INTERNATIONAL COURT OF JUSTICE: RECENT CASES

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I. RECENT CASES

THE EAST TIMOR CASE (*PORTUGAL* v. *AUSTRALIA*)[1]

CONTENTIOUS cases before the International Court of Justice (hereafter ICJ) are formulated within a bilateral framework that allows the ICJ to give an authoritative ruling on the legal rights and duties of the parties, after hearing their arguments on the merits of their claims. This bilateralism fails to take account of the interests of third parties not before the ICJ whose multifaceted concerns are characteristically at stake in international disputes.[2] In recent cases the ICJ has been faced with various third-party claims, both where the third party has requested the right to argue its own legal interests before the ICJ,[3] and where it has been claimed that the absence of an identified third party abrogates the ICJ's jurisdiction.[4] In the main the ICJ has remained unreceptive to third-party claims, upholding and ruling upon the parties' presentation of their own dispute.[5]

The *East Timor* case is perhaps the most unambiguous example to date of the artificiality caused by the elucidation of a dispute as concerning only the legal rights of the parties before the ICJ. The unstated questions about the legal rights and duties of other entities made the case resemble an Indonesian *wayang*, or shadow puppet show, in which the actions and words of the characters appearing

* The aim of this annual section is to provide a guide to the current work of the ICJ by summarising the essential aspects of recent cases and highlighting points of particular significance.

1. *East Timor* (*Portugal* v. *Australia*) I.C.J.Rep. 1995, 90 (judgment of 30 June 1995).
2. See generally C. Chinkin, *Third Parties in International Law* (1993), esp. chap.I.
3. Third parties can request intervention under the ICJ Statute, Arts. 62 and 63. On intervention under Art.62 see *Case Concerning the Continental Shelf* (*Tunisia/Libya Arab Jamahiriya*) (application by Malta to intervene) I.C.J. Rep. 1981, 3; *Case Concerning the Continental Shelf* (*Libya Arab Jamahiriya/Malta*) (application by Italy to intervene) I.C.J. Rep. 1984, 3; *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras*) (application by Nicaragua to intervene) I.C.J. Rep. 1990, 92. On intervention under Art.63 see *Military and Paramilitary Activities In and Against Nicaragua* (*Nicaragua* v. *United States*) (declaration of intervention) I.C.J. Rep. 1984, 215.
4. The so-called "indispensable third party" rule; see *Nicaragua* v. *United States*, *idem* (jurisdiction and admissibility) I.C.J. Rep. 1984, 392; *Land, Island and Maritime Frontier Dispute*, *ibid*; *Certain Phosphate Lands in Nauru* (*Nauru* v. *Australia*) (jurisdiction and admissibility) I.C.J. Rep. 1992, 240.
5. Nicaragua's request to intervene in the *Land, Island and Maritime Frontier Dispute*, *ibid*, was the first successful request under Art.62.

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before the audience blend with the shadows and reflections of other actors concealed behind the screens. In this case the shadows cast by the actions of Indonesia against the people of East Timor deflected attention from the claims and arguments of those actually before the ICJ: Portugal and Australia. In its outcome the interests of Indonesia took priority.

A. The Background

The factual background to the case was the military invasion of East Timor by Indonesia on 7 December 1975, and its subsequent assertion of sovereignty over the territory as constituting the 27th province of Indonesia.[6] Since the invasion, the Timorese resistance, FRETILIN (Frente Revolucionaria Timor Leste Independente) has waged continuous and courageous, but impossible, guerrilla conflict in the territory belying Indonesian assertions of the satisfaction of the right of the people of East Timor to self-determination.[7] There have also been repeated allegations of widespread violations of human rights, including the notorious 1991 massacre in the Santa Cruz cemetery, Dili.[8] Immediately following the 1975 invasion, successive resolutions were passed in the General Assembly and Security Council confirming the right of the people of East Timor to self-determination and condemning the Indonesian use of armed force.[9] However, by 1982 the support for these resolutions had become progressively smaller and the 1982 resolution was the last.[10] No UN resolution called for non-recognition of the integration.[11] Although the General Assembly has never retracted from its

6. These facts are well known. See e.g. J. Taylor, *Indonesia's Forgotten War* (1990); J. Ramos-Horta, *The Unfinished Saga of East Timor* (1987); ICCR and IPJET, *International Law and the Question of East Timor* (1995), esp. Section One; F. De Quadros, "Decolonisation of Portuguese Territories", in R. Bernhardt (Ed.), *Encyclopedia of Public International Law*, Vol.10, pp.93–96; P. Elliott, "The East Timor Dispute" (1978) 27 I.C.L.Q. 238; R. Clark, "The 'Decolonization' of East Timor and the United Nations Norms on Self-Determination and Aggression" (1982) 7 Yale J. of World Public Order 2.

7. One of Indonesia's arguments is that the integration was voluntarily accepted by the East Timorese, thus constituting self-determination. As Indonesia was not a party before the ICJ such arguments were not presented for analysis. On the Indonesian perspective see A. Alatas (Minister of Foreign Affairs of Indonesia), "East Timor: Debunking the Myths Around a Process of Decolonisation", remarks before the members of the National Press Club, Washington DC, 20 Feb. 1992.

8. Since 1975 there have been numerous reports of human rights violations in East Timor, by such non-governmental organisations as Amnesty International. On the Dili massacre of 12 Nov. 1991 see Report of the Special Rapporteur on Torture, Peter Kooijmans, E/CN.4/1992/17/Add.1, 8 Jan. 1992, p.14. On conditions in East Timor since 1975 see G. Aditjondro, *In the Shadow of Mount Ramelau, The Impact of the Occupation of East Timor* (1994).

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

10. The voting for GA Res.3485, *ibid*, was 72 for, 10 against and 47 abstentions; that for GA Res.37/30, *ibid*, was 50–46–50. After 1982 there was apprehension that a subsequent resolution might not gain the requisite support.

11. On other occasions UN organs have called for non-recognition of sovereignty over territory that is tainted by illegality. E.g. SC Res.2775E(XXVI), 29 Nov. 1971; GA Res.3411D(XXX) 28 Nov. 1975; GA Res 31/6A, 27 Oct. 1976 with respect to non-recognition of the South African Bantustans of Transkei, Bophuthatswana and Venda; SC

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assertion of the right of the people of East Timor to self-determination and East Timor remains on the Decolonisation Committee's agenda, since 1982 active consideration of the territory has focused upon human rights abuses rather than on the denial of self-determination and the use of force.[12]

As the closest neighbour to East Timor,[13] Australia's responses to these events have carried particular international political significance.[14] Although it originally condemned the invasion, Australia altered its stance in 1978 and voted against that year's General Assembly resolution on East Timor.[15] It also decided "to accept East Timor as part of Indonesia".[16] The Australian government emphasised that it remained "highly critical" of the way in which Indonesia had integrated East Timor into its territory, but regarded it as unrealistic not to recognise Indonesia's effective control over the territory. On 14 February 1979 Australia consolidated this position by according *de jure* recognition to Indonesian sovereignty in East Timor.[17] Shortly afterwards negotiations between Indonesia and Australia with respect to the allocation of the resources of the maritime areas off the southern coast of East Timor, that is, between East Timor and Australia, commenced. Although it had entered into maritime delimitation agreements with Indonesia before 1975,[18] Australia had been unable to conclude any such agreement with Portugal while the latter remained in control in East Timor.[19] In 1989 a decade of negotiations between Australia and Indonesia concluded with the signing of the

Res.242, 2 Nov. 1967 with respect to territory occupied by Israel in the Six Day War; SC Res 541(1983) with respect to the proclamation of the Turkish Republic of Northern Cyprus; SC Res.662, 9 Aug. 1990 with respect to Iraq's invasion and occupation of Kuwait. For discussion of the significance of the failure to recommend non-recognition see C. Chinkin, "The Merits of Portugal's Case Against Australia" (1992) 15 New South Wales L.J. 423, rep. as "East Timor Moves into the World Court" (1993) 4 E.J.I.L. 206.

12. See G. Nettheim, "International law and International Politics", in ICCR/IPJET, *op. cit. supra* n.6, at p.181, for an account of responses to the situation in East Timor from the UN Commission on Human Rights, the Special Rapporteur on Torture and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

13. East Timor is approximately 430 km from Australia's Northern Territory.

14. See C. Chinkin, "Australia and East Timor in International Law", in ICCR/IPJET, *op. cit. supra* n.6, at p.269.

15. Australia voted for GA Res.3485, 12 Dec. 1975; it abstained from voting on GA Res.31/53, 1 Dec. 1976 and GA Res.32/34, 28 Nov. 1977.

16. GA Res.33/39, 13 Dec. 1978. The Australian government representative explained: "The text of the Resolution did not reflect a realistic appreciation of the situation in East Timor and no practical purpose was served by the Resolution." Australian Department of Foreign Affairs, *Annual Report 1978* (Australian Government Printing Service, Canberra, 1979) p.30.

17. See further C. Chinkin, "The Law and Ethics of Recognition: Cambodia and Timor", in P. Keal (Ed.), *Ethics and Foreign Policy* (1992), p.190.

18. Agreement (with Indonesia) Establishing Certain Seabed Boundaries, 18 May 1971, 31 Aust.T.S. (1973); Agreement (with Indonesia) Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971, 9 Oct. 1972, 32 Aust.T.S. (1973).

19. Simpson cites a telex sent in 1975 by Australia's then Ambassador to Indonesia: "It would seem to me that this Department [Department of Minerals and Energy] might well have an interest in closing the present gap in the agreed sea border and this could be much more readily negotiated with Indonesia than with Portugal or independent Portuguese Timor": G. Simpson, "Judging the East Timor Dispute: Self-determination at the International Court of Justice" (1994) 17 Hastings I. & Comp. L.R. 323.

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so-called Timor Gap Treaty.[20] The Treaty was implemented into Australian law and applications for exploitation licences were accepted.[21]

B. The Claims

Prior to the military invasion in 1975, representatives of Portugal, the undisputed colonial power in East Timor, retreated first to the island of Atauro (also under Portuguese rule) and then left the area altogether. Portugal has had no physical presence in East Timor since that time. Nevertheless, in 1991 it commenced proceedings against Australia before the ICJ. Portugal claimed that Australia's conclusion of the Timor Gap Treaty with Indonesia constituted a violation of its own rights as the only continuing legal authority over the territory, which, in the absence of a legitimate act of self-determination, remained a non-self-governing territory under Chapter XI of the UN Charter, with Portugal as administering power. Portugal also claimed that by entering into the Treaty Australia infringed the rights of the people of East Timor to self-determination through denial of their rights to choose freely their own form of government, and to permanent sovereignty over their natural wealth and resources in the maritime areas adjacent to their coast.[22] Since Australia was not alleged to have directly denied the right to self-determination, Portugal claimed that Australia had acted in breach of an obligation not to disregard but to respect these rights.

The ICJ's jurisdiction was founded upon the declarations made by Portugal and Australia under the Statute of the International Court of Justice, Article 36(2). No case could be commenced against Indonesia since that State has not accepted the ICJ's jurisdiction. The limitation of the ICJ's contentious jurisdiction and incidental proceedings to States denies standing to the people of East Timor to bring their own claims before it, as either a party or an intervener.[23] The claims of such groups can only be put before the ICJ by a State with standing that is prepared to act on their behalf, or through the ICJ's advisory jurisdiction.[24] Australia argued that the ICJ lacked jurisdiction, or that Portugal's claim was inadmissible. Nevertheless there was no jurisdictional phase and arguments on admissibility and the merits

20. Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and Northern Australia, Timor Sea, 11 Dec. 1989, in force 9 Feb. 1991, Aust.T.S. No.9, 1991.

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

22. The right to political and economic self-determination is spelled out as Art.1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted by the General Assembly on 16 Dec. 1966. See also the Resolution on Permanent Sovereignty over Natural Resources, GA Res.1803(XVII).

23. ICJ Statute, Art. 34.

24. As e.g. in the cases of the people of South West Africa and the Saharawi people; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Res.276(1970)* I.C.J. Rep. 1971, 16; *Western Sahara* I.C.J. Rep. 1975, 12.

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were joined. The ICJ received extensive written and oral pleadings from both parties on the substantive issues of the case.

C. Admissibility

Australia rejected Portugal's bilateral formulation of the facts as constituting a dispute between itself and Portugal. Australia distinguished the "alleged" dispute before the ICJ and the "real" dispute between Portugal and Indonesia, or between Indonesia and the people of East Timor. Australia considered that its exercise of its sovereign right to enter into a delimitation agreement in order to exploit the resources of its own continental shelf could not create a dispute with Portugal. Despite strong criticism of its earlier jurisprudence on the definition of an international dispute,[25] the ICJ reverted to it.[26] It held a dispute to be "a disagreement on a point of law or fact, a conflict of legal views or interests between parties"[27] and accordingly that there was a dispute between Portugal and Australia.[28] Former ICJ President Judge Jennings, who was among the majority in the case, has pointed out that this definition "bowderlised" the original statement in the *Mavromattis* case that had specified a dispute to be "between two persons".[29] In the multipartite dispute over East Timor the difference appears deliberate. Portugal's formulation of factual and legal complaints against Australia, coupled with Australia's rejection of them, was sufficient to constitute a legal dispute between the parties that was *prima facie* within the ICJ's competence.

Once it had established that a dispute between Portugal and Australia existed, the ICJ had to determine whether it could adjudicate upon it.[30] Although international adjudication is modelled upon the adversarial process of domestic tribunals, there is one significant difference between the ICJ and municipal courts: the former cannot compel jurisdiction before it.[31] This presented the ICJ with a dilemma. Its function is "to decide in accordance with international law such disputes as are submitted to it".[32] Indeed, the absence of compulsory jurisdiction perhaps places a higher onus on it than on municipal tribunals to determine disputes submitted in accordance with the Statute of the ICJ and the principle of the peaceful settlement of disputes.[33] As dissenting Judge Weeramantry pointed out: [34]

25. Notably by Judge Morelli, dissenting, in *South West Africa* (preliminary objections) I.C.J. Rep. 1962, 560.

26. *Mavrommatis Palestine Concession* P.C.I.J. Ser.A, No.2, 11 (judgment of 13 Aug.); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* I.C.J. Rep. 1950, 74 (adv. op. 30 Mar.); *Northern Cameroons* I.C.J. Rep. 1963, 27 (order of 2 Dec.); *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* I.C.J. Rep. 1988, 27, para.35 (adv. op. 26 Apr.).

27. Judge Skubiszewski in para.36 of his dissenting opinion preferred the fuller definition of dispute given by Judge Fitzmaurice, *Northern Cameroons*, *idem*, pp.109–110.

28. I.C.J. Rep. 1995, para.22.

29. R. Jennings, "The Judiciary, International and National, and the Development of International Law" (1996) 45 I.C.L.Q. 1, 10.

30. Since both Portugal and Australia had made declarations accepting the compulsory jurisdiction of the ICJ under the ICJ Statute, Art.36(2), there was no challenge as such to jurisdiction; *Portugal* v. *Australia*, para.1.

31. ICJ Statute, Art.36.

32. *Idem*, Art.38.

33. UN Charter, Arts.2(3), 33.

34. I.C.J. Rep. 1995, 16 (Judge Weeramantry dissenting).

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> 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.

There is an unresolved tension between the structure of the international legal system and the role of adjudication within it. Portugal, like any other party to the Statute, has a right to have a decision given in a case legitimately submitted to the ICJ under Article 36. Further, all members of the international community share an interest in the outcome of claims presented to the ICJ, especially where the claim encompasses directly or indirectly obligations owed *erga omnes*. This was precisely the situation in the *East Timor* case, where determination of the substantive issues raised seemed to require analysis of the legal obligations of all members of the international community in the face of an alleged violation of the right to self-determination, and the military invasion of a territory that in December 1975 was either a non-self-governing territory under Portuguese control or an independent State.[35]

Balanced against the right of the applicant State to have its claim considered on the merits, and the interests of all other members of the international community in a statement of the applicable legal principles, is the right of individual third States not to be subject to the jurisdiction of the ICJ without their consent. Despite the protection afforded to third parties by Article 59 of the Statute,[36] the ICJ has held that the requirement of jurisdictional consent means that jurisdiction no longer exists where the legal interests of a third State form the very subject matter of the decision, the so-called *Monetary Gold* principle.[37] Where jurisdiction is not based upon a special agreement representing a genuine community of interest between the parties to the proceedings in having their dispute decided, an unwilling respondent State is likely to raise the interests of an absent third-party State in order to avoid jurisdiction and frustrate the proceedings.[38] Regard for the interests of an absent third party can lead to disregard of those of the applicant State and of other third parties, including the wider international community and those who might be directly affected by the decision, such as peoples claiming a right to self-determination.[39]

It is arguable that where the third-party interests are those of the broader international community they should counterbalance the procedural right of an individual third State not to be subject to the ICJ's jurisdiction without its consent. The ICJ by a majority of 14 to 2 (Judges Weeramantry and Skubiszewski dissenting) took the opposite approach and avoided the complex third-party issues raised by the concept of rights held *erga omnes* by focusing exclusively on the jurisdictional

35. After civil war in 1974–5 between different political groups within East Timor, FRETILIN had proclaimed the Independent Republic of East Timor on 28 Nov. 1975.

36. Art.59 states: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

37. *Case of the Monetary Gold Removed from Rome in 1943* (*Italy* v. *France, United Kingdom and United States*) (preliminary question) I.C.J. Rep. 1954, 32.

38. The claim was raised by the US in *Nicaragua* v. *United States*, *supra* n.4; and Australia in *Nauru* v. *Australia*, *supra* n.4. In the *Land, Island and Maritime Frontier Dispute*, *supra* n.3, the third-party intervener, Nicaragua, made the claim.

39. Judge Vereshchetin explicitly affirmed the third-party status of the people of East Timor: I.C.J. Rep. 1995 (sep. op. Judge Vereshchetin).

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rights of Indonesia, as argued by Australia. It held that it could not exercise its jurisdiction under Article 36(2) because:[40]

> in order to decide the claims of Portugal, it would have to rule as a prerequisite, on the lawfulness of Indonesia's conduct in the absence of that State's consent. This conclusion applies to all the claims of Portugal, for all of them raise a common question: whether the power to make treaties concerning the continental shelf of East Timor belongs to Portugal or Indonesia, and, therefore, whether Indonesia's entry into and continued presence in the Territory are lawful.

This narrow ruling presents at least two questions: was the decision consistent with, or required by, the earlier case of *Monetary Gold* and what are the implications of the judgment for the two other third parties: the people of East Timor and the wider international community?

The ICJ's reliance upon *Monetary Gold* can be questioned both on the authority of that case and on its different facts. In *East Timor* the ICJ asserted that *Monetary Gold* itself rested upon a steady stream of prior judicial authority in its reaffirmation of the jurisdictional requirement of consent, including that of absent third parties. However, the ruling in *Monetary Gold* was not founded upon any precedent and indeed can be seen as going further than the earlier decision in *Corfu Channel*.[41] In *Corfu Channel* the United Kingdom had made very specific allegations that a third party not before the ICJ (Yugoslavia) was in fact responsible for the laying of the mines that had caused the damage to its ships. Judges in *Corfu Channel* emphasised that Yugoslavia could not in its absence be accused of, or impliedly found liable for, any international wrongdoing of this sort. Any such implication would contravene international standards of due process and natural justice. As Judge Weeramantry pointed out in *East Timor*, the British allegations were not treated by the ICJ as a reason for denying jurisdiction as between the United Kingdom and Albania. Indeed Judge Weeramantry considered *Corfu Channel* to be a stronger case of third-party involvement than the present case, stating that "it may even be characterized as a case which went to the very edge of the principle, or even conceivably somewhat beyond it".[42]

Indonesia's position can be compared with that of Yugoslavia in *Corfu Channel*, perhaps even more readily than with that of Albania in *Monetary Gold*. In the latter case Italy and the United Kingdom had both made claims to gold that admittedly belonged to Albania, the absent third party. Albania's proprietary interests in the gold were undisputed, they formed the subject matter of the case. In *East Timor* Indonesia's interests in, or sovereignty over, the maritime resources in the zones established by the Timor Gap Treaty are the underlying source of the dispute but were not its subject matter, which was the entering into of the Timor Gap Treaty by Australia. Responsibility for violation of the right to innocent passage was at the heart of the *Corfu Channel* case and the ICJ was able to deflect the United Kingdom's allegations with respect to Yugoslavia by founding Albania's liability upon its own failure to ensure navigational safety within its territorial sea. It could have taken the same approach in *East Timor* by concentrating upon Aus-

40. I.C.J. Rep. 1995, para.35.
41. *Corfu Channel Case* (*United Kingdom* v. *Albania*) (merits) I.C.J. Rep. 1949, 4.
42. I.C.J. Rep. 1995, 21 (Judge Weeramantry dissenting).

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tralia's international obligations *vis-à-vis* Portugal with respect to the disputed territory, not upon those of the absent third party.[43]

Admittedly, a finding that Australia had infringed Portugal's rights by entering into a bilateral treaty with Indonesia would inevitably raise the question of Indonesia's rights to enter into the same Treaty, but the ICJ had not allowed such concerns to frustrate proceedings in the *Nauru* case. In that case (which was decided comparatively shortly before *East Timor* and after proceedings in the latter case had commenced before the ICJ), the ICJ held that the test is not merely one of the sameness of subject matter, but also whether in relation to the same subject matter the ICJ is making a judicial determination of the responsibility of a non-party State. In that case the ICJ held, perhaps surprisingly, that the interests of the United Kingdom and New Zealand did not form the very subject matter of the case, since Australia's responsibility towards Nauru could be determined separately from that of its co-trustee States. The ICJ emphasised the "very special role" in the active administration of Nauru that Australia had played and which had not been shared by its two partners. Nevertheless, it remains difficult to envisage how a finding of Australian liability would not have implied the joint liability of these other States, or at the very least required them to distinguish their legal situation. In *Nauru* the ICJ had stressed that a determination of the responsibility of the United Kingdom and New Zealand was not a "prerequisite" to a finding with respect to Australia, whereas in *East Timor* the legality of the Indonesian invasion was a prerequisite to a determination whether Australia had infringed Portugal's rights. Nevertheless, the ICJ noted Australia's acceptance of the fact that the United Nations has named Portugal as the administering power of East Timor.[44] What the ICJ declined to do was determine the legal consequences of this acceptance as between Portugal and Australia, without reference to the interests of Indonesia.

The authority of *Monetary Gold* is also lessened by the fact that it had not been applied or extended in any subsequent case until *East Timor*. In *Military and Paramilitary Activities In and Against Nicaragua* the ICJ cautioned against any undue extensions of the doctrine, saying that it (*Monetary Gold*) "probably represent[s] the limit of the power of the Court to refuse to exercise its jurisdiction".[45] It refused to extend the doctrine even where its judgment might impinge upon a third party's right to individual self-defence (El Salvador in the *Nicaragua* case). Especially after the *Nauru* decision, the present case extends the *Monetary Gold* third-party principle and correspondingly diminishes again the scope of the ICJ's jurisdiction.

This narrowing of the ICJ's jurisdiction occurred where the underlying claims of another absent third party (the people of East Timor) were accepted by the ICJ as appertaining to violations of obligations owed *erga omnes*. The Court emphasised that: "Portugal's assertion that the right of peoples to self-determination, as it

43. Similarly in the *Libya/Malta* case the ICJ limited its determination of the maritime boundary to the areas outside the interest of the third party, Italy: *Case Concerning the Continental Shelf* (*Libya Arab Jamahiriya/Malta*) (merits) I.C.J. Rep. 1985, 3.

44. I.C.J. Rep. 1995, para.21.

45. *Military and Paramilitary Activities In and Against Nicaragua* I.C.J. Rep. 1984, 431.

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evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable."[46]

In *Monetary Gold* the third party's right lay in its ownership of property. In *Nauru* the ICJ did not allow third-party concerns to block judicial consideration of the proper administration of a trusteeship territory in accordance with the UN Charter, Chapter 11. The Charter's formulation of the obligations owed to the inhabitants of non-self-governing territories as a "sacred trust" in which their interests were paramount extended the relationship beyond that of the immediately affected parties to one of international concern.[47] The ICJ's refusal to expand the absent-third-party principle to protect the United Kingdom and New Zealand from potential claims of joint liability appeared to acknowledge this wider interest.[48] That case was a welcome move away from the formalism of the *South West Africa* cases where procedural restrictions had prevented consideration of the substantive obligations with respect to the fulfilment of the obligations of the mandate.[49] *East Timor* too concerned substantive issues of the rights of peoples within a non-self-governing territory, as raised by Portugal. They could not be presented directly where they touched upon the competing claims of Indonesia, precisely because of *Monetary Gold*, but the joining of argument on jurisdiction, admissibility and merits meant that the ICJ was necessarily made aware of them. The ICJ avoided the question of third-party obligations in the face of an alleged violation of an obligation owed *erga omnes* by upholding Indonesia's implicit right to deny the ICJ jurisdiction.

The Statute of the ICJ makes no reference to jurisdictional requirements with respect to third parties. There has been considerable uncertainty as to whether a State requesting intervention under Article 62 must establish a jurisdictional link with the case as formulated by the parties, as well as satisfying the criteria of that Article. In the *Land, Island and Maritime Frontier Dispute* the Chamber upheld Nicaragua's request to intervene in the absence of any such jurisdictional link, but denied it party status.[50] Assuming the Full Court adopts this decision of the Chamber, a third party can successfully request intervention without establishing jurisdiction, but if it chooses not to intervene can also deny the ICJ jurisdiction as between the parties.

Judge Weeramantry indicated what he saw as the logical consequences of the majority's decision: the ICJ would have no jurisdiction in any case where a third party's wrongdoing must be established as a prerequisite to a claim or a defence, even if this leads to an absurd, unreasonable or manifestly unjust result. He gave some examples of the potential application of this rule:

46. I.C.J. Rep. 1995, para.29.

47. UN Charter, Art.73. Cf. *Namibia (South West Africa)* case, *supra* n.24.

48. On 13 Aug. 1993 the case was discontinued as a consequence of a settlement between Nauru and Australia: Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice Concerning Certain Phosphate Lands in Nauru, 10 Aug. 1993, rep. (1993) 32 I.L.M. 1471.

49. *South West Africa Cases* (second phase) I.C.J. Rep. 1966, 4.

50. *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras; Nicaragua intervening*) I.C.J. Rep. 1992, paras.421–424.

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> A and B enter into a mutual defence pact. C commits an act of aggression gainst A and B breaches the terms of the pact. In a judicial action by A against B, A must first prove C's aggression. Since C is not before the Court the case must be dismissed; or
>
> C makes a raid against A and plunders a historic object belonging to A which ends up in B. A sues B for its recovery, but must first establish that it was wrongfully taken from A. In C's absence this cannot be done because it involves a wrongful act by C.

Judge Weeramantry found that the application of such a rule would produce manifest injustice in these examples and considered it difficult to imagine that such a rule "can truly represent a 'well-established' principle of international law". Another consequence of these examples,[51] and of the ruling of the majority, is, in the opinion of the commentator, also regrettable. Substantive law developments towards acceptance of the related concepts of obligations owed *erga omnes* and non-derogable norms of *jus cogens* have not been matched by procedural flexibility.[52] Indeed the ICJ explicitly distinguished between the *erga omnes* nature of the norm of self-determination and the jurisdictional requirement of consent.[53] Incorporation of such substantive principles, backed by procedures for implementation, would engender a communitarianism within international law that would move its development beyond the traditional bilateral framework. The basis for such communitarianism is a recognition of the "public order of the international community", which rests upon principles "the enforcement of which is of such vital importance for the international community as a whole that any unilateral action or any agreement which contravenes these principles can have no legal force".[54] In particular it would promote the concept of an objectively illegal act requiring responses from all other States. The famous *dicta* in *Barcelona Traction* appeared to give some support to this potential development:[55]

> an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis a vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

It must be conceded that *Barcelona Traction* did not consider the necessary procedural consequences of such a distinction. The *East Timor* case retreats from

51. I.C.J. Rep. 1995, 17 (Judge Weeramantry dissenting).

52. On the concept of *jus cogens* see Vienna Convention on the Law of Treaties 1969, U.N.T.S. 18.232, Arts.53 and 64; on the formulation by the ICJ of the concept of obligations owed *erga omnes*, see *Barcelona Traction Light and Power Company Case* (*Belgium* v. *Spain*) (new application) I.C.J. Rep. 1970, 3, 32 (order of 5 Feb.); see also the work of the International Law Commission on the concept of an international crime of State, Draft Articles on State Responsibility, Art.19, (1980) 2 Y.B.I.L.C., Pt.II, p.30 and the consequences of the commission of an illegal act. See further Chinkin, *op. cit. supra* n.2.

53. I.C.J. Rep. 1995, para.29.

54. H. Mosler, "The International Society as a Legal Community" (1974) 140(IV) Hag. Rec. 17, 34.

55. *Barcelona Traction*, *supra* n.52.

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any such radical restructuring of the hierarchy of international norms,[56] by favouring procedural requirements over substantive change. Ultimately the beneficiary is the alleged wrongdoer, Indonesia, which remains sheltered by its sovereignty.[57] In the words of Judge Skubiszewski:[58]

> it is all too positive for Australia, all too negative for Portugal: but it still remains to be seen whether the real winner is not a third State. This is an effect the Court wishes to avoid, for it might easily frustrate the Court's undoubted concern not to have any third State in the picture.

D. Standing

The ICJ's support for this, the principal ground argued by Australia for refusing jurisdiction, meant that it did not need to consider Australia's other arguments. In particular it did not have to determine whether Portugal had legal standing to make claims against Australia, on behalf of the people of East Timor, as opposed to its own claims. Judge Vereshchetin questioned the authority of Portugal to do this in the absence of evidence that it was indeed in accordance with their wishes. He pointed out that the consent of the East Timorese had not been obtained by Portugal before commencing the proceedings, any more than by Australia before entering into the Timor Gap Treaty.[59] In his view Portugal should have presented to the ICJ credible evidence that its application was supported by the Timorese, especially as its standing could not be assumed in the light of its long absence from the territory. This might have led the ICJ into an examination of Portugal's continuing legal interest in the territory as the formal administrative power, and into obtaining evidence from appropriate UN organs. Judge Vereshchetin considered the lack of any evidence as to the wishes of the people of East Timor to be another basis for finding the case to be inadmissible. This conclusion is a double-edged sword for the East Timorese: while it recognises the inappropriateness of proceedings that fail to accord a voice to those most immediately concerned, the outcome is to deny judicial consideration of their situation. It highlights the procedural inadequacies for non-State entities that are accorded substantive rights, but are denied competence to request intervention, or present the ICJ with information in their own name.[60] The priority accorded to States' interests before the ICJ is well demonstrated by the deference accorded to Indonesia's interests, compared with those of the people of East Timor. Although silent throughout, Indonesia's rights were guaranteed, while through a form of procedural imperialism the people of East Timor were given no opportunity to speak.

The ICJ also did not enter into any re-examination of its earlier refusal to allow standing through an *actio popularis* brought in the international public interest. Such an action would allow the procedural limitations of standing to be overcome

56. For a strong criticism of such a hierarchy see P. Weil, "Towards Relative Normativity in International Law?" (1983) 77 A.J.I.L. 413.

57. Potential Indonesian arguments such as its right to territorial integrity were of course not before the ICJ. Yet there is no doubt that the case has consolidated the Indonesian position; see Simpson, *op. cit. supra* n.19.

58. I.C.J. Rep. 1995, para.48 (Judge Skubiszewski dissenting).

59. I.C.J. Rep. 1995 (sep. op. Judge Vereshchetin).

60. ICJ Statute, Art.34(2) allows public international organisations to present information to the ICJ in contentious cases; see Chinkin, *op. cit. supra* n.2, at chap.10.

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where the rights alleged to have been violated are those held *erga omnes*, and would minimise the procedural disadvantages of lack of Statehood for claimants to self-determination.[61] Judge Vereshchetin's concerns that the people most directly affected should be able to make their own wishes known to the ICJ would seem to be equally applicable.

E. Self-Determination

Although the ICJ also did not have to rule upon the right of the people of East Timor to self-determination it explicitly asserted both this and its continued status as a non-self-governing territory in a number of separate paragraphs: "For the two parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination."[62]

The right to self-determination was assented to in argument by Australia, as well as by Portugal. This reaffirmation is especially important for, again in the words of Judge Skubiszewski: "East Timor has not been well served by the traditional interests and sovereignties of the strong, hence the importance of the Court's position on the Territory and the rights of its people."[63]

It is therefore disappointing that the *dicta* of the majority upholding the right to self-determination fail to indicate what level of political autonomy would constitute satisfaction of the right. This is especially pertinent in the light of the ICJ's apparent acceptance of Indonesia's continued presence in, and dealings on behalf of, the territory. The ICJ held that the fact that General Assembly and Security Council resolutions referred to Portugal as the administering power of East Timor did not establish an obligation "to treat exclusively with Portugal as regards the continental shelf of East Timor". Indeed the ICJ noted without comment that other States had entered into treaties with Indonesia with application to East Timor.[64]

The meaning of self-determination is being rethought in the post-colonial era, where it does not carry the presumption of independent Statehood.[65] Designs of models of government that provide for varying forms and degrees of political autonomy for particular groups have become increasingly important in the light of claims to self-determination by peoples wishing to secede from independent States, and by indigenous persons.[66] Yet the origins of the East Timorese claim lay in the process of decolonisation from Portuguese rule, not in a movement for secession—until the actions of Indonesia gave it this character. Further, the prin-

61. An *actio popularis* was denied in the *South West Africa Cases* (*Ethiopia* v. *South Africa*; *Liberia* v. *South Africa*) (second phase) I.C.J. Rep. 1966, 4 (judgment of 18 July).

62. I.C.J. Rep. 1995, para.31. See also paras.21, 29 and 37.

63. *Idem*, para.45 (Judge Skubiszewski dissenting).

64. *Idem*, para.32.

65. Even within the framework of decolonisation, self-determination could be achieved by other means, including integration or free association with an existing State, provided the decision is made as "the result of a free and voluntary choice by the Peoples of the Territory concerned expressed through informed and democratic processes": GA Res.1541(XV).

66. Draft Declaration on Discrimination Against Indigenous Peoples, accepted by the Working Group on Indigenous Populations, 1994 established by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Human Rights Commission in 1994, E/CN.4/Sub2/1993/29/Annex I.

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ciple of *uti possedetis* emphasised by the ICJ in the *Frontier Dispute* requires the boundaries of newly independent States to be those established by the former colonial powers.[67] There is no argument that East Timor under Portuguese rule was not part of the Dutch East Indies from which Indonesia claimed independence in 1947. In these circumstances guidance as to the meaning of self-determination for the East Timorese that could be used in political negotiations, as well as the obligations of third parties towards them, would have been helpful. So too would have been the views of the people of East Timor. In the words of Judge Vereshchetin: "the right of a people by definition, requires that the wishes of the people concerned at least be ascertained and taken into account by the Court". Throughout, the people of East Timor remained silent shadows: their aspirations were mediated through the claims of others, and presented in accordance with other peoples' agendas.

Admittedly, competence over an act of self-determination rests with the General Assembly Decolonisation Committee, and not with the ICJ, which could not have given any practical effect to any fuller pronouncements it might have made with respect to the process of obtaining self-determination. But this need not have prevented consideration of the substantive content of self-determination and the competences of an administering power. Portugal had not asked the ICJ to find the Timor Gap Treaty to be invalid and it did not have to decide whether the case was inadmissible on the grounds that no practical purpose could be served by the decision, an argument based primarily upon *Northern Cameroons*.[68]

As pointed out by the dissenting judges, the judgment also denies the principles of justice and equity that have become so significant in a number of cases concerning allocation of natural resources. Yet this case too concerns allocation of essential and non-renewable resources. It would seem that equity should be even more important where the would-be beneficiary is a non-self-governing territory without the capacity to protect its own resources and where those resources are part of its claim to economic self-determination. Indeed Australia had argued that East Timor would benefit economically from the Timor Gap Treaty "*provided Indonesia passes on an equitable part of the benefits to the people*".[69] This claim surely invited some response from the ICJ, but again would have required it to assert obligations for Indonesia. In the words of dissenting Judge Skubiszewski:[70]

> the Court should have resolved the dispute between Portugal and Australia not only on the basis of the rules governing jurisdiction and/or admissibility ... but also in accordance with the demands of justice. The dichotomy between law and justice is perennial. The Court has constantly been looking for an answer to it. The search becomes difficult, and the contours of the dichotomy gain in sharpness, when too narrow an interpretation of the principles governing competence restrains justice. I am, therefore, also concerned with the possibility that the judgment might revive past fears regarding a restrictive concept of the Court's function.

The Court's narrow ruling and formalism promote procedural requirements above the development of substantive principles. They also give priority to the

67. *Frontier Dispute* (*Burkina Faso* v. *Mali*) I.C.J. Rep. 1986, 662.
68. *Northern Cameroons* I.C.J. Rep. 1963, 27.
69. Rejoinder from Australia, 1 July 1993, para.160 (emphasis in the original).
70. I.C.J. Rep. 1995, para.43 (Judge Skubiszewski dissenting).

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interests of an individual third State above those of non-State claimants to the fundamental right of self-determination and of the international community in consideration of the meaning of that right. Although the bilateral framework within which the case had to be argued before the ICJ may have made this outcome inevitable, the deference accorded to the jurisdictional position of Indonesia seems likely to inhibit progressive development of international law in ways beneficial to the wider international community.

CHRISTINE CHINKIN*

NEW ZEALAND'S REQUEST FOR AN EXAMINATION OF THE SITUATION IN ACCORDANCE WITH PARAGRAPH 63 OF THE COURT'S JUDGMENT OF 20 DECEMBER 1974 IN THE NUCLEAR TESTS (*NEW ZEALAND* v. *FRANCE*) CASE, ORDER OF 22 SEPTEMBER 1995[1]

ON 21 August 1995 New Zealand submitted to the ICJ a request for an examination of the situation "arising out of a proposed action announced by France which will, if carried out, affect the basis of the Judgment rendered by the Court on 20 December 1974 in the *Nuclear Tests Case* (*New Zealand* v. *France*)". The event giving rise to the application was the announcement by France (13 June 1995) that it would conduct "a final series of eight nuclear weapons tests in the South Pacific starting in September 1995".[2]

The ICJ's judgment, made in the form of an order to dismiss the application, is unremarkable from the point of view of the reasoning adopted or its ultimate outcome. The case is, however, interesting for two main reasons. First, the ICJ was faced with a highly unusual form of proceedings which had no formal recognition in its Statute or in its practice. Although the ICJ ultimately dismissed the New Zealand application by twelve votes to three,[3] it did suggest that in certain circumstances it might legitimately be seised of a case notwithstanding the lack of any overt statutory basis. Second, it was a case in which, for the first time, the ICJ gave recognition to developments in the international law of the environment. Again, although it was not in a position to pronounce upon the substance of the dispute, elements of the law were considered extensively in the dissenting opinions of Judges Weeramantry and Palmer.

* University of Southampton. This comment is based upon a paper, "Rights but no Remedies", given to a seminar entitled "*Portugal* v. *Australia* in the International Court of Justice", sponsored by the Australian Branch International Law Association and the Australian Institute of International Affairs, in Sydney, Sept. 1995.

1. I.C.J. Rep. 1995, 288.

2. *Idem*, para.1.

3. In favour: Bedjaoui (President), Schwebel (Vice-President), Oda, Guillaume, Shahabuddeen, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins. Against: Weeramantry, Koroma, Sir Geoffrey Palmer (Judge *ad hoc*). Vice-President Schwebel and Judges Oda and Ranjeva appended declarations to the order, Judge Shahabuddeen appended a separate opinion, and Weeramantry, Koroma and Sir Geoffrey Palmer dissenting opinions.

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