, such as appears in the statements of Australia made outside the Treaty.

Upon the basis of the averments in the Treaty, it would seem therefore that Portugal's assertion of an incompatibility between Australia's action in entering into the Timor Gap Treaty, and Australia's recognition of the principle of self-determination, raises issues requiring close consideration.

If self-determination is a right assertible *erga omnes*, and is thus a right opposable to Australia, and if Australia's action in entering into the Treaty is incompatible with that right, Australia's individual action, quite apart from any conduct of Indonesia, would not appear to be in conformity with the duties it owes to East Timor under international law.

(vii) *The suggested clash between the rights of the people of East Timor and the rights of the people of Australia*

Australia has submitted that Australia too enjoys the right of permanent sovereignty over its natural resources and that what is involved in this case is " 'peremptory norm versus peremptory norm', 'permanent sovereignty of Australia versus sovereign rights of Portugal' " (CR 95/11,

p. 29). The undeniable rights of Australia cannot, of course, be matched by the purely fiduciary rights of Portugal, for Portugal has no sovereign rights, save in its capacity as custodian of the rights of the East Timorese people. More properly stated, the suggestion is then of a clash between the peremptory norm of Australia's permanent sovereignty over its natural resources and the peremptory norm of East Timor's permanent sovereignty over its natural resources.

It cannot be said that Australia enjoys an absolute right to permanent sovereignty over its natural resources in the Timor Gap which can be delineated independently of the rights of East Timor. With only 430 kilometres of ocean space between them (Judgment, para. 11), the extent of Australia's entitlement is obviously determined, *inter alia*, by the claims of East Timor — hence the need for a treaty. Since Australia's rights cannot be considered independently of East Timor, Australia's claim to deal with no more than its own entitlement is unsustainable.

Competing interests to a limited ocean space can only be resolved by the consent of parties or by some equitable external determination in a manner recognized by law. An agreement that does not embody the consent of the East Timorese people does not fall within the first category and a determination by Indonesia as to how much it is equitable to give to Australia does not fall within the second. It is not such a determination as would bring it within the means of resolution indicated by the Court's case-law and Article 83, read with Part XV, of the Montego Bay Convention.

It is not within the ambit of this case or within the Court's competence to determine whether the division of resources between Australia and Indonesia is indeed an equitable one from the point of view of the East Timorese people. This is simply not a matter before the Court, and must await determination at the proper time and in the proper manner. All that arises for decision is whether a treaty has been entered into which deals with the natural resources of the East Timorese people without their consent or the consent of the administering Power recognized by the United Nations.

It may be that the Treaty obtains for Australia exactly its equitable rights, or it may be that it obtains for the Australian people even less than their proper entitlement. Portugal's claim is that a treaty not entered into in the manner recognized by international law *may* sign away in perpetuity certain non-renewable resources of the East Timorese people. If this is the case, and if the authority charged by the United Nations with administering the affairs of the East Timorese people brings up the matter in the form of an East Timorese right which is opposable to Australia, that complaint deserves the closest attention.

Portugal contends that Australia, inasmuch as it has negotiated, con-

cluded and initiated performance of the agreement of 11 December 1989, and has taken internal legislative measures for the application thereof, has thus infringed the right of the people of East Timor to self-determination and permanent sovereignty over its natural wealth and resources. If this is so, Australia, through its individual conduct, is in breach of the obligation to respect that right.

The Australian argument that there was no option available to Australia but to enter into this Treaty opens up an important issue of international law relating to recognition. Where a territory has been acquired in a manner which leaves open the question whether legal sovereignty has been duly acquired, countries entering into treaty relations in respect of that territory have a range of options stretching all the way from *de facto* recognition through many variations to the highest level of recognition — *de jure* recognition.

It is to be observed that, in this Treaty, Australia has made no qualification whatever of its recognition of Indonesia's sovereignty over East Timor. Indeed, the very title of the Treaty is "Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between *the Indonesian Province* of East Timor and northern Australia" (emphasis added). The description of East Timor as a province of Indonesia is more than once repeated in the text of the Treaty. Such an unreserved recognition of Indonesia's sovereignty over East Timor in an important Treaty is perhaps one of the highest forms of *de jure* recognition.

This high form of recognition focuses attention more sharply on the alleged incompatibility of the Australian action with East Timor's rights of self-determination and permanent sovereignty.

* * *

In the result, I would reaffirm the importance of the right of the people of East Timor to self-determination and to permanent sovereignty over natural resources, and would stress that, in regard to rights so important to contemporary international law, the duty of respect for them extends beyond mere recognition, to a duty to abstain from any State action which is incompatible with those rights or which would impair or nullify them. By this standard, Australia's action in entering into the Timor Gap Treaty may well be incompatible with the rights of the people of East Timor.

PART D. THE OBLIGATIONS OF AUSTRALIA

The preceding Part of this opinion has examined the central importance of the rights of self-determination and permanent sovereignty over natural resources of the people of East Timor. It has also considered to

what extent Australia's action in entering into the Timor Gap Treaty is compatible with the rights enjoyed in this regard by the people of East Timor.

This Part concentrates on the duties that result from those rights.

A. Obligations under General International Law

(i) *Obligations stemming from the general sources of international law*

The multiplicity of sources of international law which support the right of self-determination have been dealt with in Part C of this opinion. Corresponding to the rights so generated, which are enjoyed by the people of East Timor, there are corresponding duties lying upon the members of the community of nations. Just as the rights associated with the concept of self-determination can be supported from every one of the sources of international law, so also can the duties, for a right without a corresponding duty is no right at all.

It suffices for present purposes to draw attention to this multiplicity of sources and to the fact that they concur in recognizing those rights as existing *erga omnes*. It is not necessary for the purposes of this opinion to explore them all. Australia, in common with all other nations, would, under general international law, be obliged to recognize the obligations stemming from these rights. Australia unhesitatingly acknowledges the right. Its acceptance of the corresponding duties does not clearly appear from its submissions.

(ii) *Obligations expressly undertaken by treaty*

It is pertinent to note at least three significant occasions on which the Respondent, in common with other States, has solemnly undertaken by treaty the duty to act in furtherance of these rights. These have been referred to in Part C, and it will suffice here to draw attention to these treaty commitments — under the Charter and under the two International Human Rights Covenants of 1966. The Charter provisions on self-determination have been outlined earlier. Under the two Covenants, every party accepts the obligation to promote the realization of the right to self-determination and to respect that right (Arts. 1 and 2 of each Covenant).

These references are sufficient to place the duty to respect self-determination on a firm foundation of treaty obligation.

B. Obligations under United Nations Resolutions

It is not proposed to enter here into a discussion of the broad question of the binding nature of Security Council decisions. It is more to the pur-

pose to consider whether, having regard to the particular circumstances of this case, the Security Council resolutions which reaffirm principles of general international law may be considered to give added force to them.

As observed earlier, there was no suggestion at any stage in this case that the General Assembly or the Security Council had acted outside their province or beyond the scope of their legitimate authority in regard to any of the resolutions on East Timor which were discussed in this case. The objections to their binding effect were rather on the basis of other considerations, such as declining majorities and desuetude. These have already been considered. In relation to the Security Council resolutions, the technical consideration was urged as to whether in the resolutions the Security Council spoke in the language of decision or exhortation.

Resolution 384 "*urges* all States . . . to co-operate fully with . . . the United Nations . . . to facilitate the decolonization of the Territory" and resolution 389 "*calls upon* all States" to do likewise.

Each resolution also *calls upon* all States "to respect 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)".

Words such as *urges* and *calls upon* are not necessarily of a purely hortatory nature. As with all documents that come under legal analysis, the totality of the document, rather than any particular words, must be the guide to its overall import. In this case, one can treat them as imposing no obligation, if one takes the words "urges" and "calls upon" in isolation, but not in the context of the overall construction of the document. That is not the method of legal construction and it is not a method I would employ.

We have here two documents which state categorically the Security Council's position that self-determination was an imperative and that it had not yet taken place. They urge all States to co-operate, and call upon all States to respect the territorial integrity of East Timor. Does a Member State faced with such resolutions, reaffirming a cardinal rule of international law, have the freedom to disregard the need for self-determination at its will and pleasure? In the face of the Security Council's considered assertion that self-determination has not taken place, is it open to an individual State to recognize *de jure* the annexation of a non-self-governing territory by another State, and to enter into treaty relations with that State regarding the assets of the territory? The overall circumstances of this case would point to a negative answer to these questions.

Without any attempt at an exhaustive survey of this matter, it may be noted that the lack of phraseology such as "decides" and "determines" does not appear in the past to have prevented Security Council resolu-

tions from being considered as decisions[1]. For example, Security Council resolution 145 (1960) of 22 July 1960, in relation to the Congo, nowhere uses such words as "decides" or "determines", but "calls upon" the Government of Belgium to implement speedily Security Council resolution 143 (1960) on the withdrawal of its troops. It "requests" all States to refrain from any action which might tend to impede the restoration of law and order and the exercise by the Government of the Congo of its authority and also to refrain from any action which might undermine the territorial integrity and the political independence of the Republic of the Congo. Is this language merely hortatory or is it the language of a decision?

After this resolution was passed, the Secretary-General drew the attention of the Council to the obligations of members under Articles 25 and 49. The Secretary-General's observations were made on the basis that the resolution was binding under Articles 25 and 49. Having cited these two sections, the Secretary-General observed to the Council:

> "Could there be a more explicit basis for my hope that we may now count on active support, in the ways which emerge from what I have said, from the Governments directly concerned?" (United Nations, *Official Records of the Security Council, Fifteenth Year*, 884th Meeting, 8 August 1960, para. 23.)

Thereafter, resolution 146 (1960) of 9 August 1960 was passed. That resolution, which still lacked the phraseology of decision and determination, "*Calls upon* the Government of Belgium to withdraw immediately its troops from the province of Katanga . . ." and again:

> "*Calls upon* all Member States, in accordance with Articles 25 and 49 of the Charter of the United Nations, to accept and carry out the *decisions* of the Security Council and to afford mutual assistance in carrying out measures decided upon by the Council." (Emphasis added.)

There is here a clear indication by the Security Council itself that its earlier resolution was a decision.

In this context, mention should also be made of resolution 143 (1960) of 14 July 1960 which "*Calls upon* the Government of Belgium to withdraw its troops from the territory of the Republic of the Congo" and "*Decides* to authorize the Secretary-General to take the necessary steps . . . to provide the Government with such military assistance as may be necessary . . .".

Thereafter the General Assembly made a "request" to all Member States to accept and carry out the decisions of the Security Council, this

[1] See Goodrich, Hambro and Simons, *op. cit.*, p. 210.

resolution again carrying the implication that the Security Council resolutions constituted decisions and imposed obligations.

Secretary-General Hammerskjöld stressed, in his intervention, that if the co-operation needed to make the Charter a living reality were not to be achieved, "this would spell the end of the possibilities of the Organization to grow into what the Charter indicates as the clear intention of the founders . . ."[1]. The words of Hammarskjöld assume particular significance in the context of resolutions dealing with such rights as those relating to self-determination and permanent sovereignty over natural resources.

The resolutions of the Security Council involved in this case (resolutions 384 and 389), use phraseology similar to that of the first resolution cited above relating to the Congo. Each of these resolutions calls upon all States to respect 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).

Each resolution likewise "calls upon" the Government of Indonesia to withdraw without further delay all its forces from the Territory.

Thus, on United Nations precedent, it would appear that the absence of words of determination or decision does not necessarily relegate Security Council resolutions to the level of mere hortatory declarations.

Against the background of the Security Council reaffirming a right admittedly of fundamental importance, and admittedly enjoyed *erga omnes*, it seems academic to examine its obligatory nature in terms of the precise phraseology used. Especially is this so when one has regard to the fact that the resolutions were made after hearing Australia, and were in line with the Australian submissions made to the Council.

C. Some Juristic Perspectives

(i) *The correlativity of rights and duties*

This section surveys the obligations under examination, from what may be described as a jurisprudential or conceptual angle. While the right to self-determination has attracted much attention in modern international law, the notion of duties corresponding to that right has not received the same degree of analysis. This is well illustrated in the present case, where the concept of self-determination is freely accepted, but not the corresponding duties. A conceptual examination of the

[1] United Nations, *Official Records of the General Assembly, Sixteenth Session*, Supplement No. 1A, A/4800/Add.1, p. 4; see, also, the similar view expressed by U Thant, in a speech on 28 October 1969, *UN Monthly Chronicle*, Vol. 6, No. 10, November 1969, p. 86.

question will underscore the importance of duties in the context of this case.

The existence of a right is juristically incompatible with the absence of a corresponding duty. The correlativity of rights and duties, well established in law as in logic (see, especially, Hohfeld, *Fundamental Legal Conceptions*, 1923), means that if the people of East Timor have a right *erga omnes* to self-determination, there is a duty lying upon all Member States to recognize that right. To argue otherwise is to empty the right of its essential content and, thereby, to contradict the existence of the right itself. It is too late in the day, having regard to the entrenched nature of the rights of self-determination and permanent sovereignty over natural resources in modern international law, for the accompanying duties to be kept at a level of non-recognition or semi-recognition.

(ii) *Is duty limited to compliance with specific directions and prohibitions?*

An important submission made to the Court by Australia needs now to be addressed. It has juristic implications transcending this particular case.

This argument was summarized by Australia in the penultimate paragraph of its Counter-Memorial in terms that:

> "By entering into the Treaty in December 1989, Australia did not contravene any direction of the United Nations with respect to East Timor, for none had been made." (Para. 412.)

This point was further emphasized at the oral hearings in terms that:

> "The Security Council has not spelt out or imposed a single legal obligation on Australia or any other Member State which would preclude Australia from entering into the Timor Gap Treaty with Indonesia." (CR 95/10, p. 31.)

Again, it was submitted that:

> "Neither resolution calls on Australia or Member States generally to negotiate only with Portugal. Neither resolution calls on Australia not to deal with Indonesia. And neither resolution condemns Australia for any violation of the United Nations Charter or of international law." (*Ibid.*, p. 26; see, also, Counter-Memorial, paras. 328-346.)

This argument suggests that obligations owed by States in relation to self-determination are confined to compliance with express directions or prohibitions.

A further development of this argument was that there are no sanctions laid down by the United Nations of which Australia is in breach.

In the first place, the obligation exists under customary international law which, by its very nature, consists of general principles and norms rather than specific directions and prohibitions. In the analogy of a domestic setting, customary or common law (as opposed to specific legislation) provides the guiding norms and principles in the light of which the specific instance is judged.

So it is with international law, making due allowance, of course, for the differences in its sources. Customary law provides the general principles, while other sources, such as treaties and binding resolutions, may deal with specifics.

Thus conduct which merely avoids violations of express *directions* or *prohibitions* is not necessarily in conformity with the international obligations lying upon a State in terms of customary international law. The obligations to respect self-determination and the right to permanent sovereignty over natural resources are among these and extend far further than mere compliance with specific rules or directions and the avoidance of prohibited conduct.

If further elucidation be necessary, one can approach the question also from the standpoint of analytical jurisprudence.

Reference needs to be made in this connection to the major jurisprudential discussions that have in recent years explored the nature of legal obligations. While it is self-evident that legal obligations consist not only of obedience to specific directions and prohibitions, but also of adherence to norms or principles of conduct, this distinction has been much illuminated by recent discussions in this department of juristic literature[1].

To take the analogy of domestic law, the corpus of law on which conduct according to law is based consists not only of commands and prohibitions, but of norms, principles and standards of conduct. Commands and prohibitions cover only a very small area of the vast spectrum of obligations. Quite clearly, duties under international law, like duties under domestic law, are dependent not only on specific directions and prohibitions but also on norms and principles.

[1] Without entering into the details of this far-ranging analysis, it will suffice to refer to some well-known expositions of the nature of rights and duties. See Dworkin, *Taking Rights Seriously*, 1977, especially Chaps. 2 and 3; see, also, the similar approach of Roscoe Pound, "The Theory of Judicial Decision", *Harvard Law Review*, 1923, Vol. 36, p. 645, which anticipates the studies of Dworkin; and see, further, Roscoe Pound, "Juristic Science and Law", *Harvard Law Review*, 1918, Vol. 31, pp. 1047 ff. These demonstrations that principles and standards are as integral to a legal system as rules (Dworkin, "Is Law a System of Rules?", in Dworkin (ed.), *The Philosophy of Law*, 1977, p. 38) have applicability to the international legal system as well.

Indeed, the extension of obligations beyond mere obedience to specific directions and prohibitions, if true of domestic law, must apply *a fortiori* in the field of international law which grew out of the broad principles of natural law and has no specific rule-making authority in the manner so familiar in domestic jurisdictions. The dependence of international law for its development and effectiveness on principles, norms and standards needs no elaboration.

If rights are to be taken seriously, one cannot ignore the principles on which they are based[1]. If the right of self-determination is to be taken seriously, attention must focus on the underlying principles implicit in the right, rather than on the itemization of specified incidents of direction and prohibition which, useful so far as they go, are not a complete statement of the duties that follow from the right. It is impossible to define in terms of specific directions and prohibitions the numerous duties these impose. As Australia itself has observed, "the obligation to promote self-determination is an example of an obligation where no particular means are prescribed" (CR 95/10, p. 21).

Juristically analysed, it is not appropriate to view self-determination as though the totality of the duties it entails consist only in obedience to specific directions of the United Nations. Performance of duties and obligations must be tested against the basic underlying norms and principles, rather than against such specific directions or prohibitions as might have been prescribed. Quite clearly, an obligation cannot cease to exist merely because specific means of compliance are not prescribed, nor is its underlying general principle exhausted by the enumeration of particular itemized duties. The duty of respect and compliance extends beyond the letter of specific command and prohibition.

To illustrate from domestic law, such a general principle as that under which a manufacturer of motor cars "is under a special obligation in connection with the construction . . . of his cars"[2], is one which "does not even purport to define the specific duties such a special obligation entails"[3]. Yet the obligation applies in the particular unspecified eventualities which might occur. When a claim arises from a breach of some specific duty within the general principle, the manufacturer cannot avoid the principle on the ground that it does not specify the particular duty. The argument that no breach of duty has occurred because the respondent's conduct violates no specific direction can be answered in much the same manner, because the conduct required by law consists not only of

[1] See, further, Dworkin, *Taking Rights Seriously* (*op. cit.*, p. 22). The author contends that if rights are not taken seriously, law is not taken seriously either (*ibid.*, p. 205).

[2] *Henningsen* v. *Bloomfield Motors, Inc.*, 32 NJ 358 (1960).

[3] Dworkin, *supra*, p. 26, citing *Henningsen* v. *Bloomfield Motors, Inc., supra.*

compliance with specified directions or prohibitions, but of compliance with a *principle* of conduct.

The jurisprudential discussions referred to have not passed unnoticed in the literature of modern international law[1].

In the circumstances of this case, the act of being party to the Timor Gap Treaty would appear to be incompatible with recognition of and respect for the principle of East Timor's rights to self-determination and permanent sovereignty over natural resources inasmuch as, *inter alia*, the Treaty:

(1) expressly recognizes East Timor as a province of Indonesia without its people exercising their right;
(2) deals with non-renewable natural resources that may well belong to that Territory;
(3) makes no mention of the rights of the people of East Timor, but only of the mutual benefit of the peoples of Australia and Indonesia in the development of the resources of the area (Preamble, para. 6);

(4) makes no provision for the event of the East Timorese people deciding to repudiate the Treaty upon the exercise of their right to self-determination;
(5) specifies an initial period of operation of 40 years, with possible renewals for successive terms of 20 years; and
(6) creates a real possibility of the exhaustion of this resource before it can be enjoyed by the people of East Timor.

These aspects, all prima facie contradictory of the essence of self-determination and permanent sovereignty over natural resources, do not cease to have that character because treaty-making with Indonesia has not been expressly prohibited.

Attention was also drawn to the aspect of sanctions. It was pointed out, for example, that issues such as arms supplies, oil supplies and new investments in South Africa were singled out for condemnation when sanctions were imposed on South Africa. On this basis, Australia submitted that the General Assembly has shown willingness, when appropriate, to condemn particular actions or recommend and urge others. It was submitted that the United Nations has issued no such specific directions requiring States to abstain from dealings with a State involved in a self-determination dispute (CR 95/9, p. 78), and that there has been no specific pronouncement on the Timor Gap Treaty.

[1] See, for example, Kratochwil, *Rules, Norms, and Decisions*, 1989.

Sanctions may point to an obligation, but they are clearly not the only source of obligations. Indeed, Oscar Schachter, in a study of the bases of obligation in international law, lists thirteen possible items, of which sanctions is only one[1].

Further,

> "The most thorough research, in both domestic and international law, shows that in reality, compulsion is neither an integral nor a constitutive part of legal rule, but that it represents a distinct element added to the rule to perfect it. Sanction does not represent a condition for the existence of obligation but only for its enforcement."[2]

International law in its present stage of development, serving the needs of an integrated world community, demands a broader view of international obligations than that which is implicit in the Australian submissions.

Security Council resolutions 384 and 389 clearly formulate certain principles of conduct in relation to self-determination and permanent sovereignty. Those principles were already well recognized and entrenched in international law before being applied by those resolutions to the specific case of East Timor. Australia is, in my view, in violation of those principles, contradicting by its conduct its obligation to respect the right of self-determination of the people of East Timor and their right to permanent sovereignty over their natural resources. The plea that Australia did not contravene any *direction* of the United Nations does not exempt it from responsibility.

(iii) *Obligations stemming from the* erga omnes *concept*

The Court has found that "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" (Judgment, para. 29).

This paragraph bases itself upon that finding. It is a position, moreover, which has been accepted by Australia and assumed throughout the hearings.

The Court's jurisprudence has played a significant role in the evolution of the *erga omnes* concept.

In *Barcelona Traction*, this Court, drawing a distinction between obligations of a State towards the international community as a whole, and

[1] Oscar Schachter, "Towards a Theory of International Obligation", *Virginia Journal of International Law*, 1968, Vol. 8, p. 301.

[2] Mohammed Bedjaoui, *Towards a New International Economic Order*, 1979, p. 179.

those arising vis-à-vis another State in the field of diplomatic protection, observed:

> "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character." (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 34.)

In paragraph 35, the Court followed this principle through by observing that in obligations of this category, unlike the obligation which is the subject of diplomatic protection, *"all States have a legal interest in its observance"* (*I.C.J. Reports 1970*, p. 32; emphasis added). In *Barcelona Traction*, the Court was, of course, dealing with obligations that are *owed erga omnes*.

In that case, the Court was spelling out that, where a State has an obligation towards all other States, each of those other States has a legal interest in its observance. If, therefore, Australia has an obligation *erga omnes* towards all States to respect the right of self-determination, Portugal (as the administering Power of East Timor) and East Timor would have a legal interest in the observance of that duty.

Other cases in which this Court was confronted with *erga omnes* obligations were *Northern Cameroons* (*I.C.J. Reports 1963*, p. 15); the *South West Africa* cases, *Preliminary Objections* (*I.C.J. Reports 1962*, p. 319) and *South West Africa* cases, *Second Phase* (*I.C.J. Reports 1966*, p. 6); *Nuclear Tests (Australia* v. *France)* (*I.C.J. Reports 1974*, p. 253) and *Nuclear Tests (New Zealand* v. *France)* (*ibid.*, p. 457); *United States Diplomatic and Consular Staff in Tehran* (*I.C.J. Reports 1980*, p. 3); and *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility* (*I.C.J. Reports 1988*, p. 69).

Although in this fashion the *erga omnes* principle has played an apparently frequent role in the Court's recent jurisprudence, it has not yet drawn a definitive decision from the Court in relation to the manner in which the principle will operate in case of breach. For example, in *Northern Cameroons*, the question whether a Member State has a right of action consequent upon an *erga omnes* breach was left undecided as the case was dismissed on grounds of judicial propriety. The dismissal of the *South West Africa* cases in the merits phase, in 1966, left no scope for any

conclusions regarding *erga omnes* obligations. The *Nuclear Tests* cases did not pronounce on the *erga omnes* character of the rights of all States to be free from atmospheric nuclear tests.

It has thus happened that no Judgment of this Court thus far has addressed the consequences of violation of an *erga omnes* obligation. The present case, had it passed the jurisdictional stage, would have been just such a case where the doctrine's practical effects would have been considered. Since this opinion proceeds on the basis that the merits must be considered, it must advert to the consequences of violation of an *erga omnes* obligation.

All the prior cases before this Court raised the question of *duties* owed *erga omnes*. That aspect is present in this case as well, for every State has an *erga omnes* duty to recognize self-determination and, to that extent, if Portugal's claim is correct, Australia is in breach of that general *erga omnes* duty towards East Timor[1].

However, this case has stressed the obverse aspect of *rights* opposable *erga omnes* — namely, the *right erga omnes* of the people of East Timor to the recognition of their self-determination and permanent sovereignty over their natural resources. The claim is based on the opposability of the right to Australia.

In *Barcelona Traction*, the Court's observations regarding obligations *owed* to the international community as a whole were not necessary to the case before it. Yet, though its observations were *obiter*, the notion of obligations *erga omnes* developed apace thereafter[2].

The present case is one where quite clearly the consequences of the *erga omnes* principle follow through to their logical conclusion — that the obligation which is a corollary of the right may well have been contravened. This would lead, in my view, to the grant of judicial relief for the violation of the right.

I am conscious, in reaching this conclusion, that the violation of an *erga omnes* right has not thus far been the basis of judicial relief before this Court. Yet the principles are clear, and the need is manifest for a recognition that the right, like all rights, begets corresponding duties.

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[1] For a recent survey of *erga omnes* as a source of obligations generally, see Claudia Annacker, "The Legal Régime of Erga Omnes Obligations in International Law", *Austrian Journal of Public and International Law*, 1994, Vol. 46, pp. 131 ff.

[2] See Bruno Simma, "Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?", in Jost Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios — New Law?*, 1993, pp. 125 ff.

The *erga omnes* concept has been at the door of this Court for many years. A disregard of *erga omnes* obligations makes a serious tear in the web of international obligations, and the current state of international law requires that violations of the concept be followed through to their logical and legal conclusion.

Partly because the *erga omnes* obligation has not thus far been the subject of judicial determination, it has been said that: "Viewed realistically, the world of obligations *erga omnes* is still the world of the 'ought' rather than the 'is'."[1] This case raises issues which bridge that gap.

I would end this paragraph as it began, by adopting the Court's pronouncement on the *erga omnes* character of East Timor's right, and I would follow that principle through to what I have indicated to be its logical and legal conclusion.

* * *

In the result, the obligations of Australia towards East Timor can be shown to stem from a multiplicity of sources and juristic considerations. Any one of them by itself would be sufficient to sustain these obligations in law. Cumulatively, their weight is compelling.

PART E. AUSTRALIA'S OBJECTIONS BASED ON JUDICIAL PROPRIETY

Australia has submitted that there are reasons of judicial propriety, in consideration of which the Court should not decide this case (Counter-Memorial, para. 306).

Among the supportive reasons adduced are

(i) that there is no justiciable dispute in this case (*ibid.*, paras. 315-316);

(ii) that these proceedings are a misuse of the processes of the Court (*ibid.*, paras. 306-316);

(iii) that the proceedings have an illegitimate object (Rejoinder, paras. 155-166);

(iv) that the Judgment would serve no useful purpose in that it would not promote the interests allegedly requiring protection (Counter-Memorial, paras. 271-278);

(v) that the Court should not, in any event, give a judgment which the Court has no authority or ability to satisfy (Rejoinder, paras. 160-166); and

(vi) that the Court is an inappropriate forum for the resolution of the dispute (*ibid.*, paras. 167-169) inasmuch as other United

[1] Simma, "Violations of Obligations Erga Omnes?", *op. cit.*, p. 126.

Nations organs have assumed responsibility for negotiating a settlement of the East Timor question (Counter-Memorial, paras. 288-297).

(i) *Absence of a justiciable dispute*

The Court has held that there is in fact a justiciable dispute in this case and I respectfully concur in that finding.

(ii) *Misuse of the process of the Court*

Australia has argued that this case is:

> "a sham — a blatant artifice, by which, under the guise of attacking Australia's capacity to conclude the Treaty, in reality Portugal seeks to deprive Indonesia of the benefits of its control over East Timor" (CR 95/11, pp. 47-48).

This contention is linked to Australia's submission that there is in reality no dispute in this case. If there is indeed a justiciable dispute, as the Court has held, the resort to the processes of the Court for resolution is right and proper, for it is for the resolution of justiciable disputes that the Court exists.

Moreover, if the expression "administering Power" has any meaning, it means a commitment to the solemn duties associated with the "sacred trust" on behalf of the people of East Timor. As pointed out earlier in this opinion, Portugal would be in violation of that basic obligation if, while being the administering Power, and while claiming to be such, it has failed to take such action as was available to it in law for protecting the rights of the people of East Timor in relation to their rights which are dealt with under the Treaty. This case involves no less than the assertion, on behalf of a Territory that has no *locus standi* before the Court, of the denial of two rights which are considered fundamental under modern international law. Whatever be the result, this is eminently a justiciable dispute, brought before an appropriate forum.

(iii) *The Judgment would not serve any legitimate object*

Under this head, Australia argues that a judgment in Portugal's favour cannot fulfil any legitimate object inasmuch as the Court cannot require Australia to breach valid treaty obligations owed to third States, and judgment for Portugal would deny Australia's ability to protect its sovereign rights (Counter-Memorial, paras. 269-286). These have been sufficiently answered in the course of this opinion. It was also suggested at various stages of the case that Portugal's objectives included the gaining of benefits for itself as the former colonial power. It has been indicated elsewhere in this opinion that whatever Portugal gains from these pro-

ceedings will be held strictly for the benefit of the people of East Timor, and under United Nations supervision.

(iv) *The Judgment would serve no useful purpose in that it would not promote the interests of East Timor*

Portugal has submitted that a judgment in Portugal's favour would serve the useful purpose of conserving the rights of the people of East Timor.

Australia submits, on the other hand, that:

> "Faced with a situation such as postulated by Portugal, both Australia and Indonesia are likely unilaterally to exploit the area, without the Treaty, avoiding jurisdictional conflicts on a purely pragmatic basis." (Rejoinder, para. 160.)

Australia also submits that the Treaty is potentially more beneficial to the people of East Timor, "provided Indonesia passes on an equitable part of the benefits to the people" *(ibid.)*. The qualification introduced to this proposition goes to the crux of the matter. One does not know whether, when or how this will occur.

To dismiss this claim on the basis that, in any event, an equitable part of the benefits derived by a third country will somehow be passed on to the people does not answer the concerns which lie at the root of the principles of self-determination and permanent sovereignty.

In its Rejoinder, Australia states:

> "No matter how hard Portugal emphasizes its alleged *formal* status and responsibilities, it gives no indication of how a judgment in its favour will make one iota of difference to the rights of the East Timorese over their offshore resources. Those rights, as well as Australia's, will continue. No judgment of this Court can affect them, given the limited issue which Portugal asks the Court to adjudge." (Para. 162; emphasis in original.)

It is somewhat difficult to understand this passage, for the judgment sought by Portugal is not merely a judgment affirming the rights of East Timor to self-determination and permanent sovereignty over its natural resources, but one which holds, in relation to those rights, that they are opposable to Australia, and that they have been infringed by Australia in entering into the Timor Gap Treaty. Such a judgment, had it been obtained, would not have been without legal consequences.

In *Northern Cameroons*, the adjudication sought would have been devoid of any purpose. It concerned a dispute about the interpretation and application of a treaty which was no longer in force and in which there could be no opportunity for a future act of interpretation or appli-

cation of that treaty in accordance with any judgment the Court might render (*I.C.J. Reports 1963*, p. 37). In that case, if the Court made a declaration after the termination of the trusteeship agreement, it would have no continuing applicability. In the words of a recent treatise, the distinction between *Northern Cameroons* and the present case was noted as follows:

> "In *Northern Cameroons* the Court did not proceed to the merits of the case because its judgment could have had no practical effect and would have had no impact upon existing legal rights or obligations. To give a judgment under the circumstances would not have accorded with the judicial function; *Case Concerning the Northern Cameroons* (*Cameroon* v. *United Kingdom*), Preliminary Objections, 1963 ICJ Rep. 15 (Judgment of 2 Dec. 1963). In the *East Timor* case this limitation does not appear to apply."[1]

The judgment sought here is in respect not of a defunct treaty but of two basic international obligations which are very much a part of current law. It cannot be said that there will be no opportunities for any future application of those principles to the rights of the East Timorese people. The *Northern Cameroons* case is thus clearly distinguishable.

(v) *The Court should not give a judgment which it has no authority or ability to satisfy*

The Court, by its very constitution, lacks the means of enforcement and is not to be deterred from pronouncing upon the proper legal determination of a dispute it would otherwise have decided, merely because, for political or other reasons, that determination is unlikely to be implemented. The *raison d'être* of the Court's jurisdiction is adjudication and clarification of the law, not enforcement and implementation. The very fact that a justiciable dispute has been duly determined judicially can itself have a practical value which cannot be anticipated, and the consequences of which may well reach into the area of practicalities. Those are matters beyond the purview of the Court, which must discharge its proper judicial functions irrespective of questions of enforceability and execution, which are not its province.

(vi) *Is the Court an inappropriate forum?*

The fact that other United Nations organs are seised of the same matter and may be considering it is no basis for a suggestion that the Court should not consider that matter to the extent that is proper within the limits of its jurisdiction. This matter does not need elaboration in view of

[1] C. Chinkin, *Third Parties in International Law*, 1993, p. 211, footnote 105.

the extensive case-law upon the subject. Each organ of the United Nations has its own allotted responsibility in its appropriate area. A matter for adjudication under the judicial function of the Court within its proper sphere of competence is not to be considered extraneous to the Court's concerns merely because political results may flow from it or because another organ of the United Nations is examining it from the standpoint of its own area of authority. As the late Judge Lachs observed with his customary clarity in the *Lockerbie* case, the Court is

> "the guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction." (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Provisional Measures (Libyan Arab Jamahiriya* v. *United States of America), Order of 14 April 1992, I.C.J. Reports 1992*, p. 138; separate opinion.)

The Australian submission that other organs of the United Nations have assumed responsibility for negotiating a settlement of the East Timor question (Counter-Memorial, paras. 288 *et seq.*) does not absolve the Court of its own responsibility within its own allotted area.

Moreover, this is not a case, as indicated earlier in this opinion, which opens out a full range of enquiry into all the military, diplomatic and political nuances of the East Timor situation. Since this is not so, the Australian submission that the case is unsuitable for adjudication in these proceedings (see Counter-Memorial, paras. 298-300) must fail.

The complementarity of the various organs of the United Nations, all pursuing in their different ways the Purposes of the Organization to which they belong, requires each organ, within its appropriate and legitimate sphere of authority, to further those Purposes in the manner appropriate to its constitution. This Court, properly seised of a justiciable dispute within its legitimate sphere of authority, does not abdicate its judicial responsibilities merely because of the pendency of the matter in another forum.

CONCLUSION

A. I concur in the Court's finding that there is a justiciable dispute between the Parties.
B. I concur with the Court in its reaffirmation of the importance of the principle of self-determination.

C. The Applicant has the necessary *jus standi* to maintain this action, and is under a duty under international law to take necessary steps to conserve the rights of the people of East Timor. Any benefits obtained by such action will be held strictly for the people of East Timor.

D. The various objections based on judicial propriety must be rejected.

E. This Application is maintainable in the absence of a third State for the following reasons:

(i) East Timor is a non-self-governing territory recognized as such by the General Assembly and the Security Council, and acknowledged by the Respondent to be still of that status.

(ii) Since East Timor is a non-self-governing territory, its people are unquestionably entitled to the right to self-determination.

(iii) The right to self-determination constitutes a fundamental norm of contemporary international law, binding on all States.

(iv) The right to permanent sovereignty over natural resources is a basic constituent of the right to self-determination.

(v) The rights to self-determination and permanent sovereignty over natural resources are recognized as rights *erga omnes*, under well-established principles of international law, and are recognized as such by the Respondent.

(vi) An *erga omnes* right generates a corresponding duty in all States, which duty, in case of non-compliance or breach, can be the subject of a claim for redress against the State so acting.

(vii) The duty thus generated in all States includes the duty to recognize and respect those rights. Implicit in such recognition and respect is the duty not to act in any manner that will in effect deny those rights or impair their exercise.

(viii) The duty to recognize and respect those rights is an overarching general duty, binding upon all States, and is not restricted to particular or specific directions or prohibitions issued by the United Nations.

(ix) The Respondent has entered into a treaty with another State, dealing with a valuable, non-renewable natural resource of East Timor for an initial period of 40 years, subject to 20-year extensions.

(x) The Respondent has in the Treaty expressly acknowledged and accepted East Timor's incorporation in that other State as a province of that State.

(xi) That other State has at no time been recognized by the United Nations as having any authority over the non-self-governing

Territory of East Timor, or as having displaced the administering Power duly recognized by the General Assembly and the Security Council.

(xii) The Treaty thus entered into has the potential to deplete or even exhaust this non-renewable and valuable resource of East Timor.

(xiii) The Treaty makes no provision conserving the rights of the people of East Timor, or providing for the eventuality that, after exercising their right to self-determination, the people of East Timor may choose to repudiate the Treaty.

(xiv) Neither the people of that Territory, nor their duly recognized administering Power, have been consulted in regard to the said Treaty.

(xv) The Treaty has been entered into by the Respondent and another State "for the mutual benefit of their peoples in the development of the resources of the area" with no mention of any benefits for the people of East Timor from the valuable natural resource belonging to them.

(xvi) the Respondent's individual actions:

(a) in entering into the said Treaty;
(b) in expressly acknowledging the incorporation of East Timor into another State;
(c) in being party to an arrangement dealing with the non-renewable resources of East Timor in a manner likely to cause their serious depletion or exhaustion;
(d) in being party to an arrangement dealing with the non-renewable resources of East Timor without consultation with the people of East Timor, or their duly recognized representative;
(e) in being party to an arrangement which makes no mention of the rights of the people of East Timor, but only of the peoples of Australia and Indonesia; and
(f) in taking steps for the implementation of the Treaty

raise substantial doubts regarding their compatibility with

(a) the rights of the people of East Timor to self-determination and permanent sovereignty over their natural resources;
(b) the Respondent's express acknowledgment of those rights;
(c) the Respondent's obligations, correlative to East Timor's rights, to recognize and respect those rights, and not to act in such a manner as to impair those rights;
(d) the Respondent's obligations under relevant resolutions of the General Assembly and the Security Council.

(xvii) The circumstance that a judgment of this Court against a party may have effects upon an absent State does not by itself,

according to the settled jurisprudence of this Court, deprive the Court of jurisdiction to make an order against a party which is in fact present before it.

(xviii) The claim against the Respondent can be determined on the basis of:

(a) the Respondent's *individual* obligations under international law;
(b) the Respondent's *individual* actions; and
(c) the principle of a State's *individual* responsibility under international law for its *individual* actions

without any need for an examination of the conduct of another State.

F. Since the conclusions set out above can be reached upon the basis of the unilateral acts of the Respondent, without any necessity to investigate or pronounce upon the conduct of a third State, the case of *Monetary Gold* is not relevant to a determination of this case.

G. Were it necessary to consider the case of *Monetary Gold*, the facts of that case are clearly distinguishable from those in the present case. Consequently, that decision is inapplicable.

* * *

My conclusion therefore is that the Application before the Court is within the Court's competence to determine, and that the objection based upon the absence of a third State should have been overruled and the case proceeded with to a final determination. The materials necessary for that determination were before the Court, as they were inextricably linked with the preliminary issue of jurisdiction.

(Signed) Christopher Gregory WEERAMANTRY.