

DISSENTING OPINION OF JUDGE SKUBISZEWSKI

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1. I am unable to concur with the Judgment of the Court which finds that

“it cannot in the present case exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic” (Judgment, para. 38).

Nor am I able to agree with the reasons upon which this finding is based.

2. On the other hand, I concur with the dismissal by the Court of Australia's objection that “there is in reality no dispute” between it and Portugal (Judgment, paras. 21 and 22). I agree with the Court when in the reasons for the Judgment it takes note that, “for the two Parties, the Territory of East Timor remains a non-self-governing territory and its people has the right to self-determination” (*ibid.*, para. 37). It might be said that the narrowing down of the relevancy of the status of the Territory and of the said right to the position of the Parties constitutes the absolute minimum. However, this approach is rather a matter of method than of substance: the Court itself subscribes to the continued legal existence of the status of East Timor as a non-self-governing territory and the applicability of the principle of self-determination. I am convinced that this restatement of the law by the Court is important for the stand Portugal took in the present proceedings and is taking beyond them. The restatement in the Judgment is significant for an equitable settlement of the question of East Timor. I think that everybody who has the purposes and the principles of the United Nations at heart must commend the Court for this dictum.

I. BASIC FACTS ON EAST TIMOR

3. In paragraphs 11-18 the Judgment succinctly recalls those facts on East Timor of which a knowledge is necessary for an understanding of the dispute. This Section is in the nature of a supplement to the description found in the Judgment.

Historical Background

4. The Portuguese and, subsequently, the Dutch navigators reached the island of Timor in the sixteenth century. In the process of colonial conquest the eastern part of the island was subjected to Portuguese and the western part to Dutch sovereignty. The boundary was delimited in 1859 by virtue of a Treaty concluded by the two States. The Convention and Declaration of 1893 and another Convention of 1904 also dealt with the frontier. In 1914 the Netherlands and Portugal were parties to an arbitration concerning part of the boundary. In 1941-1942 Dutch and

Australian forces entered Portuguese Timor to defend it against Japanese invasion. They were not successful and the island remained under Japanese occupation until the end the Second World War. The Portuguese authorities then came back to East Timor. On the other hand, following Indonesia's independence and recognition as a State, Dutch sovereignty over western Timor was terminated and the area became part of Indonesian territory.

*Portuguese Constitutional Law and Policies
Relating to its Colonies, Including East Timor,
Prior to the Democratic Revolution of 1974*

5. Under Portuguese constitutional law East Timor was a colony or dependency of Portugal and, consequently, part of Portuguese territory. It was described either as a "colony" or "overseas province". The Constitution of 1933 chose the latter term. There was a legal concept in it: these areas would be part of the Unitary State of Portugal and their populations part of the Portuguese nation. At that time the Head of State defined the constitutional position in the following words: "the overseas provinces are already independent through the independence of the Nation as a whole" (Memorial, para. 1.07). But the Constitution maintained the notion of the "parent country", which concept was in formal contradiction to the interpretation quoted. Thus the constitutional law of Portugal excluded self-determination by colonial peoples and, *eo ipso*, prevented the acquisition of independence by the colonies. Article 1 of the Constitution of 1933 prohibited alienation of any part of national territory; East Timor, together with all the other colonies, was a constituent element of that territory. Consequently, when admitted to the United Nations (1955), Portugal opposed the application of Chapter XI of the Charter to its overseas possessions, including East Timor. For a few years the Government in Lisbon succeeded in stopping the Organization from subjecting the Portuguese colonies to the régime of that Chapter, but since 1960 East Timor has been classified by the United Nations as a non-self-governing territory (General Assembly resolution 1542 (XV)).

6. In 1971 the overseas provinces were categorized, in Portuguese law, as "regions possessing political and administrative autonomy, able to assume the name of States" (Memorial, para. 1.07). However, this new classification did not bring about any change either in the treatment of East Timor (and the other colonies) in the internal affairs of the State or in the Portuguese attitude towards the application of Chapter XI of the Charter. Moreover, how could it, once they remained part of the Unitary State? The breakthrough came three years later with the introduction of democracy in Portugal.

Action by the United Nations Prior to 1974

7. The United Nations was at pains to bring about, in regard to the Portuguese colonies, a state of affairs that would conform to the Charter.

8. In resolution 180 (1963), the Security Council called upon Portugal to implement "the immediate recognition of the right of the peoples of the Territories under its administration to self-determination and independence" (para. 5 (a)) and affirmed that

"the policies of Portugal in claiming the Territories under its administration as 'overseas territories' and as integral parts of metropolitan Portugal [were] contrary to the principles of the Charter and the relevant resolutions of the General Assembly and of the Security Council" (para. 2).

The Council repeated its calls and affirmations in resolutions 183 (1963) and 218 (1965). In resolution 312 (1972), the Security Council reaffirmed "the inalienable right of the peoples of Angola, Mozambique and Guinea (Bissau) to self-determination and independence" and recognized "the legitimacy of their struggle to achieve that right" (para. 1). The same position is reflected by Council resolution 322 (1972) and by General Assembly resolutions 2270 (XXII), 2395 (XXIII) and 2507 (XXIV).

9. The United Nations also decided to take steps which went further than mere calls and affirmations. In resolution 180 (1963) the Security Council requested that

"all States should refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the peoples of the Territories under its administration, and take all measures to prevent the sale and supply of arms and military equipment for this purpose to the Portuguese Government" (para. 6).

Similar requests and calls were made in Security Council resolutions 218 (1965) and 312 (1972) as well as in General Assembly resolutions 2270 (XXII), 2395 (XXIII) and 2507 (XXIV). In resolution 2507 (XXIV) the General Assembly further called upon all States, United Nations specialized agencies and other international organizations to "increase their moral and material assistance to the peoples of the Territories under Portuguese domination who are struggling for their freedom and independence" (para. 11).

Change in Portugal's Stand (1974)

10. It was not surprising that the Armed Forces Movement (MFA) which triggered off the Democratic Revolution of 25 April 1974 (known as the "Carnation Revolution"), laid emphasis on a political solution of the colonial problem, in contradistinction to military action. The colonial

war which pre-1974 Portugal waged in Africa (viz., in Angola, Guinea-Bissau and Mozambique) was the direct cause of the Revolution. The first Provisional Government spoke of self-determination of the colonies. That policy found expression in decree-law 203/74. Another legislative act, viz., Constitutional Law 7/74 provides in Article 1 that

“the solution to the overseas wars is political and not military . . . [and] implies, in accordance with the United Nations Charter, the recognition by Portugal of the right of the peoples to self-determination”

and in Article 2 that

“the recognition of the right to self-determination, with all that it implies, includes the acceptance of the independence of the overseas territories and exemption from the corresponding part of Article 1 of the Political Constitution of 1933”.

11. By resolution 3294 (XXIX) the United Nations General Assembly welcomed the new policy of Portugal. That policy conformed to the Charter.

12. Constitutional Law 7/75 reaffirmed “the right of the people of Timor to self-determination . . . in conformity with the relevant resolutions of the United Nations Organization . . .” (Art. 1). It may be added that Article 307 of the Portuguese Constitution of 1976 safeguarded East Timor’s “right to independence”, while Article 293 of the Constitution of 1989 (now in force) is broader as it refers to “the right to self-determination and independence”.

*Developments in East Timor 1974-1975,
Including Indonesian Invasion and Occupation*

13. In contrast with other Portuguese colonies there was, in East Timor, no liberation movement or armed struggle, though there were sporadic riots or other manifestations of unrest. In 1974 three political associations were formed: the União Democrática Timorese (UDT) which first supported gradual autonomy, and subsequently the granting of independence after a period of association with Portugal, but finally opted for union with Indonesia; the Frente Revolucionária de Timor-Leste Independente (FRETILIN; this movement initially bore a different name), which advocated independence; and the Associação Popular Democrática Timorese (APODETI) which favoured integration with Indonesia. Later, the UDT joined a group of pro-Indonesian parties collectively known as the Anti-Communist Movement (MAC).

14. In 1975 Portugal engaged in consultations with these organizations on the future of the Territory. The choice was between independence, integration into a State other than Portugal (which in practice meant

Indonesia), or association with Portugal. The Government in Lisbon made preparations for a general election on the island. The plan was to set up a Popular Assembly. In the meantime local elections took place. But immediately following them the UDT launched a coup d'état. The FRETILIN responded by staging a counter-coup. The capital of the Territory, Dili, found itself in the hands of the FRETILIN. The fighting involved the various political movements. The Portuguese authorities emphasized that they did not side with any of them. For reasons of safety the authorities left the capital on 26-27 August 1975 and established themselves on the island of Atauro which was part of the Territory.

15. While the East Timorese political organizations continued to pursue their conflicting policies regarding the Territory's future, Portugal made preparations for further talks with and among them. But the situation became yet more complex when in November 1975 the MAC proclaimed the integration of East Timor with Indonesia and on 28 November 1975 the FRETILIN, for its part, proclaimed the Democratic Republic of East Timor (RDTL). The United Nations did not regard these proclamations as implementing East Timor's right to self-determination (in 1984 the FRETILIN itself abandoned its position on the alleged existence of the RDTL).

16. The situation was under discussion in the United Nations General Assembly when, on 7 December 1975, Indonesian armed forces invaded East Timor and occupied it. On 8 December 1975 the Portuguese authorities left the Territory.

Reaction by the United Nations

17. In paragraphs 14-16 the Judgment describes the stand taken by the United Nations, in particular in the light of the resolutions adopted by the Security Council (1975-1976) and the General Assembly (1975-1982) after Indonesian invasion and occupation. I shall limit myself to a few additional points.

18. First, apart from calling upon "the Government of Indonesia to withdraw without delay all its forces from the Territory" the Security Council also deplored "the intervention" of these forces in East Timor and expressed its grave concern "at the deterioration of the situation in East Timor", including "the loss of life" there (resolution 384 (1975), seventh, eighth and ninth preambular paragraphs; that resolution was subsequently recalled in resolution 389 (1976)). Equally, the General Assembly "[s]trongly deplore[d] the military intervention" (resolution 3485 (XXX), para. 4). In its subsequent resolution (31/53, para. 4) the Assembly reiterated the same strong regret in view of "the persistent refusal of the Government of Indonesia to comply with the provisions" of the foregoing resolutions. The Assembly reaffirmed this attitude in its resolutions 32/34 (para. 2) and 33/39 (para. 2). The Assembly was also "[d]eeply con-

cerned at the critical situation in the Territory” (later described as the “continuing critical situation”) resulting from the intervention and, as stated in subsequent resolutions, from “the persistent refusal on the part of the Government of Indonesia to comply with the provisions of the resolutions of the General Assembly and the Security Council” (resolutions cited and resolution 33/39).

19. Second, in 1980 the General Assembly welcomed “the diplomatic initiative taken by the Government of Portugal as a first step towards the free exercise by the people of East Timor of their right to self-determination and independence” (resolution 35/27, para. 3). In 1981 the Assembly noted

“the initiative taken by the Government of Portugal, as stated in the communiqué of the Council of Ministers of Portugal issued on 12 September 1980, and invite[d] 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, in accordance with General Assembly resolution 1514 (XV), and to report to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples on the progress of its initiative” (resolution 36/50, para. 4).

It may be observed that there is a link between the efforts of Portugal and the institution of the present Geneva “consultations” conducted under the auspices of the Secretary-General of the United Nations with “all parties directly concerned” (resolution 37/30, para. 1), namely “Portugal, as the administering Power, and the representatives of the East Timorese people, as well as Indonesia” (resolution 36/50, para. 3).

20. Third, as long as these “consultations” continue, there is practically no room or need for any of the principal political organs of the United Nations to vote on any resolution on East Timor.

21. Fourth, the Judgment enumerates those United Nations resolutions “which did not specifically refer to Portugal as the administering Power” but which, at the same time, “recalled another resolution or other resolutions which so referred to it” (Judgment, para. 15). Thus such non-reference is without significance. It may be added that the silence of three resolutions is more apparent than real. For they speak of statements by Portugal; now these statements were made by it solely in its capacity as administering Power (Security Council resolution 389 (1976); General Assembly resolutions 31/53 and 32/34). In effect, only one resolution, viz., General Assembly resolution 33/39 of 1978, makes no allusion to Portugal. Nevertheless it recalls resolutions which contain a reference to Portugal.

22. Fifth, the wording of the resolutions referred to in paragraphs 17-21 above is silent on human rights. However, in its resolutions (1975-1982) the General Assembly points to the principles of the Charter and of the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV)). Some of these principles specifically protect human rights. Each year the Assembly stated that it had examined the relevant chapter of the report of the Committee of Twenty-Four. Again, concern with human rights in the colonies has always been part of the work of that organ. In resolution 37/30 the Assembly took note of both the report by the Secretary-General and of resolution 1982/20 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The name of the Sub-Commission speaks for itself. Thus the human rights factor is also present, albeit indirectly, and it is relevant to the evaluation of the East Timor situation. There is also a direct link: the 1993 resolution of the Commission on Human Rights on the violation of human rights and fundamental freedoms in East Timor (United Nations document E/CN.4/1993/L.81/Rev.1).

Attitude towards Indonesian Rule in East Timor

23. On 31 May 1976 a Popular Assembly meeting in the East Timorese capital Dili under Indonesian occupation petitioned Indonesia for integration (United Nations document S/12097, Ann. II). Official observers from India, Indonesia, Iran, Malaysia, New Zealand, Nigeria, Saudi Arabia and Thailand were present. In the reports on these events there were references to the "wishes of the people" which were subsequently "verified" by a fact-finding team from the National Parliament of Indonesia. Some foreign diplomatic observers accompanied that team. The United Nations was not represented during any of these activities. The Indonesian Parliament incorporated East Timor into Indonesia on 16 July 1976. Under Indonesian law East Timor became a part of the territory of Indonesia as that country's twenty-seventh province.

24. The United Nations clearly refused and still continues to refuse to acknowledge the situation created in East Timor by Indonesian invasion, occupation and annexation. In 1976, in resolution 31/53, paragraph 5, the General Assembly

"Rejects 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."

A similar rejection is found in paragraph 3 of resolution 32/34.

25. The Judgment points out that Australia recognized the incorporation of East Timor into Indonesia (Judgment, para. 17).

26. Other States have also granted their recognition, in one way or another, sometimes *de facto* only and without committing themselves to confirming that self-determination took place. According to information in the Counter-Memorial and Rejoinder of Australia (paras. 175 and 45-48, respectively), they include, in alphabetical order, Bangladesh, India, Iran, Iraq, Jordan, Malaysia, Morocco, Papua New Guinea, Philippines, Singapore, Suriname, Sweden, Thailand and the United States of America. I have not listed all the States referred to by Australia as "accepting the incorporation of East Timor" (Counter-Memorial, title of paragraph 175) or recognizing the "reality of Indonesian control" (Rejoinder, para. 44). The reason for the omission of some States (included by Australia) is that, having examined their statements, I doubt whether they could be classified under the rubric of recognition (e.g., New Zealand, Rejoinder, para. 48). And what is more, there is room for hesitation with regard to some of the States enumerated above. In all, the group of States which granted recognition is small.

27. Whether territorial clauses in some of the tax treaties concluded by various other States with Indonesia imply recognition of the latter's sovereignty over East Timor is considered in paragraph 122 below.

Timor Gap Treaty

28. Submissions (2) to (5) presented by Portugal (Judgment, para. 10) assert several claims in connection with the conclusion by Australia of that Treaty.

29. Australian-Indonesian Agreements of 18 May 1971 and 9 October 1972 on their respective rights to the continental shelf in the areas of the Arafura and Timor Seas left outside the delimitation the shelf facing the coast of East Timor. Thus a kind of gap was left in the delimitation of the continental shelf in those Seas, the "Timor Gap". This name was soon extended to the whole area between East Timor and Australia. The lines recorded by these Agreements identify the whole boundary of the continental shelf between Australia and Indonesia. No boundary was established in the area between Australia and East Timor. In the opinion of Portugal (Memorial, para. 2.01)

"the 1971 and 1972 Agreements, and particularly the latter, signify an acknowledgment by Australia that the question of rights over the continental shelf between territories whose coasts face one another and the question of the 'frontal' delimitation of the shelf in the area referred to as the Timor Gap, in other words, in the area opposite

East Timor, was a matter for Australia and this Territory alone. Moreover, such an acknowledgment is fully borne out by the contacts established between Australia and Portugal, between 1970 and 1974, concerning the formal opening of negotiations for the delimitation of the shelf in the area in question, as well as by the dispute which arose between them as a result, among other things, of the concession granted by Portugal to the Oceanic Exploration Company Ltd.”

30. The attitude of Australia changed after Indonesia took over actual control of East Timor. In 1979 Australia and Indonesia started negotiations concerning the exploration, exploitation and delimitation of the continental shelf in the area of the Timor Gap. The two States agreed not to fish in an area which included the Timor Gap (Memorandum of Understanding of 1981). Pending the delimitation of the continental shelf in the Timor Gap they signed, on 11 December 1989, the Treaty on the Zone of Cooperation in an area between the Indonesian Province of East Timor and northern Australia (which was to be known as the Timor Gap Treaty). This Zone serves to enable the exploration and exploitation of the petroleum resources of the continental shelf in the Timor Gap. The “Zone of Cooperation”, covering some 67,800 km², is divided into three “areas”: Area A in the centre (the largest, at approximately 62,000 km²), Area B in the south and Area C in the north. Areas B and C are areas of exploration, exploitation and jurisdiction of Australia and Indonesia, respectively. However, each State is entitled to certain notifications on the other Area and to part of the revenue collected there. Area A is destined for joint exploration, exploitation and jurisdiction. For this purpose, the two States have set up a bilateral Joint Authority under the control of a bilateral Ministerial Council.

31. Since 1985, in its capacity of administering Power, Portugal has been protesting to Australia first against the latter’s negotiations with Indonesia and subsequently against the conclusion of the Treaty itself. Australia has excluded any negotiations with Portugal on the Timor Gap.

32. The available information points to very rich oil and natural gas deposits in the Timor Gap area.

II. EXISTENCE OF THE DISPUTE

33. While I dissent from the Court’s decision on jurisdiction, and this is the heart of the matter, I obviously concur with the Court on the issue of the existence of a dispute between the Parties. Hence in this Section my opinion is not a dissenting but a separate one.

The Dispute before the Court

34. The Court rightly dismisses Australia's objection that in this case there is no "dispute" between itself and Portugal (Judgment, para. 22).

35. Clarification whether there is a dispute is, obviously, the first step. In the absence of a dispute the questions of jurisdiction and admissibility would, by definition, not arise. Australia has introduced the distinction between the "alleged" dispute and the "real" dispute (Counter-Memorial, paras. 4-17) and has asserted the "abstract and unreal character of the 'dispute' presented by Portugal" (Rejoinder, para. 34). Australia has occasionally put the actual word itself in quotation-marks (as exemplified by the preceding reference) and has used the phrase "if there is a dispute" (Counter-Memorial, para. 2). However, the purported non-existence of the dispute has not been presented in any systematic or exhaustive manner. The Respondent State did not seem to go to the lengths of definitely rejecting any notion of a dispute between itself and the Applicant State. It devoted much attention to arguing the inadmissibility of the claims, which fact implies the existence of a dispute.

36. The Court recalls its jurisprudence and that of its predecessor (Judgment, para. 22). Let me quote Judge Sir Gerald Fitzmaurice. Sharing the views expressed by Judge Morelli in the *South West Africa* cases, *Preliminary Objections, Judgment (I.C.J. Reports 1962, pp. 566-568)* the learned Judge defined the minimum required to establish the existence of "a dispute capable of engaging the judicial function of the Court":

"This minimum is that the one party should be making, or should have made, a complaint, claim, or protest about an act, omission or course of conduct, present or past, of the other party, which the latter refutes, rejects, or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded."

Quoting the definition of a legal dispute given by the United Kingdom (which, as he put it, he "slightly emend[ed]") the learned Judge stated:

"there exists, properly speaking, a legal dispute (such as a court of law can take account of, and which will engage its judicial function), only if its outcome or *result, in the form of a decision of the Court*, is capable of affecting the *legal* interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to

a still subsisting legal situation" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, pp. 109 and 110, respectively).

37. A perusal of the Application instituting proceedings and of the pleadings shows that the dispute submitted to the Court fulfils the criteria of the foregoing definitions. The case of *East Timor* is a dispute which falls under Article 36, paragraph 2, of the Court's Statute. The dispute is a legal one within the meaning of that provision and the Court's practice.

38. From any vantage point, including (it seems) that of the East Timorese people, the dispute brought before the Court is a different one from a potential or existing dispute between Portugal and Indonesia, even though some questions at issue are or may be identical.

The Question before the Political Organs

39. The specific dispute before the Court should not be confused or identified with the broader problem which in the United Nations bore the name "The Question of Territories under Portuguese Administration" (General Assembly) or that of "The Situation in Timor" (Security Council) and is now called "The Question of East Timor". By using in its resolutions the expressions "all interested parties" (resolution 36/50) and "all parties directly concerned" (resolution 37/30) — and these expressions cover Indonesia — the General Assembly identified those concerned with the "Question of East Timor", and not the parties to a future Court case, whatever its ramifications. The "Question of East Timor" involves the United Nations, Portugal, the representatives of the East Timorese people and Indonesia. But this does not mean that according to the General Assembly resolutions the settlement of any issue concerning East Timor must always include all these participants, and especially Indonesia, and that the consultations are the only road to a solution. The holding of consultations among the interested parties does not exclude the recourse to other means of settlement. A specific dispute embracing, as parties to it, only one of the States taking part in the consultations and a third State is not by definition artificial. Certainly it is not so with regard to Australia. Among the countries recognizing the incorporation of East Timor into Indonesia Australia went furthest in the consequences of its act of recognition: Australia concluded the Timor Gap Treaty, which deals with East Timorese interests regarding continental shelf and maritime resources. This is a domain of the highest importance to any State or to a non-State territorial entity such as East Timor.

III. JURISDICTION, ADMISSIBILITY, PROPRIETY

A. *Jurisdiction*

40. As indicated in paragraph 1, I dissent from the Court's finding on jurisdiction and from the reasons behind this finding. I assume that what the Court means is that it is without jurisdiction to decide the case. It is true that the Court uses different words, saying that "it cannot . . . exercise the jurisdiction conferred upon it" (Judgment, para. 38). The Court arrives at this conclusion after having examined "Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia" (Judgment, para. 23). In the written pleadings Australia presented this objection under the rubric of inadmissibility, but the submissions referred, first of all, to lack of jurisdiction and only then to inadmissibility (Rejoinder, para. 288). In its final submissions Australia took the same position: "the Court should . . . adjudge and declare that the Court lacks jurisdiction to decide the Portuguese claims or that the Portuguese claims are inadmissible" (CR 95/15, p. 56, Mr. Griffith, Agent and Counsel; Judgment, para. 10).

41. According to the Judgment (paras. 33 and 34) the reason for not exercising jurisdiction in this case is the impossibility for the Court to adjudicate on the lawfulness of Indonesia's conduct without its consent. Such adjudication is, in the opinion of the Court, a prerequisite for deciding on the alleged responsibility of Australia. The Judgment relies on the decision in *Monetary Gold Removed from Rome in 1943* (*I.C.J. Reports 1954*, p. 19). Consequently, in explaining my dissent I concentrate on the significance to be ascribed to Indonesia's absence from the proceedings in the present case and on the meaning and relevance of *Monetary Gold*. But at the outset I discuss the broader ramifications of the issue of jurisdiction and the special problem with regard to the first submission of Portugal.

Law and justice

42. Undoubtedly, as Dr. Shabtai Rosenne has put it, the Court possesses "a measure of discretion . . . to decline to decide a case"; but it should be "sparingly used"¹.

43. With respect, I submit that the Court should have resolved the dispute between Portugal and Australia not only on the basis of the rules governing jurisdiction and/or admissibility (these rules have to be applied), but also in accordance with the demands of justice. The dichotomy

¹ *The Law and Practice of the International Court*, 2nd rev. ed., 1985, p. 305.

between law and justice is perennial. The Court has constantly been looking for an answer to it. The search for a solution 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 problem cannot be reduced to legal correctness alone. This is especially so whenever the Court is confronted with certain basic elements of the constitution of the organization and with certain fundamental principles of international law. There is a real interest in maintaining and strengthening the Court's role in what Judge Sette Camara described as "the institutionalization of the rule of law among nations"¹.

44. A few years ago President Bedjaoui wrote that "it is through an awareness of the lines of force of [international] society, and of their articulations, that we can gain a better understanding . . . of [international law's] possible future conquests". In the opinion of the President the present phase of international law is that of a transition "[f]rom a law of co-ordination to a law of finalities". And the learned commentator states that "one of the essential finalities" is development, "true development, of a kind which will restore dignity to [the] peoples [of 'new States'] and put an end to relationships of domination"².

45. Does the Judgment give sufficient expression to the law so understood? The subject-matter of the dispute and its wider ramifications would justify the adoption of the President's approach. 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 (para. 2 above). But that position would be of more consequence if the holding was not silent on self-determination and on the status of the Territory. It is a telling silence, because it is coupled with a quasi-total rejection of the Portuguese claims. Was the Court not too cautious?

46. And yet, I think, this Court has had its great moments and was most faithful to its function when, without abandoning the domain of positive law, it remained in touch with the great currents of contemporary development. A court of justice need not be and, indeed, should not be an exponent of the law-making opinion of "yesterday" or still worse — to use Albert V. Dicey's expression — "the opinion of the day before yesterday"³. The Court should and can look ahead. Otherwise there would not be decisions such as the one in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*.

47. I think that what Judge *ad hoc* Lauterpacht said in the case con-

¹ José Sette-Camara, "Methods of Obligatory Settlement of Disputes", in M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, 1991, p. 542.

² M. Bedjaoui, General Introduction, *op cit.*, pp. 1, 14 and 15, respectively.

³ *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 1905, pp. 32 and 367.

cerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* is applicable to the present case:

“the Court should [not] approach it with anything other than its traditional impartiality and firm adherence to legal standards. At the same time, the circumstances call for a high degree of understanding of, and sensitivity to, the situation and must exclude any narrow or overly technical approach to the problems involved. While the demands of legal principle cannot be ignored, it has to be recalled that the rigid maintenance of principle is not an end in itself but only an element — albeit one of the greatest importance — in the constructive application of law to the needs of the ultimate beneficiaries of the legal system, individuals no less than the political structures in which they are organized.” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, I.C.J. Reports 1993*, p. 408, para. 3.)

48. There is a certain lack of balance in the *dispositif*: 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.

Portugal’s first submission

49. For all these reasons, I think that the Court should deal with the first submission of Portugal. In this submission Portugal requests the Court

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

50. The heart of the matter is that the Court cannot limit itself to saying that it has no jurisdiction in questions pertaining to the Timor Gap Treaty. The substance of the case is broader and goes deeper than that Treaty. In a nutshell, the Court should deal extensively with the principles covered by the first submission of Portugal. The present treatment of them in the reasons, though important, is too short. It is also insufficient in the sense that the subject, in my view, belongs equally to the *dispositif*.

51. Though the Court says that its “conclusion applies to all the claims” (para. 35) the Judgment does not actually deal with the first sub-

mission. Nor was its admissibility questioned. Consequently, one should apply the rule repeated in the *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case* that "it is the duty of the Court . . . to reply to the questions as stated in the final submissions of the parties . . ." (*I.C.J. Reports 1950*, p. 402)¹. In the present case there is no conflict between that duty and judicial self-restraint, if the latter were to arise at all, which I do not think it would.

52. In this connection it is convenient to include a word of comment on the observation that, during the proceedings, both Parties invoked the interests of the East Timorese people, but they presented us with little or no evidence of what the actual wishes of that people were. Be this as it may, I think that the Court can base itself on certain elementary assumptions: the interests of the people are enhanced when recourse is made to peaceful mechanisms, not to military intervention; when there is free choice, not incorporation into another State brought about essentially by the use of force; when the active participation of the people is guaranteed, in contradistinction to arrangements arrived at by some States alone with the exclusion of the people and/or the United Nations Member who accepted "the sacred trust" under Chapter XI of the Charter. The Court could have examined these and related problems without changing its present holding on lack of competence with regard to Portuguese submissions (2) to (5). For these problems are part of self-determination. They belong also to submission (1). To reiterate, it is not clear to me why the Judgment preferred to remain silent on that submission.

53. The statements (in the reasons for the Judgment) on the status of East Timor and on self-determination might have been elaborated upon. The status of non-self-government obviously implies the "integrity" of the Territory. Here the Judgment limits itself to quoting the Security Council resolutions (para. 31). There is nothing on the application of the right of self-determination to the present situation of the East Timorese people and on the view of each Party regarding the implementation of that right. The Judgment is silent on permanent sovereignty over natural wealth and resources. The Parties differ on the position of Portugal: another issue to be resolved by the Court. There is a lot that is in dispute between the Parties under the first submission, irrespective of the Timor Gap Treaty. The first submission cannot be reduced to the issue of treaty-making power, especially regarding the delimitation of maritime areas.

¹ The omitted part of the rule speaks of the duty "to abstain from deciding points not included in those submissions". The danger of infringing upon this rule does not arise in view of the general attitude of abstention and caution on the part of the Court in this case. Nor, it is submitted, does this opinion go beyond this rule when suggesting the broadening of the Judgment.

54. The first submission of Portugal is couched in such terms that by addressing the merits of it the Court runs no danger of dealing with Indonesia's rights, duties or position. The rule of consent (repeated in *Monetary Gold*) will be fully observed.

55. There is no justification for Indonesia to see in the Judgment an implicit legalization or legitimization of the annexation of East Timor. Nonetheless, I am concerned with the present operative clause, where there is no reference to the principles enumerated in the first submission. It should be emphasized that this submission differs considerably from the other ones ((2)-(5)). The latter centre on the Timor Gap Treaty and problems of responsibility, the former asks the Court to state the law and the duty of Australia to respect that law. What could be the difficulty in accepting that submission, wholly or in part?

56. I am prepared to agree with the proposition that the granting of the first submission constitutes the juridical (and also logical) prerequisite to the consideration and possible granting of the subsequent submissions. But not vice-versa. The link does not work the other way. The first submission can stand autonomously. The Court can and in fact, in its practice, did construe the submissions of the Parties. The Court could take up the first submission and resolve the relevant issue without going into the remaining claims.

57. The Court is not merely an organ of States which has the function of adjudicating upon disputes between those of them willing to bestow upon it jurisdiction and to submit to that jurisdiction. The Court is primarily the "principal judicial organ of the United Nations". It is thus part of an international structure. Its judicial function, as defined in Chapter II of its Statute and especially in Article 36, must be exercised in accordance with the purposes and principles of the Organization. The Court has been contributing to the elucidation and growth of United Nations law. This case has created an opportunity for the continuation of this task. "The Question of East Timor" is still being dealt with by the political organs of the United Nations. Once regularly seised (hence the importance of elucidating Portugal's *locus standi*), the Court has its role to play, provided its independence and the limits of its participation in the activities of the Organization are respected. None of these requirements would be threatened if the Court decided to take up the first submission. This submission is indeed separable from the issue of the Timor Gap Treaty. Portugal's first submission is no abuse of the Court.

58. To sum up, the operative clause of the Judgment could contain the following findings:

- (1) The United Nations has continued to recognize the status of Portugal as administering Power of East Timor. Consequently, Portugal has the capacity to act before the Court in this case on behalf of East Timor.

- (2) The status of the Territory of East Timor as non-self-governing, and the right of the people of East Timor to self-determination, including its right to permanent sovereignty over wealth and natural resources, which are recognized by the United Nations, require observance by all Members of the United Nations. The Court takes note that in these proceedings Australia has placed on record that it regards East Timor as a non-self-governing territory and that it acknowledges the right of its people to self-determination.

Distinction between involvement of interests and determination of rights or duties

59. I shall start by recalling the distinction between, on the one hand, a legal interest or interests of a third State (here Indonesia) being possibly or actually involved in, or affected by, the case (but no more than that) and, on the other hand, the ruling by the Court on such an interest or interests. In the latter hypothesis the legal interest or interests “would not only be affected by a decision, but would form the very subject-matter of the decision” (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32), and that decision (i.e., the decision on the responsibility of the third State) would become “a prerequisite” for the determination of the claim (cf. *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55; *ibid.*, p. 296, Judge Shahabuddeen, separate opinion). The present case merely “affects” or in a different manner “involves” an interest or interests of Indonesia. The rule of consent, as embodied in Article 36 of the Statute, is maintained; had the Court assumed jurisdiction, it would not, and could not, pass on any rights and/or duties of Indonesia. That country is, in particular, protected by Article 59 of the Statute, whatever the possible broader effects of the Judgment.

60. The nature, extent or degree of the involvement of the legally protected interests, including the rights and duties, of a third State differ from case to case. The Court must see whether it can decide on the claim without ruling on the interests of a third State. The involvement of these interests cannot simply be equated with the determination of the rights and/or duties of a third State by the Court, or with any determination concerning that State’s responsibility. If a decision on the claim can be separated from adjudicating with regard to a State which is not party to the litigation, the Court has jurisdiction on that claim. It is submitted that this is the position in the triangle Portugal-Australia-Indonesia. Here the said separation is not only possible, but already exists. Portugal did not put at issue the legal interests of a third State, i.e., Indonesia. The Court has jurisdiction.

61. In *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, the Chamber of the Court left no doubt

as to the relevance of the distinction indicated in paragraphs 59 and 60 above. The Chamber interpreted the finding in the *Monetary Gold* case:

“while the presence in the Statute of Article 62 might impliedly authorize continuance of the proceedings in the absence of a State whose ‘interests of a legal nature’ might be ‘affected’, this did not justify continuance of proceedings in the absence of a State whose international responsibility would be ‘the very subject-matter of the decision’. The Court did not need to decide what the position would have been had Albania applied for permission to intervene under Article 62.” (*I.C.J. Reports 1990*, pp. 115-116, para. 55.)

The Chamber then proceeded to explore whether there existed, on the part of the third State (Nicaragua), an “interest of a legal nature which [might] be affected by the decision”, so as to justify an intervention, and then whether that interest might in fact form “the very subject-matter of the decision” (*ibid.*, p. 116, para. 56). The Chamber found that there existed, on the part of that third State, “an interest of a legal nature which [might] be affected by its decision”; but it came to the conclusion that “that interest would not be the ‘very subject-matter of the decision’ in the way that the interests of Albania were in the case concerning the *Monetary Gold Removed from Rome in 1943*” (*ibid.*, p. 122, paras. 72 and 73).

62. The criterion of the “very subject-matter of the decision” is conclusive in establishing the Court’s jurisdiction when the interests of a third State are or seem to be at stake. As the Court said: “The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction”; otherwise, I think, there would be doubt whether the Court was fulfilling its task and mission: “it must be open to the Court, *and indeed its duty*, to give the fullest decision it may in the circumstances of each case, unless of course” the factor of the subject-matter of the decision intervenes (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, p. 25, para. 40; emphasis added). The duty to fulfil its function is a primary one for the Court. Hence in its previous decisions the Court has adopted a reasonable interpretation of the *Monetary Gold* rule. One might even say: an interpretation which is not broad. This stance was adopted by the Court in *Certain Phosphate Lands in Nauru, Preliminary Objections*. In this case, where Nauru was claimant, the Court found that it had jurisdiction in spite of the fact that the Respondent State (Australia) was only one of three States (the other two being New Zealand and the United Kingdom) who jointly constituted the Administering Authority of Nauru under the Trusteeship Agreement. A decision on Australia’s duties in that capacity would inevitably and at the same time be a decision on the identical duties of the remaining two States. In other words, though the “subject-

matter” was the same, the Court could exercise its jurisdiction with regard to only one component State of the tripartite Administering Authority. The Court said:

“In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court’s decision on Nauru’s claim against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.” (*I.C.J. Reports 1992*, pp. 261-262, para. 55.)

63. There is room for applying the concept inherent in the foregoing dictum in *Certain Phosphate Lands in Nauru* to the present case: no finding on Indonesia creates a necessary “basis” for the jurisdiction with regard to Portuguese claims against Australia, nor is there any necessary (“logical”, *ibid.*, p. 261, para. 55) link between the findings regarding Indonesia and those concerning Australia (the element of “a prerequisite”).

64. But our problem is not limited to what results from applying the test of the distinction made by the *Monetary Gold* rule. The practice of the Court amply shows that it is competent to decide bilateral disputes on territorial titles (including titles to submarine areas), the delimitation of boundaries and the status of a territory or territorial entity. The latter subject is present in the case under consideration. What the Court decides on these and similar issues may be asserted with regard to all States. In spite of the dispute being one between two States such a decision of the Court is effective *erga omnes*. In the practice of the Court (and the same is true of the Permanent Court) the said category or categories of subject-matter did not, and could not, constitute a bar to the exercise of the jurisdiction in a dispute between two States only, though the effect of the decision went beyond the bilateral relationship. The latter circumstance was not regarded by the Court as preventing it from rendering judgments. Examples are the *Fisheries, Minquiers and Ecrehos* and *Temple of Preah Vihear* cases, as well as the decisions on various continental shelves.

65. Jurisdiction (and/or admissibility) cannot be questioned (as was done in the present case) because the bringing of a claim against a State may have consequences which in fact go beyond that claim as would the decision of the Court were it to find in favour of the Claimant State. In similar or identical circumstances another State can reasonably expect a similar or identical decision by the Court. But here we are moving on the plane of a factual situation or factual possibilities. Such factual conse-

quences of a claim and of a judgment in which the Court found in favour of the Claimant State are something other than that claim itself. These facts or factual possibilities do not turn the claim into a moot one, nor do they make a third State the only object of the claim. The claims put forward by Portugal are real and are addressed to the Respondent State; the non-participation in the proceedings of a third State (Indonesia) does not deprive the Court of jurisdiction, nor does it make the Portuguese claims inadmissible.

66. For in the present case the separation of the rights and/or duties of Australia and Indonesia is both possible and necessary. A judgment on the merits should and could have given expression to this separation. In this case the vital issues to be settled (to borrow an expression from the *Monetary Gold* case (*I.C.J. Reports 1954*, p. 33), do not concern the international responsibility of a third State, i.e., Indonesia.

67. The case, there can be no doubt, involves or affects some interests of Indonesia. But this fact is not a bar to the Court's jurisdiction, nor does it make the various claims inadmissible. The Court's practice, referred to above, corroborates this conclusion. The interests of Indonesia are sufficiently protected by the Statute of the Court. They do not constitute "the very subject-matter of the decision". Hence the *Monetary Gold* rule excluding jurisdiction cannot be invoked in the present case: its premise is lacking in the *East Timor* controversy.

United Nations law and the question whether Indonesia is a necessary party

68. Contrary to what has been contended by Australia, Portugal has not chosen the "wrong opponent". In other words, this is the issue of the "prerequisite" in the sense of *Monetary Gold* (paras. 59 and 63 above). But in the present proceedings Portugal asserts claims against Australia only, and not against any absent State, i.e., Indonesia. The Court is not required to exercise jurisdiction over any such State. Australia is not the "wrong" opponent in the present proceedings, while Indonesia is not an opponent at all in them. The whole distinction in this case is both fictitious and not a genuine one.

69. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the United States asserted that the adjudication of Nicaragua's claim would necessarily implicate the rights and obligations of some other Central American States, viz., Costa Rica, El Salvador and Honduras. While rejecting this assertion and pointing out that it had "in principle" merely to decide upon the submissions of the Applicant State, the Court said:

"There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in

parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings.” (*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.)

Mutatis mutandis, this dictum is helpful in resolving the issue of the “right” or “wrong” opponent. Let me explain that I regard the rule stated as sound. I am not expressing any opinion on whether there was room for its application in the case concerning *Military and Paramilitary Activities in and against Nicaragua* or whether it was correctly applied in the light of the existing evidence.

70. The basis for the decision on jurisdiction and admissibility and, further, on the merits is the status of East Timor. Under the law of the United Nations, East Timor was and, in spite of its incorporation into Indonesia, remains a non-self-governing territory in the sense of Chapter XI of the United Nations Charter. This issue, fundamental to the case, is governed by the law of the United Nations. Unless the Court finds that the Organization acted *ultra vires*, the Court’s opinion cannot diverge from that law and from the implementation of the rules of that law in the practice of the Organization, especially as reflected in the relevant resolutions of the General Assembly and the Security Council¹.

71. Under the law and in the practice of the Organization the implementation of Chapter XI of the Charter is part and parcel of the functions of the General Assembly. In at least some issues falling under that Chapter Member States are not confronted with mere recommendations: the Assembly is competent to make binding determinations, including determinations on the continued classification of an area as a non-self-governing territory or on the administering Power.

72. The Court accepts that in some matters the General Assembly has the power to adopt binding resolutions. By resolution 2145 (XXI) the Assembly terminated the Mandate for South West Africa and stated that the Republic of South Africa had “no other right to administer the Territory”. This was not a recommendation. In the *Namibia* case, the Court explained:

“it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative

¹ The Memorial speaks of “*une donnée*” (a “given”) of which “the Court will only need to take note”. This “*donnée*” is constituted by the “affirmations” that “the people of East Timor enjoy the right of self-determination, that the Territory of East Timor is a non-self-governing Territory, and lastly, that Portugal is *de jure* the administering Power thereof” (para. 3.02).

design” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *I.C.J. Reports 1971*, p. 50, para. 105).

73. It is not clear why in the present case the Court seems in fact to look at the resolutions of the Assembly on colonial issues from a different angle. The Court neither denies nor confirms their binding force. The Court says:

“Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as ‘givens’ which constitute a sufficient basis for determining the dispute between the Parties.” (Judgment, para. 32.)

But in one, rather significant, instance the Court has recourse to a “given”: it follows the United Nations resolutions and qualifies Indonesian action against and in East Timor as intervention (Judgment, paras. 13 and 14).

74. The words, quoted in paragraph 73 above, raise another question. Do they concern jurisdiction or merits? The whole paragraph 32 of the Judgment seems to deal with the merits. At the same time the Court reduces this paragraph to consideration of the problem of “an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor”. An examination limited to that problem obviously does not put the Court in a position enabling it to bring forward all the arguments which would justify its negative conclusion on the “givens”. The latter constitute a wider problem, not restricted to the issue of who can treat with whom. Also, the conclusion at the end of the first subparagraph of paragraph 31 of the Judgment resolves an issue of merits.

75. The Court links the continuity of the status of the Territory, including the relevance of the principle of self-determination, first of all to the Parties’ position (Judgment, paras. 31 and 37). But it is rather difficult to define the Court’s stance because in the following passages the resolutions regain their autonomous significance. It is not clear why the Court, after having surveyed the United Nations acts, does not take up the problem of “the legal implications that flow from the reference to Portugal as the administering Power in those texts” (Judgment, para. 31); instead, the Court concentrates on treaty-making. That question is not fully examined and yet the Court expresses some doubts regarding Portugal’s claim to exclusivity in concluding agreements in and on behalf of East Timor. Again, incidentally, a problem of merits.

76. The Court’s stance commented upon in paragraphs 74-75 is in some contrast with the Orders in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident*

at *Lockerbie (I.C.J. Reports 1992, pp. 3 and 114)*. These Orders respect the decision of the Security Council on the merits of the two cases, though that decision was adopted after the close of the hearings (*ibid.*, pp. 14-15, paras. 34-42; and pp. 125-127, paras. 37-45) and the law, while leaving the Court some freedom of choice, could be understood as pointing to a different solution (see *ibid.*, dissenting opinions, pp. 33 *et seq.* and 143 *et seq.*). In regard to East Timor, the subject-matter is regulated by law and by resolutions which make binding determinations. One would think that the Court cannot avoid applying the relevant rules. But the Court prefers to maintain a certain distance.

77. By taking cognizance of the status of East Timor in United Nations law, resolutions included, the Court would not be passing upon any Indonesian territorial or other rights, duties, jurisdiction or powers. In this case the Court would not require any proof of that status on the part of Portugal. Nor is any finding on Indonesian conduct and position necessary to adjudication upon Portuguese claims. Interestingly enough, the Judgment qualifies the Indonesian action as intervention (paras. 13 and 14). Will this have its effects? Intervention (particularly military) is by definition unlawful and produces no rights or title until there is a decision by the United Nations validating its consequences or until there is universal recognition.

78. The law of the United Nations is binding on all Member States. The status of a territory, in view of its objective nature, is opposable not only to each of them but also to non-Members. This applies to the non-self-governing Territory of East Timor. Also, the right of the East Timor-ese people to freely determine their future and the position of the administering Power are opposable to every State (and this includes Australia). Therefore, in this context, it is erroneous to regard Australia as the "wrong" respondent and Indonesia as the "true" one. The present case does not justify such a contradistinction. Nor, as the Court explains, is it "relevant whether the 'real dispute' is between Portugal and Indonesia rather than Portugal and Australia" (Judgment, para. 22). There is, no doubt, more than one dispute with regard to East Timor, but in this case the Court has been seised of a specific dispute which qualifies for being decided on the merits.

79. There is yet another reason why the presence of Indonesia, a country which has an interest in the case (although it made no request concerning its possible intervention), is not a precondition of adjudication. If the contrary were true, the Court would practically be barred from deciding whenever the application of the *erga omnes* rule or rules and the opposability of the legal situation so created were at stake; the Court's practice does not corroborate such a limitation (paras. 64 and 65 above). The presence of a third State in the proceedings before the Court (whether as party or intervening) is not necessary for that organ to apply and inter-

pret the United Nations resolutions, in particular to take note of their effect.

80. Australia has presented itself to the Court as simply a third State which has responded to a situation brought about by Portugal and Indonesia. Without entering into the issue of the treatment of these two States on the same level of causation, the Court can examine and determine the lawfulness of Australia's response to the said situation. There is no essential requirement that, in the judicial proceedings devoted to that examination and determination, Indonesia be a party. It is enough for Portugal to prove its claim against Australia.

81. The conclusion is that Indonesia is not a necessary party, i.e., one without whose participation the Court would be prevented by its Statute from entertaining the Application. Nor is Indonesia the "true" party¹. The dispute brought before the Court is one different from a potential or existing dispute between Portugal and Indonesia, even though some questions at issue are or may be identical.

Subject-matter of the decision

82. The rights of Indonesia could not, need not and would not constitute any "formal" or "actual" subject-matter of the decision on the merits. The claims submitted by Portugal are distinct from the alleged rights, duties and powers of Indonesia. There is no difficulty in separating the subject-matter of the present case from that of a theoretical case between Portugal and Indonesia. The fact of the incorporation of East Timor is (or would be) the same for the two cases, the existing one and the imaginary one. But the rights and duties of Indonesia and Australia are not mutually interdependent; the contents of some of them are identical, yet this is irrelevant to the problem whether a specific State (Australia) conformed to rules of law governing East Timor. That problem can be decided by the Court without linking its decision to any prior or simultaneous finding on the conduct of another State (Indonesia) in the same matter. To exercise jurisdiction with regard to Australia it is not necessary for the Court to decide on the question of Indonesian duties concerning the Territory.

83. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court said:

¹ By using in its resolutions the expressions "all interested parties" (resolution 36/50) and "all parties directly concerned" (resolution 37/30) — and these expressions cover Indonesia — the General Assembly identified the interested States with regard to the "Question of East Timor", and not with regard to a future Court case, whatever its ramifications. For a contrary view, see Counter-Memorial, paras. 214 and 215.

“There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in 1943*, 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). 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. . . . [O]ther States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention.” (*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.)

Without there being any need to express an opinion on the issue of third States in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (see para. 69 above), the approach exemplified by this dictum should have been followed in this case.

84. In the present case the Judgment in *Monetary Gold* is fully relevant as a statement of the non-controversial rule (or principle) of the consensual basis of jurisdiction. The Court has been corroborating this rule since the very outset of its activity (cf. *Corfu Channel case, Preliminary Objection, Judgment, I.C.J. Reports 1948*, p. 27). It is a rule of its Statute, which fact is decisive. Further, there can be no doubt regarding the relevance of the distinction between legal interests of a third State which are merely affected by the decision and its legal interests which “would form the very subject-matter” of the decision (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32). But the whole structure of the problem in *Monetary Gold* is different from that in *East Timor*. In the former the determination whether one country (Italy) was entitled to receive the property of another (Albanian gold) depended on a prior determination whether the other State (Albania) had committed an internationally wrongful act against the former (Italy) and was under an obligation to pay compensation to it. In the *East Timor* case the position of Indonesia cannot be compared to that of Albania in *Monetary Gold*. In the present case we are dealing with the duties which the countries have by virtue of their obligation to respect the status of East Timor as determined by the United Nations. These duties are not interconnected: the obligation of any Member State of the United Nations to abide by the law governing East Timor is autonomous. In *Monetary Gold* one claim could be adjudicated only after a different claim to compensation was first granted. That is not the construction of the case now before the Court. With respect, I have the impression that

in this case the Court has gone beyond the limit of the operation of *Monetary Gold*.

85. Moreover, the rule of *Monetary Gold* is one governing jurisdiction, and not one preventing the Court from basing itself on determinations made by the Security Council or the General Assembly with regard to a dispute or a situation, including the position or conduct of another State. By taking account of such "external" determinations the Court is not making any finding of its own on the interests of a non-party to the proceedings. The Court, as already indicated (para. 70 above), cannot ignore the law of the United Nations as applied by the Organization's other principal organs provided they act within their Charter powers. Thus it is not Portugal which, before the Court, challenges Indonesia's occupation of East Timor, its position as the proper State to represent the interests of the Territory, and generally the conformity of its actions with the self-determination of the East Timorese people. The challenge came much earlier from the United Nations¹. By now taking judicial notice of the relevant United Nations decisions the Court does not adjudicate on any claims of Indonesia nor does it turn the interests of that country into the "very subject-matter of the dispute".

86. The Court is competent, and this is shown by several judgments and advisory opinions, to interpret and apply the resolutions of the Organization. The Court is competent to make findings on their lawfulness, in particular whether they were *intra vires*. This competence follows from its function as the principal judicial organ of the United Nations. The decisions of the Organization (in the broad sense which this notion has under the Charter provisions on voting) are subject to scrutiny by the Court with regard to their legality, validity and effect. The pronouncements of the Court on these matters involve the interests of all Member States or at any rate those which are the addressees of the relevant resolutions. Yet these pronouncements remain within the limits of *Monetary Gold*. By assessing the various United Nations resolutions on East Timor in relation to the rights and duties of Australia the Court would not be breaking the rule of the consensual basis of its jurisdiction.

87. The Court has always been sensitive regarding the limits of its jurisdiction. In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*,

¹ That challenge is decisive. The fact that Portugal does not challenge the lawfulness of Indonesia's acts does not make it obligatory for the Court to presume that these acts are lawful. There is no such presumption. For a contrary view, see Rejoinder, para. 94.

Application for Permission to Intervene, Judgment, the Court emphasized that “no conclusions or inferences may legitimately be drawn from [its] findings or [its] reasoning with respect to rights or claims of other States not parties to the case” (*I.C.J. Reports 1981*, p. 20, para. 35). Applied, as it was, in the quoted case to Malta, there is no doubt that this rule protects the interests of Indonesia in the present litigation.

88. One can also add that in all systems of law courts take judicial notice of matters of public knowledge. This category comprises, *inter alia*, historical events such as war, aggression, invasion and the incorporation of territory. Indonesia’s action in regard of East Timor falls under this heading. Taking account of such facts and drawing conclusions on their basis is not a usurpation of jurisdiction.

Indonesian control over East Timor

89. A decision on the legality of “the presence of Indonesia in East Timor” is not a prerequisite to a decision on Australia’s responsibility. That is the difference as compared with *Monetary Gold*, especially as interpreted in *Certain Phosphate Lands in Nauru* (paras. 59 and 62 above). But the said decision is implicit in the description of the Indonesian conduct as intervention (*Judgment*, paras. 13 and 14).

90. In the present case there it is not necessarily implied that the Court should determine the *status of Indonesia in East Timor*. The Court need only refer to the *status of East Timor* in the law of the United Nations and its implementing resolutions. It is on Australia’s own acts related to the latter status that Portugal rests its claim. It is also in that status alone that one would possibly find the answer to the question regarding which country is competent to conclude treaties concerning East Timorese interests. Contrary to what is stated in the Counter-Memorial (para. 212) the Court need not determine “the legal status of the Indonesian administration of East Timor at and since 11 December 1989, i.e., at the time of and since the making of the Timor Gap Treaty”. The Court needs only to say what, under United Nations law and resolutions, the status of East Timor in the relevant period was and now is. Nor is a “decision on Indonesia’s claim to sovereignty . . . a prerequisite to any finding of Australian responsibility” (*contra: ibid.*). Again, the key to the problem is the status of the Territory under United Nations norms. To declare how these norms define that status the Court need not make any finding concerning Indonesia.

91. The link between the claims which Portugal makes vis-à-vis Australia and the claims Portugal has or might have made elsewhere against

Indonesia (i.e., not before this Court) is of a factual nature. Both groups of claims concern the situation in East Timor. That link does not suffice to make the adjudication between Portugal and Australia dependent upon a prior or at least simultaneous decision on the (potential or existing) claims of Portugal against Indonesia. In contrast with the situation in the *Monetary Gold* case, the decision of the Court in the dispute between Portugal and Australia would not be based on the obligation and responsibility of Indonesia (cf. Judge Shahabuddeen in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, p. 297, separate opinion).

92. Australia's obligations resulting from the duty to respect the United Nations status of East Timor are identical with or similar to those of other Member States of the Organization. But that identity (or similarity) does not mean that Portugal needs to rely on this fact or that the Court must or needs to found its judgment on it. One might reiterate here what Judge Shahabuddeen said on the position of Australia in another case, viz., in *Certain Phosphate Lands in Nauru*:

“That others had the same obligation does not lessen the fact that Australia had the obligation. It is only with Australia's obligation that the Court is concerned.” (*I.C.J. Reports 1992*, pp. 296-297.)

The Portuguese Application is directed towards certain Australian acts and their conformity, or otherwise, with the United Nations status of East Timor, not towards the acts of Indonesia. In this case a decision on the submissions of the Applicant State would not constitute a determination of the responsibility of the non-party (Indonesia), with all the legally dispositive effects such a determination would or might carry.

Timor Gap Treaty

93. Let us begin by clarifying one point. The Court has no jurisdiction to make a finding on the invalidity of the Timor Gap Treaty: the Court must stop short of a determination to this effect. For the purpose of the present proceedings the Treaty remains valid. That validity prevents the Court from ordering any measures aimed at the non-performance of the Treaty. Its actual, possible or potential consequences of a harmful nature for the people of East Timor cannot be determined by the Court. A ruling on the validity, or otherwise, of the Treaty would require the participation of Indonesia in the present case. Both the Applicant and the Respondent (though in somewhat different contexts) quote the judgments of the Central American Court of Justice in *Costa Rica v. Nicaragua* (1916) and *El Salvador v. Nicaragua* (1917) (Counter-

Memorial, para. 189; Reply, paras. 7.21 and 7.22). The validity of the Timor Gap Treaty is not a subject of the dispute. Portugal does not request the Court to declare the Treaty invalid.

94. But a finding on the lawfulness of some unilateral acts of Australia leading to the conclusion of the Treaty or constituting its application is another matter. Juridically speaking the negotiation, conclusion and performance of a treaty are acts in law (expressions of the will or intention of a legal person). To be effective in law, they must conform to the legal rules governing them. Several of these acts are unilateral in contradistinction to the treaty itself. If a case involves the lawfulness or validity of any of these acts, and this is a "question of international law" under Article 36, paragraph 2, of the Statute, the Court is competent to review the said conformity and, consequently, decide on the lawfulness or validity of the act. Historically and sociologically speaking the negotiation, conclusion and performance of a treaty are facts. And various facts are also subject to judicial review the extent of that review depending on the law of the country or, in international relations where there is no central judiciary, on the particular provisions of treaty law.

95. The Court is competent to make a finding on whether any of the unilateral acts of Australia conducive to the conclusion, entry into force and application of the Timor Gap Treaty constituted an international wrong. By concentrating exclusively on such acts the Court in no way deals with any treaty-making acts of Indonesia. The Court remains within the limits of an assessment which is covered by its jurisdiction and which is admissible. The Court would fulfil its task by examining these acts in the light of Australia's duties under United Nations law and especially that body of its provisions which is being called the "law of decolonization".

96. In order to examine whether Australia's conduct leading to the conclusion of the Timor Gap Treaty was or was not wrongful, it is not necessary for the Court to determine the wrongfulness of Indonesia's control over East Timor. It is enough to test the Australian conduct against the duty Australia had and has to treat East Timor as a non-self-governing territory. While protecting its maritime rights and taking steps to preserve its natural resources, Australia had (in the circumstances) some obligations towards the Territory: it dealt not with the administering Power, but with Indonesia, a State which was not authorized by the United Nations to take over the administration of the Territory, and yet controlled it. Maritime and related interests of the Territory were also at stake, not only those of Australia. There is no question of equating the position of third States (one of them being Australia) to the responsibilities of States which, like Portugal, have been charged with the administration of a territory or territories under Chapter XI of the

Charter. But the non-administrators also have some duties. Did Australia fulfil them? This question does not trigger the *Monetary Gold* rule; the Court is competent to answer it.

B. Admissibility

General

97. Generally, the issue of admissibility has already been touched upon in some of the preceding paragraphs. In this case, before starting a discussion on admissibility, the Court had first to decide on its jurisdiction. In view of its conclusion, there was no room for considering admissibility. In the present case admissibility or otherwise can be resolved after the examination of the substance of the several claims submitted by Portugal. Indeed, Australia points to the inextricable link between the issue of admissibility and the merits (Counter-Memorial, para. 20).

98. It has already been noted that although it asked the Court to adjudge and declare that it lacked jurisdiction, Australia dealt with the case principally under the heading of admissibility, its “submissions on the merits [having] only a subsidiary character” (Counter-Memorial, para. 20; as to the admissibility, or rather inadmissibility, see *ibid.*, Part II, and Rejoinder, Part I).

99. The emphasis on admissibility or otherwise has not been lessened, let alone eliminated, by what Australia alleged on the non-existence of the dispute in the present case (paras. 34-38 above).

Applicant State's jus standi

100. The present case does not “involve direct harm to the legal rights of the plaintiff State in a context of delict”, but it is one in which the claim is grounded “either in a broad concept of legal interest or in special conditions which give the individual State *locus standi* in respect of legal interests of other entities”¹. East Timor is such an entity.

101. In this case there is a conflict of legal interests between Portugal and Australia. Several times during the proceedings Australia admitted that Portugal was one of the States concerned. That admission was made in order to contrast it with the capacity to appear before the Court in this case, which Australia denied. However, to have *jus standi* before the Court it is enough to show direct concern in the outcome of the case. Portugal has amply shown that it has a claim for the protection of its powers which serve the interests of the people of East Timor.

¹ Ian Brownlie, *Principles of Public International Law*, 4th ed., 1990, pp. 466-467.

102. It was said by a Co-Agent and counsel of Australia that "to have standing, Portugal must point to rights which it possesses" (CR 95/8, p. 80, Mr. Burmester). Portugal has standing because, in spite of all the factual changes in the area, it still remains the State which has responsibility for East Timor. This standing follows from the competence Portugal has in its capacity as administering Power. One of the basic elements of that competence is the maintenance and defence of the status of East Timor as a non-self-governing territory; this is the administering Power's duty. Portugal has the capacity to sue in defence of the right of the East Timorese people to self-determination. Portugal could also rely generally on the remaining attributes of its sovereignty over East Timor, such attributes being conducive to the fulfilment of the task under Chapter XI of the Charter. On the one hand, Portugal says that it does not raise any claim based on its own sovereign rights; in some contexts it even denies their existence (Memorial, paras. 3.08 and 5.41, and Reply, para. 4.57). On the other hand, Portugal invokes its "prerogatives in regard to sovereignty" (Reply, para. 4.54). At any rate, it is erroneous to argue that the departure from East Timor in 1975 of the Portuguese authorities resulted in bringing "to an end any capacity [Portugal] had to act as a coastal State in relation to the territory" (Counter-Memorial, para. 237). Such an opinion is contrary to both the law of belligerent or military occupation and the United Nations law on the position of the administering Power.

103. Portugal may be said not to have any interest of its own in the narrow sense of the term, i.e., a national interest, one of a myriad of interests which States have as individual members of the international community. However, Portugal received a "sacred trust" under Chapter XI of the Charter. It is taking care of interests which, it is true, are also its own, but primarily they are shared by all United Nations Members: the Members wish the tasks set down in Chapter XI to be accomplished. Australia also adopts the stance of favouring the implementation of Chapter XI. Yet there is a sharp difference between the two States on how to proceed in the complex question of East Timor and what is lawful in the circumstances. That is a matter which should have been decided by the Court. However, through its decision on jurisdiction, this distinguished Court barred itself from that possibility. Had this not been the case, the Judgment would have eliminated a number of uncertainties from the legal relations between the Parties and, more generally, some uncertainties regarding a non-self-governing territory which has been incorporated into a State without the consent of the United Nations. At any rate, it is clear that an actual controversy exists. What doubt could there be regarding the *locus standi*?

104. I think that Portugal meets the rigid criteria laid down by President Winiarski with regard to having "a subjective right, a real and existing individual interest which is legally protected" (*South West Africa*,

Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 455). In that case Ethiopia and Liberia asserted that they had “a legal interest in seeing to it through judicial process that the sacred trust of civilization created by the Mandate is not violated”. To this the learned Judge replied: “But such a legally protected interest has not been conferred on them by any international instrument . . .” (*Ibid.*, p. 456.) Portugal has the United Nations Charter behind it.

C. “Judicial Propriety”

General

105. There is no mention of the issue of propriety in the Judgment. But would it be going too far to say that, implicitly, the Court has admitted that at least entertaining this case was not, at the stage reached by the Court, contrary to “judicial propriety”? The Court might as well begin consideration of the case by examining the issue of propriety. For, as Judge Sir Gerald Fitzmaurice has pointed out, that issue

“is one which, if it arises, will exist irrespective of competence, and will make it unnecessary and undesirable for competence to be gone into, so that there will be no question of the Court deciding that it has jurisdiction but refusing to exercise it” (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 106, separate opinion).

The Charter does not provide any guidance as to the problem which legal disputes “politically speaking might be considered as *prima facie* suitable for judicial settlement . . .”¹ Here the question should be asked whether the political stratum and implications of the case (including those of a judgment on the merits) are of a nature to make the judicial process inappropriate.

106. Meanwhile it may be pointed out that Portugal “as administering Power” was called upon by the Security Council in its resolution 384 (1975) “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”. The reference to co-operation with the Organization does not exclude individual actions by Portugal, i.e., actions not co-ordinated with the United Nations, which are or can be related to the task of self-determination. Portugal’s Application instituting proceedings in the present case falls under this heading. General Assembly resolution 3485 (XXX) speaks of “the responsibility of the administering Power to undertake all efforts to create conditions enabling the people of Portuguese Timor to exercise freely their right to self-determination . . .”. The exercise of that responsibility, including the choice of means, is a matter to be decided by the administering Power acting alone or in conjunction with the United Nations.

¹ Cf. S. Rosenne, *The Law and Practice of the International Court*, 2nd rev. ed., 1985, p. 92.

107. In the present case the choice was between, on the one hand, entertaining the case upon the merits and, on the other, refusing to adjudicate. A policy of abstention does not seem a better solution. Considerations of public policy speak in favour of the pronouncement of the Court on the merits. Such a pronouncement is more likely to contribute to the settlement of the problems submitted to it. These problems, or at any rate some of them, are ripe for solution by the application of international law.

108. The legal components of a dispute resulting from the question of East Timor need not necessarily be submitted to the Court only by way of a request for an advisory opinion (as Australia asserted). Litigation is not excluded.

A justiciable dispute?

109. The resolution of the dispute between Portugal and Australia does not conflict with the Court's "duty to safeguard the judicial function" (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38). In other words, adjudication on the merits will be consistent with the Court's judicial function (cf. *ibid.*, p. 37). The present dispute is justiciable.

110. The written and oral pleadings amply show that there is, in this case, "an actual controversy involving a conflict of legal interests between the parties". By addressing itself to the submissions of Portugal the Court and its judgment will affect the legal rights and obligations of the Parties, "thus removing uncertainty from their legal relations". Consequently, the "essentials of the judicial function" could and, indeed, would be satisfied (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 34). In this case there is a legal dispute between the two Parties which the Court, if it wishes to be true to its function, cannot refuse to resolve. For a necessary consequence of the existence of any dispute, including the present one, is the party's (i.e., Portugal's) interest in securing a decision on the merits (here I am following the concept of dispute as explained by Judge Morelli, *ibid.*, p. 133, para. 3). Portugal has shown sufficient interest for the Court to consider the case. That interest persists, and the controversy between the two States has not yet come to an end.

111. In the question of East Timor there are points of interpretation and application of law where recourse to the Court is useful. These points are not abstract, they are not "an issue remote from reality" (to use the expression employed in *Northern Cameroons, I.C.J. Reports 1963*, p. 33, and referred to in the oral pleadings, CR 95/9, p. 27, para. 17, and CR 95/15, p. 51, para. 9, Professor Crawford; he expressed a contrary view). The pleadings have shown that there are legal issues between the Parties which the Court could resolve without the participation in the case of any other State (i.e., Indonesia). Even if it is taken for granted that "the underlying dispute is only suitable for resolution by negotiation" (Counter-Memorial, para. 316), it is not true that the dispute

submitted to the Court (which should be distinguished from the “underlying” one) is not suited to adjudication. Judge Sir Robert Jennings reminds us that

“it could usefully be more generally realized that the adjudication method is not necessarily an independent one and can very well be used as a complement to others such as negotiation”¹.

The learned Judge gave the example of the *North Sea Continental Shelf* cases, but that model is not exclusive.

112. One can also look at our problem from a somewhat different angle: there are disputes where the settlement does not constitute a single operation. The settlement is or becomes a process. Such is the nature of the question of East Timor. Adjudication is part of the process and there is no reason for eliminating it.

IV. THE TERRITORY OF EAST TIMOR

A. Status

113. “The Court recalls . . . that it has taken note in the present Judgment (paragraph 31) that, for the two Parties, the Territory of East Timor remains a non-self-governing territory . . .” (Judgment, para. 37). And so it is, one may conclude on the basis of the decision, for the Court. It is a matter of regret that this important affirmation did not find its place in the *dispositif*.

No change of status

114. Since 1960 East Timor has continually appeared and still appears on the United Nations list of non-self-governing territories. The United Nations maintains that status of East Timor. Only the Organization can bring about a change. Rejection of the status by the original sovereign Power; or the use of force by another country to gain control over the territory; or recognition by individual States of the factual consequences of the recourse to force — none of these unilateral acts can abolish or modify the status of non-self-government. That status has its basis in the law of the Organization and no unilateral act can prevail over that law.

115. It is true that over the years and in some respects, the language of the resolutions of the General Assembly has become less decisive and less definite and the majorities smaller. But this is a development of the political approach and the effect of the search for a solution through channels other than the Security Council or the General Assembly. The constitutional position under Chapter XI of the Charter has not changed. Nor

¹ “Comité restreint sur le règlement pacifique des différends. Note préliminaire”, Institute of International Law, *Yearbook*, Vol. 65, Part II, Session of Milan, 1993, Pedone, Paris, 1994, p. 281.

have the Geneva consultations under General Assembly resolution 37/30, currently in progress, brought about any modification of the Territory's status.

116. Obviously, we are confronted by certain facts which may be long-lived. Australia rightly maintained that the rejection of the United Nations status of the Territory by Portugal in the period 1955-1974 did not change the legal status of East Timor. It is therefore difficult to understand how, at the same time, Australia argues the effectiveness of the incorporation of East Timor into Indonesia, and in particular the contribution made to this effectiveness by acts of recognition of that incorporation. The status of East Timor in law has remained the same ever since Portugal became a Member of the Organization and the United Nations subsumed East Timor under Chapter XI of the Charter. It is a status defined by the law of the United Nations. Unilateral acts — by Portugal during the dictatorship period, and now by Indonesia since 1975 and by the few States which granted recognition — have had and continue to have no primacy over that law.

The position of Australia

117. In spite of various qualifications which Australia sometimes introduced in presenting this part of the case, it must be assumed, on the strength of its words, that it acknowledges that East Timor is still a non-self-governing territory. "Australia has never recognized the legality of Indonesia's original acquisition of the territory of East Timor" (Rejoinder, para. 224). It also refers to the change in the person of the State now in control of the non-self-governing territory (Indonesia taking the place of Portugal). This implies that, in this respect, the status (as such) of East Timor did not change. The Agent and counsel for Australia said:

"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.)

118. At the same time Australia does not seem to exclude that, in the meantime, the Territory's legal position might have become adjusted to the facts created by Indonesia. Has there been such an adjustment? The language of the Timor Gap Treaty and of some official statements (cf. paras. 127 and 140 below) can be perceived as supporting the concept of change, not of continuity. To be more specific, the position of Australia is ambivalent for three reasons.

119. First, there is the basic difficulty in reconciling Australia's recognition of Indonesian sovereignty with the continuing status of non-self-government, a difficulty all the greater since Indonesia denies the existence of that status. Does not recognition inevitably mean that Australia has consented to the Indonesian concept of what the Territory now is?

120. Second, another source of difficulty is doubts regarding the legal basis for an identical and equal treatment by Australia of the two countries (Portugal and Indonesia) as successive sovereigns of East Timor (see para. 117 above). Portugal's title to sovereignty is not comparable with Indonesia's claim. Since 1974 Portugal has conformed to the rule of the Friendly Relations Declaration¹.

121. Third, one must equally note a general tendency on the part of Australia to emphasize the significance of the fact that Portugal "has no governmental control" over East Timor and has no "territorial presence" there (CR 95/8, p. 79). I would not contend that such an assertion necessarily shows preference of fact over law, yet the tendency blurs the attitude of Australia on the status of the Territory, especially as Indonesia does not regard itself as a new "administering Power".

Recognition and non-recognition

122. It is convenient to dispose, at the outset, of the argument on the analogy between the Timor Gap Treaty and some of the treaties for the avoidance of double taxation concluded by Indonesia. Australia has drawn attention to these treaties (Counter-Memorial, Appendix C; Rejoinder, paras. 52-54; for the Portuguese view, see Reply, para. 6.14). The Court mentions in general terms (i.e., without indicating their category or subject) "treaties capable of application to East Timor but which do not include any reservation in regard to that Territory" (Judgment, para. 32). The Court does not make any explicit inference from these treaties but points to them in the context of treaty-making power, not of recognition. The latter point is made by Australia. That argument is misleading in the sense that no recognition can be implied from the tax treaties. They do not deal with territorial problems, and they do not refer explicitly to East Timor, but concern Indonesian territory under Indonesian legislation for tax purposes alone. This is an issue that could be regulated by the contracting parties without detracting from the posture of non-recognition (if it was adopted) or without entailing recognition. On

¹ "The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles."

the other hand, the Timor Gap Treaty refers to "the Indonesian Province of East Timor" and is based on the assumption of Indonesian sovereignty over that area, which sovereignty Australia has recognized.

123. Let me observe that in matters of violent changes resulting in the imposition of foreign rule or dominant foreign influence a longer perspective is necessary. Recent history has again shown that what for many years was regarded as almost permanent and immutable collapsed under our eyes — an outcome which the proponents of *Realpolitik* and of consent to accomplished facts did not foresee. We were told, in connection with East Timor, that "the realities of the situation would not be changed by our opposition to what had occurred" (the position of the United States, quoted in Rejoinder, para. 47). For the time being, that may be true. Yet we all know of instances where there was opposition and various "realities" proved to be less resistant to change than Governments might have thought.

124. In the present case the Court preferred not to consider the problem of the non-recognition of a situation, treaty or arrangement which came into being by means contrary to the prohibition of "the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations" (Art. 2, para. 4, of the Charter). However, when stating or confirming the principles relevant to the case this restraint is not the only possible posture.

125. The *policy* of non-recognition, which goes back to before the First World War, started to be transformed into an *obligation* of non-recognition in the thirties. Through the Stimson doctrine, the United States of America played a pioneering — and beneficial — role in this development¹. The rule or, as Sir Hersch Lauterpacht says², the principle of non-recognition now constitutes part of general international law. The rule may be said to be at present in the course of possibly reaching a stage when it would share in the nature of the principle of which it is a corollary, i.e., the principle of the non-use of force. In that hypothesis non-recognition would acquire the rank of a peremptory norm of that law (*jus cogens*). But that is a future development which is uncertain and has still to happen. The Friendly Relations Declaration³ correctly states the law on the subject: "No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

¹ R. Langner, *Seizure of Territory. The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice*, 1947.

² *Recognition in International Law*, 1947, Chap. XXI.

³ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. This Declaration is contained in the Annex to resolution 2625 (XXV) of the United Nations General Assembly. The rule figures in the section dealing with the prohibition of use of force.

Contrary to what has been asserted (Counter-Memorial, para. 365; Rejoinder, para. 74) the obligation not to recognize a situation created by the unlawful use of force does not arise only as a result of a decision by the Security Council ordering non-recognition. The rule is self-executory.

126. But apart from what has been said in paragraph 125 above, there is room for the view that the United Nations rejected the possibility of recognition. For the Security Council called upon "all States to respect the territorial integrity of East Timor" (resolutions 384 (1975) and 389 (1976), paragraph 1 in each of them) and the General Assembly also made a reference to East Timor's territorial integrity (resolution 3485 (XXX), para. 5; this resolution was reaffirmed by the Assembly in 1976-1978). What else can this mean but prohibition to do anything that would encroach upon the integrity of the Territory? Recognition of it as a province of Indonesia is contrary to the resolutions cited. The Assembly rejected the integration of East Timor into Indonesia (para. 24 above).

127. Yet Australia recognized Indonesia's sovereignty over East Timor; on this occasion it also questioned the legal character of the rule of non-recognition¹. Sometimes less precise language was used: it was said during the oral pleadings that Australia "recognized the presence of Indonesia in East Timor" (CR 95/8, p. 10, para. 3, Professor Pellet). Strictly speaking "presence" could mean less than "sovereignty".

¹ Senator Gareth Evans, Minister for Resources and Energy (as he then was), made the following statement in the Australian Senate on 20 March 1986:

"I make it plain that the legal status of this declaration [cited in footnote 3, p. 262, above], which is not a treaty in any sense, has long been very hotly contested. It is our understanding that there is no binding international legal obligation not to recognise the acquisition of territory that was acquired by force. In international law, the legality of the original acquisition of territory by a state must be distinguished from subsequent dealings between third states and the state acquiring new territory. It is the sovereign right of each state to determine what dealings it will have with states acquiring, by whatever means, new territory and to determine whether or not to recognise sovereignty over such a territory.

As the Prime Minister (Mr. Hawke) stated in the House on 22 August 1985, in an answer to Mr. Peacock, Australia has recognised Indonesia's sovereignty over East Timor since February 1979. Of course, that statement was accompanied by a recognition, again by Mr. Hawke which has been expressed by Government representatives on many occasions, of our concern at the way in which East Timor was incorporated. The recognition does not modify in any way the continuing concern at that historical fact.

Let me go on to say that it is perfectly consistent with Australia's recognition of Indonesia's sovereignty over East Timor to engage in negotiations with Indonesia now on the Timor Gap." (Reproduced in the Memorial, Annex III.28.)

128. The Australian justification was expressed in the following terms:

“As a practical matter, Australia could not have avoided the decision to recognize Indonesia [*sic*], and to negotiate with a view to making a treaty with it on the Timor Gap, if it was to secure and enjoy its sovereign rights there. There was no other State with which it could have negotiated and concluded an effective agreement. No arrangement with Portugal could have achieved Australia’s legitimate object, since Portugal did not control the area in question and there was not the slightest prospect that it would do so in the future.” (Counter-Memorial, para. 354.)

However, the problem cannot be reduced to “practical” considerations. They do not relieve the State of the duty of non-recognition. The argument, if put forward without any qualification, is unacceptable; admitted unconditionally, it could sap the foundation of any legal rule.

129. While recognition of States or Governments is still “a free act”, it is not so with regard to the irregular acquisition of territory: here the discretionary nature of the act has been changed by the rule on the prohibition of the threat or use of force.

130. As indicated above (para. 125) the rule of non-recognition operates in a self-executory way. To be operative it does not need to be repeated by the United Nations or other international organizations. Consequently, the absence of such direction on the part of the international organization in a particular instance does not relieve any State from the duty of non-recognition. Nor does the absence of “collective sanctions” have that effect. Australia espouses a contrary view (Counter-Memorial, paras. 355 and 356; and Rejoinder, para. 229).

131. The Court has not been asked to adjudicate or make a declaration on non-recognition in regard to the Indonesian control over East Timor. But let me restate the question: can the Court avoid this issue when it states certain principles? Non-recognition might protect or indeed does protect the rights to self-determination and to permanent sovereignty over natural resources. Any country has the corresponding duty to respect these rights and no act of recognition can release it from that duty. In other words, it might be necessary to consider whether there is any link between Australia’s attitude towards the Indonesian annexation and its duties with regard to East Timor. Such a determination would not amount to delivering any judgment on Indonesia, for the Court would limit itself to passing upon a unilateral act of Australia. That act, contrary to Australia’s view (Counter-Memorial, para. 350), means more than mere acknowledgment that Indonesia “is in effective control of the territory” while the recognizing Government is willing “to enter into dealings with that State or government in respect of the territory”.

Recognition leads to the validation of factual control over territory and to the establishment of corresponding rights.

132. The attitude of non-recognition may undergo a change by virtue of a collective decision of the international community. In law, there is a fundamental difference between such a decision and individual acts of recognition. Judge Sir Robert Jennings wrote of "some sort of collectivisation of the process, possibly through the United Nations itself . . ." ¹. But up till now nothing of the sort has happened with regard to East Timor. Nor is there any consolidation of the Indonesian "title" through other means.

133. The dichotomy between fact and law permeates this case. I have already touched upon one aspect of it in paragraph 123 above. In this opinion it is not possible to discuss generally the role of the factual element, of facts, as a source of rights, obligations and powers. But it would be too simple to dismiss the continued United Nations status of East Timor and of Portugal as being remote from the facts. Whenever it comes to an unlawful use of force, one should be careful not to blur the difference between facts and law, between the legal position and the factual configuration. Even in apparently hopeless situations respect for the law is called for. In such circumstances that respect should not mean taking an unrealistic posture. History gives us surprises. Contemporary history has shown that, in the vast area stretching from Berlin to Vladivostok, the so-called "realities", which more often than not consisted of crime and lawlessness on a massive scale, proved to be less real and less permanent than many assumed. In matters pertaining to military invasion, decolonization and self-determination, that peculiar brand of realism should be kept at a distance. And one cannot accept that Chapter XI disregards the problem of the legality of the administration of a non-self-governing territory.

B. Self-determination

"Essential principle"

134. The Court states that the principle of self-determination "is one of the essential principles of contemporary international law". The right of peoples to self-determination "has an *erga omnes* character". The Court describes the relevant assertion of Portugal as "irreproachable" (Judgment, para. 29). The Court also recalls that "it has taken note in the present Judgment (paragraph 31) that, for the two Parties, . . . [the] people [of East Timor] has the right to self-determination" (para. 37).

¹ *The Acquisition of Territory in International Law*, 1963, p. 61.

It is a matter of regret that these important statements have not been repeated in the operative clause of the Judgment.

135. In the opinion of Judge Bedjaoui, President of the Court, self-determination has, in the course of time, become “a primary principle from which other principles governing international society follow” (“un principe primaire, d’où découlent les autres principes qui régissent la société internationale”). It is part of *jus cogens*; consequently, the “international community could not remain indifferent to its respect” (“la communauté internationale ne pouvait pas rester indifférente à son respect”). States, both “individually and collectively”, have the duty to contribute to decolonization which has become a “matter for all” (“une affaire de tous”)¹. According to Judge Ranjeva “[t]he inalienability of the rights of peoples means that they have an imperative and absolute character that the whole international order must observe”². Judge Mbaye interprets self-determination in conjunction with “the principle of inviolability of borders”³. That link additionally emphasizes the incompatibility of the forcible incorporation of a non-self-governing territory with the requirement of self-determination.

136. By virtue of Chapter XI of the Charter the East Timorese right to self-determination is the focal point of the status of the Territory. This has been confirmed by several United Nations resolutions which have been adopted since the invasion of East Timor by Indonesia and since the incorporation of the Territory into that State.

137. The issue is not limited to the quadrilateral relationship (which today finds its expression in the Geneva consultations), that is, the people of East Timor, the United Nations, Portugal and Indonesia. In particular, the duty to comply with the principle of self-determination in regard to East Timor does not rest with Portugal and Indonesia alone. Depending on circumstances, other States may or will also have some obligations in this respect. By negotiating and concluding, and by beginning to implement the Timor Gap Treaty, Australia placed itself in such a position.

138. The Friendly Relations Declaration provides as follows:

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .”

¹ M. Bedjaoui, in J.-P. Cot and A. Pellet (eds.), *La Charte des Nations Unies*, 2nd ed., 1991, pp. 1082-1083.

² Raymond Ranjeva, “Peoples and National Liberation Movements”, in M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, 1991, p. 105, para. 16.

³ Kéba Mbaye, Introduction (to Part Four, “Human Rights and Rights of Peoples”), *ibid.*, p. 1055, para. 62.

Self-determination creates a responsibility not only for those who are directly concerned.

The position of Australia

139. Australia adheres to the principle of self-determination. In the pleadings Australia emphasized its acknowledgment of the right of the people of East Timor to self-determination.

140. However, some official Australian statements combine that broad general stance with a somewhat qualified approach regarding East Timor specifically. During the Senate debate on 14 November 1994 Senator Gareth Evans, Minister for Foreign Affairs, said:

“The self-determination that Australia talks about and wants to encourage is self-determination within the framework of Indonesian sovereignty. That is the implication of *de jure* recognition which the other side of Australian politics initiated in 1979 and which we subsequently endorsed when we came into office.

Self-determination in that context, and in the way in which that expression is being used a lot internationally these days, does mean genuine respect for different ethnicity and genuine respect for human rights claims of particular groups within larger national or State entities. That is the kind of thing we are talking about. In that context, some kind of special political autonomy or special status — of the kind, for example, that exists in Jogjakarta or Aceh — might be thought to be helpful in that larger process of reconciliation. It is not by itself enough to solve the whole problem but it is at least part of the answer. The other elements of the answer are those I have described, in particular the military drawdown as well as other measures being taken to respect local, religious and cultural sensitivities to a greater extent than has been the case so far.” (Senate, p. 2973.)

The reference to “self-determination within the framework of Indonesian sovereignty” should be noted, as well as “respect for different ethnicity”, “respect for human rights claims of particular groups”, and measures to be taken “to respect local, religious and cultural sensitivities” of the people of East Timor; also “political autonomy or special status” of a particular kind. These are important aims, entirely in line with a certain type of self-determination. But that statement does not fully meet the requirements of General Assembly resolution 1541 (XV). On 7 February 1995 the Foreign Minister explained “the framework of sovereignty”, indicating that:

“The situation is that before 1975 Australia recognized Portuguese sovereignty over East Timor while, at the same time, simulta-

neously recognizing the right to self-determination of the Timorese people. There is no difference between the situation then and now. A claim of a right to self-determination can exist with a recognition of sovereignty. We recognized Portuguese sovereignty then — and, in fact until 1979 before we formalized it — and since 1979 we have recognized Indonesian sovereignty, but we have also recognized right through that period the right to self-determination by the people of East Timor.” (Current Senate Hansard, Database, p. 572.)

This time the Minister referred to the whole gamut of solutions:

“[S]elf-determination can involve a number of quite different outcomes, including of course the emergence of an independent State, but also integration, or some form of association within or with another State, or a degree of autonomy within another State. I think that is important background.

In the case of East Timor, Australia recognizes that the people of East Timor do have a right of self-determination — to choose, in effect, how they are governed. This has been Australia’s position since before the events of 1975, and it has never been reversed. The United Nations, in relation to East Timor, has certainly recognized that there can be no solution to self-determination and related issues without the cooperation of the Indonesian government; . . .” (*Ibid.*)

Thus, in dealing with East Timor the statement adopts a narrower approach: self-determination is reduced to the choice of the form of government (“how they are governed”).

Erosion through acquiescence in accomplished facts

141. It may be observed that the parallelism represented by, on the one hand, recognition of sovereignty (no matter how its extension over a territory was achieved) and on the other hand by support (albeit declaratory) for self-determination cannot be assessed in the abstract. The present situation of East Timor is characterized by a lack of balance between these two factors. Recognition militates in favour of the permanency of incorporation, while self-determination is, in fact, suspended. Recognition has its petrifying impact. “[T]he question remains” said George H. Aldrich, Deputy Legal Adviser, United States Department of State, “what we are required to do if this right [of self-determination] is not observed as we might wish . . .” (quoted in Rejoinder, para. 47). The question is still with us. The United States, which recognized the incorporation, did not have an answer; “the prevailing factual situation” (i.e., Indonesian rule in East Timor) is for it “the basis” of any action (*ibid.*).

C. Administering Power

Administering Power as part of the status of the territory

142. Australia asserts that "Chapter XI of the Charter makes no reference to the concept of an 'administering Power'" (Rejoinder, para. 186). In its view the practice of the Organization "reveals that the expression 'administering Power', unlike the expression 'non-self-governing territory', has not been regarded by the United Nations as a term of art or as a reference to a particular juridical status" (*ibid.*, para. 185). This is not true. "Administering Power", a term which has been appearing in the United Nations resolutions for more than thirty years (since 1962), is a shorthand expression of the Charter phrase "Members of the United Nations which have or assume responsibilities for the administration of territories whose people have not yet attained a full measure of self-government" (Art. 73). Such a Member State, or administering Power, has a position which is part of the status of the non-self-governing territory. That position consists of powers, rights and duties as established by United Nations law and practice. Chapter XI contains the basic rules on the position of the administering Power. If it is said, and rightly so, and this is also the Australian stand, that "[t]he concept of 'non-self-governing territories' is derived from the United Nations Charter itself (see the title to Chapter XI), and is acknowledged to be a juridical status having legal consequences in international law" (Rejoinder, para. 185), then inevitably the "administering Power" shares in that "juridical status": in the sense of Chapter XI there is no "administering Power" without a non-self-governing territory and vice-versa.

Administering Power as sovereign

143. Since the Democratic Revolution of 25 April 1974 (the "Carnation Revolution") Portugal has reiterated its view that it has "no territorial claims whatsoever to East Timor" (e.g., United Nations document A/36/PV.6, para. 264). This attitude points to the paramountcy of East Timorese interests. It is for the people of East Timor to decide on their future; Portugal will accept that decision, including the Territory's independence if such is the result of the exercise of the right to self-determination.

144. Under Constitutional Law 7/74 East Timor ceased to be part of the "national territory" in the sense which the Constitution of 1933 gave to this notion. However, priority of self-determination, before it has been freely implemented, does not amount to renunciation of the sovereignty which Portugal has held over that Territory since the sixteenth century. The abolition of the 1933 rule on colonies as part of "national territory" introduced, in the municipal law of Portugal, a difference between them and the metropolitan area, that difference being already part of United

Nations law, in particular Chapter XI of the Charter and the Friendly Relations Declaration (para. 53 above). In international law the position with regard to sovereignty remained unchanged:

“without prejudice to immediate recognition of the ‘otherness’ of the Territory of East Timor and the sovereign right of its people to determine freely its political future, Portugal reserved its own prerogatives in regard to sovereignty and administration. The prerogatives in question are of course all those that accompany, in general, exercise of the jurisdiction of States over territories belonging in full to them, except only for prerogatives incompatible with the status in international law of non-self-governing territories. Such prerogatives would be temporary by nature since they would lapse upon completion of the decolonization process. The process was nevertheless not completed by the scheduled date¹ for reasons beyond Portugal’s control. It must therefore be understood that Portugal maintains, *de jure*, over East Timor all the powers pertaining to the jurisdiction of a State over any of its territories, provided that they are not incompatible with the ‘otherness’ of East Timor and the right to self-determination of the Timorese people.” (Reply, para. 4.54.)

145. It may be added that the renunciation of sovereignty has sometimes resulted in turning a territory into one that would not be subject to the sovereignty of any State; it becomes an area where the element of State sovereignty is absent (e.g., the Free City of Danzig under the treaties of 1919 and 1920). The status of a non-self-governing territory under the United Nations Charter is different. With regard to overseas colonies of Western countries that status comprises the administering State which has sovereignty over the colony. Nor is there any renunciation of sovereignty in the post-revolution Constitutions of Portugal: 1976, Article 307; 1982, Article 297; 1989, Article 293. By virtue of these provisions Portugal imposed on itself a duty to pursue the interests of the people of East Timor, but did not divest itself of sovereignty.

146. Here the distinction between sovereignty and its exercise is a useful one. As already recalled, the Friendly Relations Declaration provides that “[t]he territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the [metropolitan] territory of the State administering it”. The reason for that separateness and distinctness is self-determination. But the provision quoted does not aim at depriving the State of its title to sovereignty which it held prior to

¹ Under Article 5, paragraph 1, of Constitutional Law 7/75 “the third Sunday of October 1978” was fixed as the date for the completion of decolonization.

the Charter and the Declaration. The State has remained sovereign. The said provision imposes restrictions on the exercise of the State's sovereignty. These restrictions are far-reaching. Portugal rightly referred to its "prerogatives [of] sovereignty" (para. 75 above), though on occasions it has avoided the word "sovereignty" in describing its position with regard to East Timor. Instead it has used the terms "jurisdiction" (CR 95/4, p. 10, para. 2, Co-Agent, counsel and advocate of Portugal, J. M. S. Correia), and "authority" (CR 95/12, p. 44, para. 3, *idem*). Nonetheless Portugal explains that the

"Administering Powers are independent States which keep their attributes as such when they act on the international scene in relation to the non-self-governing territories for whose administration they are responsible." (*Ibid.*).

It is submitted that these "attributes" are nothing more than sovereignty, the exercise of which has been restricted in favour of the self-determination of the people concerned. Portugal stresses that the people of the Territory is "the holder of the sovereignty inherent in the capacity to decide for itself its future international legal status" (CR 95/4, p. 13, para. 6, *idem*) and that "the international law of decolonization has transferred the sovereignty relating to such territories to their own peoples" (CR 95/12, p. 44, para. 3, *idem*). Under international law these contentions must be understood as referring to self-determination: it is the people which decides on its implementation; but "people" as the holder of "sovereignty" is a concept which, at least in part, lies beyond the realm of law.

Continuity of Portugal's position as administering Power

147. Portugal remains the administering Power of the Territory of East Timor. This status of Portugal has been corroborated expressly by Security Council resolution 384 (1975) and General Assembly resolutions 3485 (XXX), 34/40, 35/27, 36/50 and 37/30. The position of Portugal was implicitly maintained in a number of other resolutions (cf. para. 22 above). In resolution 384 (1975) the Security Council regretted that "the Government of Portugal did not discharge fully its responsibilities as administering Power in the Territory under Chapter XI of the Charter". This statement did not lead to any change in Portugal's responsibilities; on the contrary, Portugal was called upon, in its capacity of administering Power, "to co-operate fully with the United Nations". In spite of the loss of territorial control over East Timor, Portugal was thus confirmed in its mission and functions.

148. The issue of sovereignty is relevant to the question of continuity. As explained in paragraphs 144 and 145, under Chapter XI of the Charter it is the State which has sovereignty of the colony who becomes and remains administrator. It is an automatic consequence of being sovereign and a contracting party to the Charter, i.e., a Member of the Organiza-

tion. There is no "appointment" or election to the "function" of administering authority. But sovereignty should not be confused with factual effective control over the territory. Such control does not of itself bestow on its holder the status of administering Power.

149. At the time of the Indonesian invasion, Australia admitted that Portugal had, "of course, the continuing legal responsibility" (United Nations, *Official Records of the Security Council*, 1865th Meeting, 16 December 1975, para. 101). But some time later Australia changed its position.

150. The fact that the General Assembly, unlike in resolution 3458 A (XXX) on Western Sahara, did not expressly refer to "the responsibility of the Administering Power and of the United Nations with regard to the decolonization of the territory" is without significance. The resolutions on East Timor maintain that "responsibility" by using other terms.

151. Australia admits that "Portugal may be the administering Power for certain United Nations purposes" (Rejoinder, para. 98). Loss of control over the Territory in question no doubt resulted in the actual disappearance of Portuguese administration on the spot. And there may be room for dealing with the State in effective control with regard to certain specific questions (cf. the case concerning *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. 56, para. 125).

152. But foreign invasion has not eliminated all the elements which constitute the competence of the lawful administrator. Nor is there a right "for others to recognise that there has been a change in the State administering that Territory" (*contra*: Rejoinder, para. 183). That change is a matter exclusively within the domain of the United Nations. Until such time as the Organization has taken a new decision, the status of the administering Power continues, legally unaffected, notwithstanding the loss of control over the Territory.

153. Australia contends that

"Portugal did not make any attempt to prevent or repel the Indonesian military intervention. The withdrawal of its administration to Atauro in August 1975, its inaction while there, and its departure from Atauro the day after the Indonesian intervention in December 1975 constituted a clear abandonment by Portugal of its responsibilities as administering Power." (Counter-Memorial, para. 41.)

154. It is not possible to agree with the foregoing interpretation. The transfer to Atauro was dictated by security reasons, Dili having been taken by the forces of FRETILIN (para. 14 above). The physical separa-

tion from the capital prevented any involvement of the Portuguese authorities in the fighting among East Timorese factions. Such involvement was to be avoided in the interests of the administration of East Timor. As to the Indonesian invasion, Portugal did not have any troops at its disposal in East Timor to offer any resistance: the Governor was left with two platoons of parachutists. Apart from the factual impossibility, it was probably in the interest of all concerned not to extend or intensify the military operations. When the invasion took place Portugal had no other choice but to withdraw its authorities from East Timor. But that withdrawal did not, and could not, amount to abandoning the function of the administering Power. This is so because, first, Portugal had no such intention and, second, no administering Power is competent to give up its position without the consent of the United Nations. A unilateral act would remain ineffective in law. Portugal's international action in the United Nations following the invasion gives ample proof of its decision to continue to exercise the function of the administering authority. At the same time the Organization did not release Portugal from its duties.

155. It would be erroneous to contend that Portugal lost its status of administering Power because some resolutions passed over that status in silence or the United Nations political organs ceased adopting any resolutions on East Timor. The status could be changed only by an explicit decision, including acknowledgment that another State (i.e., Indonesia) had now assumed the responsibility for the Territory. Hitherto this has not happened.

V. CONCLUSION

156. The Court's decision that it cannot exercise jurisdiction in the *East Timor* case cannot be regarded as weakening the concept of non-self-governing territories, though an elaboration on the merits would be welcome. At the present time the United Nations list of these territories is short as the decolonization process reaches its end. But non-self-government (or governance) need not be a closed chapter: ideologies, political systems and many individual countries are in transition and undergoing transformation. Legal strategy requires that old institutions (like that of Chapter XI of the Charter) adapt to new challenges. It would be better if the Court assumed jurisdiction: better for the prospective developments, better for the rule of law.

157. It is to be regretted that, in its operative part, the Judgment does

not recite as relevant the prohibition of force; non-recognition; the self-determination of peoples; the status of East Timor under United Nations law, including the rule that only the Organization can change that status; the position of Portugal as administering Power; the duty of States to respect that status; in particular the duty of States which enter into some arrangements with the Government in control of the Territory to consult, when these arrangements reach a certain level of political and legal importance, with Portugal, with the representatives of the East Timorese people and with the United Nations. It is not only appropriate but also highly significant that the reasons for the Judgment affirm some of these principles. But the subject is too important for a cautious presentation of the reasons. The Court's responsibility and function are also involved.

158. The case created an opportunity for assessing the activities of a Member of the United Nations in the light of the Charter. That is a capital issue at a time of crisis for the Organization and, more generally, in the present climate of the growing weakness of legality throughout the world.

159. The conduct of Australia, like that of any other Member State, can be assessed in the light of the United Nations resolutions. Such an assessment does not logically presuppose or require that the lawfulness of the behaviour of another country should first be examined. Member States have obligations towards the United Nations which in many instances are individual and do not depend on what another State has done or is doing. To that extent the Court has jurisdiction. Here no prerequisite is imperative. The principal judicial organ of the United Nations cannot desist from such assessment when the dispute submitted to the Court falls under Article 36, paragraph 2, of the Statute. On the other hand, in the present case, because of the non-participation of Indonesia, the Court has no jurisdiction to pass upon the conduct of Indonesia.

160. It has been said that, as Australia accepts the right of the people of East Timor to self-determination, there is nothing for the Court to decide. On the contrary. Portugal raised several issues regarding that right; also, some other ingredients of the status of the Territory have been discussed. And in this opinion I have tried to show that there are various points which are unclear in this respect. Consequently, the Court should adjudicate. In the Judgment there should be an operative part on the merits, or at least on some of them.

161. Doubts were expressed regarding the effectiveness of such a judgment. Let me here take up one specific argument against "judicial propriety" which might appear to have some weight, viz., the view that the judgment would not be capable of execution. It has been pointed out that the present case differs in this respect from *Northern Cameroons* because Portugal is not requesting the nullification of the Timor Gap

Treaty. Why would it be improper for the Court to assess Australia's conduct consisting in the negotiation, conclusion and application of the Treaty? Would a decision on this subject be unenforceable? The implementation of the Treaty is an everyday concern. While the post-adjudicative phase is not part of the function of the Court, there is no basis for anticipating non-compliance. Australia has been praised for its loyalty to the Court.

162. This Court administers justice within the bounds of the law. In the present case, on the one hand, we have insistence on national interests — legitimate, it is true — and on *Realpolitik*: we have been told that recognition of conquest was unavoidable. On the other hand we have the defence of the principle of self-determination, the principle of the prohibition of military force, the protection of the human rights of the East Timorese people. And last but not least, the defence of the United Nations procedures for solving problems left over by West European, in this case Portuguese, colonization. We may safely say that in this case no Portuguese national self-interest is present. Portugal does not want to be the sovereign of East Timor and to get from it various benefits, maritime ones for example. Its stand is a negation of selfishness. Portugal has espoused a good cause. This should have been recognized by the Court within the bounds of judicial propriety. How could this cause be dismissed on the basis of debatable jurisdictional arguments?

163. What are the duties of third States (and one of them is Australia) towards East Timor? First, not to do anything that would harm or weaken the status of the Territory, including the exercise by the people of its right to self-determination. Second, when a third country (i.e., one which is neither the administering Power nor controls the Territory *de facto*) concludes a treaty or enters into another arrangement which concerns the interests of the Territory and/or its people, special care is required on its part to safeguard these interests in so far as the third State is in a position to do it. That duty may be said to be comprised by the Security Council's exhortation addressed to "all States or 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" (resolution 384 (1975), para. 4, and resolution 389 (1976), para. 5; these resolutions were reaffirmed by the General Assembly in 1976-1978). In regard to East Timor, in view of the prevailing circumstances (including the human rights situation), a third State has the obligation to consult the administering Power and the legitimate representatives of the Territory. Finally, some other duties may follow from both the legal and factual situation in and of the Territory. These duties may be dictated by various considerations, including the fact that the third State is part of the same region.

164. It is true that legitimate maritime interests of Australia had to be taken care of. But as they also concern a maritime area of East Timor, that Territory's status made it imperative for Australia to be in touch on this matter with the United Nations and/or the administering Power.

165. The negotiation, conclusion and performance of the Timor Gap Treaty by Australia are subject to the requirement of conformity with legal rules and legal standards stemming from the duty to respect the status of the Territory, in particular from the requirement of self-determination. Depending on the result of the analysis, there may indeed be responsibility. For instance, the Timor Gap Treaty is silent on any material benefit to be derived by, and possibly assigned to, the people of East Timor. Under United Nations law a large part of the resources covered by the Treaty belongs to that people. How will it be compensated?

166. The duties referred to in the preceding paragraphs are independent of, and do not concern, the bilateral relationship of the parties to the Timor Gap Treaty. They relate to the status of the Territory and the competence of the administering Power as its guardian. It is a question of United Nations law and resolutions and that law and resolutions are to be applied by the Court. Australia assured the Court that, in concluding the Timor Gap Treaty, it also protected the rights and interests of East Timor. The Court is competent to verify this assurance.

167. To conclude, the Court has jurisdiction in this case and the Portuguese claims are admissible. There is nothing improper in dealing with the merits of the case. A judgment on the merits could be rendered along the following lines:

- (1) The United Nations has continued to recognize the status of Portugal as administering Power of East Timor. Consequently, Portugal has the capacity to act before the Court in this case on behalf of East Timor.
- (2) The non-self-governing status of the Territory of East Timor, and the right of the people of East Timor to self-determination, including its right to permanent sovereignty over natural wealth and resources, which are recognized by the United Nations, require observance by all Members of the United Nations. The Court takes note that in these proceedings Australia has placed on record that it regards East Timor as a non-self-governing territory and that it acknowledges the right of its people to self-determination.
- (3) Any change in the status of East Timor can only take place by virtue of a United Nations decision. According to the law of the United Nations no use of force nor any act of recognition by an individual State or States could of itself effect a change in the status of the Territory.

- (4) Australia should fulfil its duties resulting from subparagraph (2) in accordance with the law and resolutions of the United Nations. Its national interests cannot be a bar to the fulfilment of these duties.
- (5) Portugal is the administering Power of East Timor, and Australia, like any other State, is under a duty to respect that position of Portugal. The fact that Portugal lost the territorial administration of East Timor did not deprive it of other attributes of its competence which are relevant to this case. Portugal did not abandon its responsibilities as administering Power. Portugal continues to hold the "sacred trust" under Chapter XI of the Charter.
- (6) In protecting its maritime rights and interests Australia cannot avoid acting in conformity with the duties which it has as a result of the status of East Timor. These duties include the obligation to respect and take account of the competence of the administering Power. The fact that another State or States failed to respect the position of the administering Power does not relieve Australia of its duties.
- (7) Australia did not make recourse to any of the available United Nations mechanisms, and particularly consultations on the negotiation of the Timor Gap Treaty and on how the Treaty could be put into effect without prejudice to the people of East Timor. In particular, it had a duty to consultation to at least some extent with the administering Power and the representatives of the people of East Timor. None of this was done and Australia bears responsibility for this.
- (8) In some respects (subpara. 7) Australia's conduct did not conform to its duties (obligations) resulting from the law of the United Nations on the status of East Timor. A finding by the Court to this effect would in itself constitute an appropriate satisfaction. In particular, the Court could enjoin Australia that in applying and implementing the Timor Gap Treaty it should fully respect the rights of the East Timorese people in view of that people's future self-determination.
- (9) There is no evidence of any material damage at present; therefore, no reparatory provision can be imposed on Australia.
- (10) The Treaty would not be opposable to an independent or autonomous East Timor.

(Signed) Krzysztof SKUBISZEWSKI.
