INTERNATIONAL COURT OF JUSTICE

EAST TIMOR
(PORTUGAL v. AUSTRALIA)

REJOINDER
OF THE
GOVERNMENT OF AUSTRALIA

1 JULY 1993

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This Rejoinder is submitted pursuant to the Order of the Court of 19 June 1992, as varied by the Order of 19 May 1993.

In accordance with Article 49 (3) of the Rules of Court, this Rejoinder does not merely repeat Australia's contentions which are contained in the Counter-Memorial, but contains additional contentions directed to the issues which still divide the Parties.

CHAPTER 1

THE SUBSTANCE OF THE DISPUTE

Section I: Introduction

1. In its Reply, Portugal alleges that Australia has attempted "d'une part d'amputer la demande portugaise, d'autre part de l'élargir, finalement de la transformer".[1] Portugal seeks to show that Australia's allegation that the real dispute is between Indonesia and Portugal is incorrect and that the real dispute is in fact with Australia. Portugal concedes that it is for the Court to interpret the submissions of a Party,[2] while arguing that it cannot modify them.[3] But if Portugal's submissions are interpreted, it is clear that the real dispute is with Indonesia. And nothing Portugal says can disguise this fact. Australia maintains its position set out in paragraphs 12-17 and 206-231 of its Counter-Memorial.

2. Portugal's real object and purpose is concerned with a resolution of the broader question of the future of East Timor. This is an issue in relation to which the Secretary-General of the United Nations has been given particular authority. It is a process in which Portugal and Indonesia are the key participants. This is confirmed by the Portuguese Reply, and the numerous United Nations documents annexed thereto, as well as by its earlier pleadings.

3. Portugal is engaged in a continuing dialogue with Indonesia under the auspices of the Secretary-General with view to finding a solution to the East Timor issue. It is clear from statements before the United Nations that Portugal acknowledges the reality of Indonesia's occupation of East Timor but considers its presence to be illegal.[4] Portugal draws the situation in East Timor to the attention of the international community.[5] Portugal emphasises that it is concerned with the situation in East Timor itself including the human rights situation. Why else does it reproduce in its Reply a lengthy Appendix dealing with the killings in Dili in November 1991 involving Indonesian military

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1 Reply of Portugal, para.2.04.
2 Ibid.
3 Ibid.
4 See e.g. Reply of Portugal, Annex I.4, Vol.II, p.18.
5 See e.g. Reply of Portugal, Annex I.3, Vol.II, p.8.

personnel?[6] The Rules require only relevant documents to be annexed to the pleadings (Article 50), and accordingly this material must have been regarded as directly relevant. It does not concern Australia at all. Portugal even asks the Court to take notice of facts concerning East Timor that have occurred since the Application was lodged.[7] But these facts reinforce the fact of Portugal's concern with a resolution of the East Timor issue through the United Nations. Portugal's concern is quite legitimate, and it is entitled to raise it in relevant forums. But this does not show the existence of a dispute with Australia on which this Court can adjudicate. Rather, it shows the opposite.

4. As to the exercise of the right to self-determination, Portugal itself acknowledges before the Committee of 24 that Indonesia "exerce un contrôle réel, quoique illégitime" over the territory of East Timor.[8] It acknowledges that Indonesia's role will as a consequence be decisive in ensuring the widest possible representation of political opinion in the dialogue Portugal envisages occurring as part of finding a just solution to the East Timor issue. An examination of all the circumstances surrounding East Timor, particularly Portugal's own conduct and statements since 1975, points all too clearly to the fact that the true object and purpose of its claim against Australia is the pursuit of a much broader claim against Indonesia.

Section II: Portugal's negative propositions

5. The point can be taken further. As noted in paragraph 1 above, Portugal complains that Australia has distorted its claims. But if there is any distortion of the underlying dispute for the purposes of the present proceedings, it is attributable to Portugal, which presents an extraordinarily constricted and artificial version of the dispute for the Court's decision. This can be seen from a recital of the various matters which, according to Portugal, the dispute does not involve, or which the Court does not need to decide. These include the following negative propositions:

(1) **Negative proposition 1 (the treaty validity point):** The Court is not requested to determine the validity or invalidity of the 1989 Treaty (Reply of Portugal, paras.2.08-2.17, 6.76, 7.19-7.21).

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6 Reply of Portugal, Vol.III pp.245-338.
7 Reply of Portugal, para 3.03.
8 Reply of Portugal, Annex I.22, Vol.II p.135.

(2) **Negative proposition 2 (the Indonesian intervention point):** The Court is not requested to determine whether Indonesian military intervention in East Timor was lawful or unlawful, or to determine for itself the legal consequences for States of any such illegality. In particular Portugal does not rely on a duty of non-recognition of Indonesia's sovereignty, but on a duty not to misrecognise Portugal's status (a duty of "non-méconnaissance") (Reply of Portugal, paras.2.05, 6.16, 9.02; see also Reply of Portugal, paras.2.19-2.20, 5.79, 6.30, 7.28).

(3) **Negative proposition 3 (the sovereignty point):** The dispute is not about which of two claimant States, Portugal or Indonesia, has sovereignty over East Timor. On the one hand, Portugal disclaims such sovereignty (Reply of Portugal, para.4.57).[9] On the other hand Indonesia, which does claim sovereignty, is not a party to these proceedings.[10]

(4) **Negative proposition 4 (the maritime delimitation point):** The Court is not requested to engage in any form of maritime delimitation in relation to the disputed area (Reply of Portugal, paras.5.81, 6.73).

(5) **Negative proposition 5 (the treaty content point):** The dispute is not about the content of the 1989 Treaty; Portugal implicitly accepts that the Treaty could be entered into by a State entitled to represent the people of East Timor.

(6) **Negative proposition 6 (the Portuguese compliance with self-determination point):** The Court is not asked to determine whether Portugal has acted consistently with the principle of self-determination in its conduct in relation to East Timor: Portugal accepts that a third State such as Australia would have been entitled to deal with Portugal in respect of East Timor whether or not Portugal was complying with the principle of self-determination in relation to that transaction (Reply of Portugal, para.5.09).

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9 See also Memorial of Portugal, paras.3.08, 5.41; Counter-Memorial of Australia, para.44.

10 But it should be noted that Portugal does not claim to bring the proceedings merely in its capacity as a concerned member of the United Nations, so that that issue is not raised either (Reply of Portugal, para.8.15).

(7) **Negative proposition 7 (the Indonesian non-involvement point):** The Court is not asked to determine the rights or powers any other State (such as Indonesia) may or may not lawfully exercise in relation to East Timor, since the gist of the Portuguese complaint is Australia's failure to deal with Portugal alone as administering authority (Reply of Portugal, para.7.10).

6. These are important clarifications as to Portugal's claims, which in many cases were not apparent from its Application or Memorial. The Memorial, for example, regularly spoke of a duty of non-recognition of situations resulting from the illegal use of force.[11]

7. But these "clarifications", added to the formidable list of negatives already present in the Portuguese Memorial, raise the question why the dispute is presented in this tortuous and abstracted way. The answer appears to be that each of the negatives listed in paragraph 5 above corresponds to something which Portugal tacitly accepts that the Court either cannot, or should not, do. Thus, as to:

(1) **the treaty validity point** — the Court is not requested to determine the validity or invalidity of the 1989 Treaty, because that would obviously involve the legal rights of a third State.

(2) **the Indonesian intervention point** — the Court is not requested to determine whether Indonesian military intervention in East Timor was lawful or unlawful, or to determine for itself the legal consequences for States of any such illegality (such as a duty of non-recognition), because that would make the determination of the international responsibility of a third State a precondition to the determination of the present case, and would obviously contravene the Monetary Gold principle.[12]

(3) **the sovereignty point** — the Court is not asked to decide whether Portugal or Indonesia has sovereignty over East Timor, because that

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11 Memorial of Portugal, paras.2.15, 2.17, 8.23-5.

12 The resolutions of the United Nations General Assembly and Security Council adopted between 1975 and 1982 do not establish that the occupation of East Timor by Indonesia in 1975 was unlawful, and even if they did, they do not determine the question of the legality of the Indonesian occupation of East Timor at the time the Treaty was negotiated: see paras.95-97, 217-225 and Part II, Chapter 2 of this Rejoinder. (Cf Reply of Portugal, paras.6.42-6.43, 7.28-7.33.)

dispute obviously involves, as its very subject-matter, the rights of a third State.

(4) **the maritime delimitation point** — the Court is not requested to engage in any form of maritime delimitation in relation to the disputed area:

(i) because there is no way that Portugal could claim to be a coastal State;

(ii) because there is no way that Portugal could give effect to any such delimitation; and

(iii) because a third State claims rights in relation to the whole of the disputed zone and has not consented to the determination of the dispute.

(5) **the treaty content point** — the Court is not asked to resolve a dispute about the content of the 1989 Treaty, because that would inevitably focus on the legal rights and claims of a third State party to that Treaty, contrary to the Monetary Gold principle.

(6) **the Portuguese compliance with self-determination point** — the Court is not asked to determine whether Portugal has acted consistently with the principle of self-determination in its conduct in relation to East Timor, because even a cursory examination would reveal that this is not the case,[13] and would raise questions about the real causes of the East Timor conflict which Portugal wishes to avoid.

(7) **the Indonesian non-involvement point** — according to Portugal, the dispute is not about the rights or powers any other State may or may not lawfully exercise in relation to East Timor: if it were, it would be obvious that the Court was asked to decide on the legal rights or claims of that State as the very subject of the dispute.

8. But in truth, as Australia has already shown in its Counter-Memorial and as it will demonstrate more fully below, the Court will be required, whether

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[13] The Appendix to this Rejoinder sets out the principal United Nations resolutions dealing with the territories under Portuguese administration, demonstrating the consistent record of criticism by the United Nations of Portugal's administration of its non-self-governing territories, including, inter alia, in relation to East Timor.

tacitly or explicitly, to do each of the things listed as negative propositions in paragraph 5 if it is to decide the present case. To take each of the negative propositions in turn:

(1) **The treaty validity point**: It is obvious that the Court, if it is to deal with the merits of the present case, must determine the validity or otherwise of the 1989 Treaty. Portugal argues that the negotiation, conclusion and implementation of the Treaty (including its implementation in Australian law) are "faits illicites",[14] and that there is a distinction between "validité" and "liceité". As is demonstrated later in this Rejoinder, the distinction is illusory. The validity of a treaty is nothing other than the lawfulness ("liceité") of negotiating, concluding and implementing that treaty. See below, paras.109-111.

(2) **The Indonesian intervention point**: Similarly, it will be necessary for the Court to determine whether the Indonesian presence in East Timor in 1989 was lawful or unlawful, because no Security Council resolution determines that issue, and because apart from any Security Council resolution the only way that the Court could hold that Australia was bound not to recognise the Indonesian presence in 1989 would be by determining for itself the legal consequences for third States of the Indonesian intervention in 1975 and its aftermath.[15] Again the asserted distinction between non-recognition and misrecognition ("méconnaissance") is illusory: the misrecognition of A for B is the misrecognition of both A and B.

(3) **The sovereignty point**: Australia entered into the Treaty in 1989 because it took the view that there was no other coastal State with effective power to negotiate with Australia about the continental shelf.[16] There being no question about Australia's capacity to negotiate with respect to its own rights and interests in the continental shelf, its conduct can only be impugned if it is first held that the Indonesian claim to sovereignty is unjustified. In addition the special legal status as "administering Power" which Portugal claims as a substitute for territorial sovereignty is not a distinct legal status at all: see Part II,

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14 Reply of Portugal, para 6.02.

15 See below, paras.214-230.

16 See below, paras.40, 224, 228. See also Counter-Memorial of Australia, paras.401-402.

Chapter 1 below. Accordingly, it will be necessary to determine whether Portugal was entitled to exercise exclusive powers of administration over East Timor in 1989, and by exact correspondence, whether Indonesia was not.

(4) **The maritime delimitation point**: In order to decide this case it will not be necessary for the Court actually to delimit the continental shelf in the region of the Timor Gap (and on this point Australia and Portugal are agreed). Nonetheless, the immediate and operative legal effect of a decision of the Court adverse to Australia would be to implicate the rights of a third State in relation to that continental shelf. As noted in paragraph 26 below, the Court would to that extent be doing indirectly what both parties (and, in particular, Portugal as the Applicant State) accept it cannot do directly.

(5) **The treaty content point**: Portugal complains about the fact that Australia has entered into the Treaty with a State other than itself. It does not complain about the terms of the Treaty as such. But, while the Court may not be required to investigate the provisions of the Treaty in exhaustive detail, some examination of them will inevitably be required. For example, Australia has instanced a large number of bilateral treaties entered into between Indonesia and other States and clearly extending to East Timor.[17] If these treaties are to be distinguished from the 1989 Treaty (as Portugal argues[18]), this can only be because of the content of the latter.

(6) **The Portuguese compliance with self-determination point**: As noted in paragraph 5 (6), Portugal accepts that a State such as Australia would have been entitled to deal with Portugal in respect of East Timor, whether or not Portugal was complying with the principle of self-determination in relation to that transaction:[19] this is another facet of its claim that the content of the Treaty is irrelevant. But if this is so, then Portugal's claim to act merely in the exercise of limited public powers (as distinct from sovereignty) is contradicted. And as already noted (in sub-paragraph (3) above), the question whether Portugal was

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17 Counter-Memorial of Australia, paras.164-166, and Appendix C, pp.213-218.
18 Reply of Portugal, paras.6.14 and 6.48.
19 Reply of Portugal, para.5.09.

still sovereign over the territory in 1989 immediately involves the rights and claims of a third State.

(7) **The Indonesian non-involvement point**: Finally, given that Portugal seeks to prevent Australia from giving effect to the Treaty, and from negotiating or entering into any similar treaty with a third State, it is clear that the case does directly involve the rights and powers of that third State in relation to East Timor. If Indonesia had the power to enter into the Treaty, then Australia has the obligation to comply with it. If Indonesia had the power to enter into the Treaty, then it also has the right to have the Treaty performed.

Section III: Portugal's positive propositions

9. The contradictions manifested by the analysis in paragraphs 5-8 equally appear if one asks what it is that the dispute is about, according to Portugal. If the Court cannot do the things referred to in paragraph 5 above, is there anything that Portugal does ask it to do that it can do? What does the Portuguese case consist of, with all the negatives abstracted? Essentially the Court is asked:

A. to hold that Australia has failed to recognise and to respect the right of the people of East Timor to self-determination, to the integrity and unity of their territory, and to permanent sovereignty over their natural resources (Memorial of Portugal, Submission 1, first part; Submission 2 (a)),

B. to determine that only Portugal could represent the territory of East Timor in 1989 for the purposes of the negotiation and conclusion of any treaty relating to the natural resources of East Timor (Memorial of Portugal, Submission 1, second part; Submission 2 (b); Submission 3);

C. to determine that this unique capacity of Portugal was then opposable to Australia (Memorial of Portugal, Submission 1, second part; Submission 2 (b); Submission 3);

D. to determine that some part of the area covered by the Treaty appertained in 1989 to the territory of East Timor (Memorial of Portugal, Submission 3; see also Submissions 1 and 2);

E. to determine that Australia has violated Security Council Resolutions 384 and 389, and more generally has failed in its duty, as a Member of the United Nations, to co-operate in good faith with the United Nations in respect of East Timor (Memorial of Portugal, Submission 2 (c)); and

F. as a consequence of the determinations listed above, to declare that Australia is internationally responsible for these wrongful acts, must make reparation for them to Portugal and the people of East Timor, must cease further violations, and in particular must abstain from any acts of treaty-making or of delimitation, exploration or exploitation of the continental shelf, or the exercise of jurisdiction over it in the Timor Gap zone, either at all or without Portugal's consent (Memorial of Portugal, Submissions 4-5).

10. To these propositions, which are at the heart of the Portuguese case, detailed responses are made in this Rejoinder, supplementing the very full remarks already given in the Australian Counter-Memorial. In summary, the responses are as follows:

A. FAILURE TO RESPECT THE EAST TIMORESE RIGHT TO SELF-DETERMINATION, ETC

11. Portugal asks the Court to hold that Australia has failed to recognise and to respect the right of the people of East Timor to self-determination, to the integrity of their territory, and to permanent sovereignty over their natural resources. To this the following responses are made:

12. AT THE LEVEL OF ADMISSIBILITY: The allegation that Australia has violated the right to self-determination of the people of East Timor must mean one of two things. Either the terms of the 1989 Treaty were a violation of that right, in the sense that Australia acquired resources properly belonging to the East Timorese. Or the violation might flow from the fact that the Treaty, whatever its terms, was concluded without the consent of that people, acting through Portugal as their representative. But in each case the substance of the complaint — given the matters that Portugal says the Court may not or does not need to decide — is the failure to treat with Portugal as administering Power.

13. The Court cannot examine the terms of the Treaty to determine their consistency with the principles of self-determination and permanent sovereignty over natural resources:

(a) without also determining the extent of East Timorese rights over the resources of the Timor Gap, thus contravening Portugal's maritime delimitation point (see paragraph 5 (4) above);

(b) without also determining, apparently, the validity or otherwise of the Treaty (thus contravening Portugal's treaty validity point (see paragraph 5 (1) above). This is on the assumption that a treaty which violates the principles of self-determination or permanent sovereignty over natural resources is invalid. This is the reason why Portugal does not insist that the various violations alleged against Australia are violations of norms of jus cogens.[20] If they were violations of jus cogens, the Treaty would be fundamentally invalid, which would contradict the Portuguese case. But since the Court cannot allow a derogation from the jus cogens status of a norm, it cannot choose to give effect to a norm of jus cogens as if it were something else.

14. Moreover, Portugal accepts that the Treaty could have been entered into by a State entitled to represent the people of East Timor (see paragraph 5 (5) above — the treaty content point). It also accepts that Australia would have been entitled to deal with Portugal in respect of East Timor whether or not Portugal was complying with the principle of self-determination in relation to that transaction (see paragraph 5 (6) above — the Portuguese compliance with self-determination point). Evidently the complaint is not about the content of the Treaty.

15. As to the fact of the conclusion of the Treaty, this involves Indonesia even more directly. For if there is a duty, given the status of the territory as a non-self-governing territory, to obtain the prior consent of the people for a treaty of this kind, that duty must lie primarily on the State purporting to represent the territory and people of East Timor. Indonesia claims to represent that territory and people. It is Indonesia that has acted as the coastal State in relation to the territory of East Timor, not Australia. Australia has to represent its own interests, and its own people and territory. Australia does not claim the authority to decide, and could not decide, whether the interests of the people of

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[20] See Memorial of Portugal, para.4.71. See also Reply of Portugal, para.5.33.

East Timor are sufficiently protected, or whether their consent was sufficiently ascertained. Whatever duties of that kind exist are imposed necessarily on the State purporting to represent them. So again, the burden of any Portuguese complaint is, in reality, directed against Indonesia. Thus the Court cannot decide on whether the mere conclusion of the Treaty was a violation of the principles of self-determination and permanent sovereignty over natural resources without also deciding on:

(c) the rights or powers a third State may or may not lawfully exercise in relation to East Timor (thus contravening the Portuguese position referred to in paragraph 5 (7) above — the Indonesian non-involvement point).

The finding of incapacity on the part of Indonesia is an essential preliminary to the allegation against Australia.

16. AT THE LEVEL OF THE MERITS: As Australia makes clear below, it does not deny the right of the people of East Timor to self-determination or to permanent sovereignty over their natural resources. What it does deny — against a background of persistent Portuguese neglect of East Timor — is that Portugal any longer effectively and exclusively exercises powers of administration over East Timor. These issues are discussed in detail in Part II, Chapter 1.

B. EXCLUSIVE PORTUGUESE CAPACITY TO REPRESENT EAST TIMOR

17. Portugal asks the Court to determine that its exclusive capacity to represent the territory of East Timor for the purposes of the negotiation and conclusion of any treaty relating to its natural resources was and remains opposable to Australia. To this the following responses are made:

18. AT THE LEVEL OF ADMISSIBILITY: The Court cannot determine that Portugal alone had the capacity to enter into such a treaty without also determining:

(d) that Indonesia did not have that capacity, thus contravening the Indonesian non-involvement point (see paragraph 5 (7) above);

(e) that the Treaty is invalid. A treaty entered into with a State other than the State solely competent to enter into that treaty must be invalid. Thus Portugal's argument contradicts its own concession, the treaty validity point (see paragraph 5 (1) above).

19. Moreover since Portugal accepts that a State lawfully occupying a non-self-governing territory (even though not as sovereign) could have entered into the 1989 Treaty (see the Portuguese positions referred to in paragraphs 5 (3), (5) and (6) above), the Court cannot determine that Portugal alone had the capacity to enter into such a treaty without also determining:

(f) that Indonesia was not lawfully occupying East Timor in 1989, thus contravening the Indonesian intervention point (see paragraph 5 (2) above).

20. AT THE LEVEL OF THE MERITS: It is argued below that it does not follow from the fact that the United Nations has referred to Portugal as the "administering Power" of East Timor that Portugal has the exclusive capacity to represent East Timor (see Part II, Chapter 1). In particular, it is argued that Portugal's capacity to enter into treaties in respect of the natural resources of East Timor had ceased even before December 1975, and that that capacity has never revived or been revived.[21]

C. OPPOSABILITY VIS-A-VIS AUSTRALIA OF THIS EXCLUSIVE PORTUGUESE STATUS

21. Portugal asks the Court to determine that its exclusive capacity to represent the territory of East Timor in 1989 for the purposes of the negotiation and conclusion of any treaty relating to its natural resources was and remains opposable to Australia. To this the following responses are made.

22. AT THE LEVEL OF ADMISSIBILITY: The Court cannot determine that Portugal's exclusive status to enter into such a treaty was opposable to Australia

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21 See below, paras.206ff.

at the relevant time without also determining, in addition to the matters referred to in paragraph 18-19 above:

(g) that Indonesia had no such capacity, thus contravening the Indonesian non-involvement point (see paragraph 5 (7) above).

23. AT THE LEVEL OF THE MERITS: It is argued below that any claim of Portugal to be the only State having capacity to enter into a treaty on behalf of East Timor was not opposable to Australia in 1989, since Australia was in the circumstances permitted by international law to recognise Indonesia as so entitled.[22]

D. APPURTENANCE OF AT LEAST PART OF THE TREATY AREA TO EAST TIMOR

24. Portugal asks the Court to determine that the act of Australia in entering into the Treaty was a violation of East Timorese rights. Thus it is required to say that at least some part of the territory covered by the Treaty is attributable to East Timor. If it were not, there would be no violation of East Timorese rights. To this the following responses are made.

25. AT THE LEVEL OF ADMISSIBILITY: The Court cannot determine that any part of the territory covered by the Treaty is attributable to East Timor without also determining:

(h) that Indonesia has no valid claim with respect to that area, since if it did, Australia could lawfully deal with it in respect of its claim (this contravenes both the Indonesian intervention point (see paragraph 5 (2) above) and the Indonesian non-involvement point (see paragraph 5 (7) above);

(i) since Australia claims that the whole of the zone covered by the Treaty appertains to it under international law, that some part of the Australian maritime claim is without substance, thus contravening Portugal's maritime delimitation point (see paragraph 5 (4) above).

26. AT THE LEVEL OF THE MERITS: Australia agrees with Portugal that the Court has no competence to delimit the continental shelf in the region of the

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22 See Part II, Chapter 1.

Timor Gap. Neither of the parties to the present case has sought such a delimitation, and in Australia's view Portugal is not competent to do so. Moreover such a delimitation would necessarily infringe on the legal claims or rights of a third State not before the Court.[23]

27. However, Australia does assert a legal claim to the area covered by the Zone of Cooperation, and the legitimacy of this claim is acknowledged by the Treaty itself.[24] The assumption underlying the Portuguese argument — viz, that at least part of the area covered by the Treaty indisputably belongs to East Timor — is thus denied. And the Court cannot resolve that dispute without:

(j) deciding on the legal claims or rights of Indonesia which Portugal accepts it cannot do (see the Portuguese concession referred to in paragraph 5 (7) above — the Indonesian non-involvement point);

(k) engaging in a form of maritime delimitation (the delimitation of disputed from non-disputed areas) which Portugal accepts it cannot do (see paragraph 5 (4) above — the maritime delimitation point).

E. VIOLATION OF SECURITY COUNCIL RESOLUTIONS AND FAILURE TO CO-OPERATE IN GOOD FAITH WITH THE UNITED NATIONS

28. Portugal asks the Court to determine that Australia has violated Security Council Resolutions 384 and 389, and also has failed in its duty, as a Member of the United Nations, to co-operate in good faith with the United Nations in respect of East Timor. To this the following responses are made.

29. AT THE LEVEL OF ADMISSIBILITY: The Security Council resolutions were passed nearly 20 years ago. The question is whether those resolutions, directed substantially at Portugal and Indonesia and imposing no express obligation of non-recognition on third States such as Australia, nonetheless had that effect in 1989. That can only be determined by an examination of the legal

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23 See paras.276ff below.
24 See para.281 below.

position in 1989, which will inevitably involve the Court in considering, inter alia:

(l) which State now has sovereignty or governing powers over East Timor, which Portugal accepts it cannot do (see paragraphs 5 (3) and 5 (7) above — the sovereignty point and the Indonesian non-involvement point).

30. The same considerations apply, a fortiori, to the obligation to co-operate in good faith with the United Nations. That is a general and contextual matter, which of its nature cannot give rise to an automatic obligation of non-recognition such as to absolve the Court of the obligation to consider the underlying dispute and its legal consequences. Moreover, Portugal has no special right or function to enforce this duty of good faith, which is owed to the United Nations. The United Nations itself has never complained of Australian non-compliance, and has not charged Portugal with any function of enforcement. As already noted, Portugal disclaims any right to act in this case simply as a member of the United Nations.[25]

31. AT THE LEVEL OF THE MERITS: It is argued below that there has been no violation by Australia of the relevant Security Council resolutions and that, in any event, those resolutions were not binding under Article 25 or Chapter VII of the Charter. Nor has there been any violation of any general obligation of co-operation with the United Nations in relation to the dispute: see below, Part II, Chapter 2.

F. CONSEQUENTIAL OBLIGATIONS OF REPARATION

32. Portugal seeks from the Court a variety of orders within the general framework of cessation, reparation, and non-repetition of unlawful conduct: see paragraph 9.F above. Since these orders are consequential upon the determinations listed above, they are subject to all of the contradictions and deficiencies already analysed. For example the Court could not enjoin a State from exploiting its own natural resources on its own continental shelf, an area subject to its sovereign rights.[26] Yet Portugal accepts that the Court is not

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25 See footnote 10 above, and para.124 below.

26 It is not suggested that there is anything contrary to international law in the way Australia proposes to exploit that part of the continental shelf which appertains to it (see para.5 (5) above).

competent to determine within which part of the Treaty area Australia has sovereign rights. The remedy sought is inconsistent with this acceptance.

33. Since Australia denies that it has committed any violation of international law, the issues of cessation, reparation, and non-repetition do not arise. But the remedial issues raised by Portugal are briefly discussed in paragraphs 163-166 below.

Section IV: Abstract and unreal character of the "dispute" presented by Portugal

34. Even if the Court was minded to overlook these contradictions and inconsistencies and to accept the very narrow and particular way in which Portugal frames its case — including both the negative aspects (paragraph 5 above) and the positive aspects (paragraph 9 above) — the case would be inadmissible. This is because the dispute as presented by Portugal contains so many negatives (things the Court is not asked or is not able to decide) that it is incapable of decision because it is abstracted from the real situation and "remote from reality".[27] For example, the Court is not asked to determine the illegality or otherwise of Indonesian use of force. But the obligation of a third State towards a lawful occupant of a self-determination territory is quite different from its obligation towards an unlawful occupant. Since most of the actual disagreement about East Timor at the multilateral level is based on the assumption that Indonesian presence is or may be unlawful, then the Court is presented with an unreal issue. It cannot decide the issue on the only basis that reflects Portugal's legal position in the real world, as distinct from its position within the framework of the quite artificial construct presented by it to the Court.

Section V: Conclusion

35. For these reasons, the dispute presented by Portugal is rife with internal contradictions and inconsistencies, both with respect to what it asks the Court to do and with respect to the matters it accepts the Court cannot decide. The substance — the legal reality — underlying the claim is that of a dispute to

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[27] Northern Cameroons case, ICJ Reports 1963, p.33.

which Indonesia is a primary party. And, for the reasons given again in Section II of this Chapter of the Rejoinder, the Court cannot decide such a dispute in the present case. But even if the Court was minded to overlook these contradictions and inconsistencies, the case would be inadmissible, because the dispute so presented would be quite unreal. It would be "remote from reality" for somewhat different reasons from, but with exactly the same effect as, the claim in the Northern Cameroons case.[28] Whether for one set of reasons or the other, Portugal's claim is inadmissible.

36. The legal consequences that result from this analysis will be examined in more detail below. They affect both the admissibility and the substance of the Portuguese claims. Before turning to these aspects, however, it is necessary to respond to the Portuguese treatment of the history of the events surrounding East Timor, and in particular its characterisation of Australia's role in those events.

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28 ICJ Reports 1963, p.15.

CHAPTER 2

THE FACTUAL ISSUES

37. Portugal in its Reply acknowledges that many of the key factual issues are not disputed.[29] However, in its Reply it seeks to distort certain positions taken by Australia and to introduce new and largely irrelevant material. In this Chapter Australia responds to this, as far as necessary for the purposes of the case.

Section I: Australia's actions in relation to East Timor

38. Throughout the period East Timor has been on the United Nations agenda Australia has supported the Secretary-General in his efforts to find a solution to the situation. It supported the efforts that were made by Portugal, Indonesia and the East Timorese parties themselves in the period prior to November 1975 to find a mechanism by which the people of East Timor could exercise in an orderly way their right to self-determination. The record of Australia's conduct during this period is set out in paragraphs 57 to 71 of its Counter-Memorial.

39. Australia is therefore astonished to find the Portuguese Reply used as an occasion to question at length the motivation and integrity of Australian policy towards East Timor from 1941 until today.[30] Without seeking to answer all the gratuitous suggestions made by Portugal, Australia addresses those which it considers of most relevance to this case. In particular, it denies the suggestion that in some way its official policy was to encourage and support the Indonesian use of force against East Timor and was otherwise a policy of abstention and passivity so far as the problems of East Timor were concerned.[31] Portugal asserts that Australian policy in relation to East Timor has been motivated principally by the desire to get access to potential (as yet unproven) petroleum situated on the continental shelf off East Timor.[32] In particular, Portugal seeks to rely on inferences drawn by journalists or commentators and not official Australian statements to support its assertions. It also seeks to elevate one

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29 Reply of Portugal, para.3.03.
30 Reply of Portugal, paras.3.51-3.81.
31 Reply of Portugal, paras.3.72-3.75.
32 Reply of Portugal, paras.3.76 and 3.79.

communication from the Australian ambassador to Indonesia in August 1975 into a statement of Australian policy. Portugal itself acknowledges that this statement did not correspond to official policy.[33] And an examination of Australian statements and actions confirms this.

40. It must be remembered that no petroleum deposits have yet been found in the Timor Gap area. Suggestions of large oil deposits are based solely on speculation. Australia has, however, understandably sought to reach agreement on the continental shelf boundary in the area, recognising that without some form of agreement any exploration in the area is unlikely and that resolution of the issue in the event that petroleum is found would be much more difficult. It initiated moves to reach agreement on this issue with Portugal in 1974, before any of the events involving Indonesia occurred. Clearly, what was important to Australia was to negotiate a continental shelf boundary with whoever was in control in East Timor in order that its legitimate interests in its offshore areas were protected. It did not favour in this regard Indonesia over Portugal. Negotiations with Portugal did not, in fact, take place. This was in part the result of the Portuguese desire to await developments at the Third Law of the Sea Conference. And negotiations with Indonesia for a final continental shelf delimitation were not successful. It was only when Australia and Indonesia agreed to put aside the location of a final seabed delimitation line and negotiated over joint development of possible petroleum in the area in dispute that agreement was able to be reached on a joint development zone. This was reflected in the 1989 Treaty.

41. As Australia made clear in its Counter-Memorial, and as it reiterates again, it has at all times expressed regret at the actions of Indonesia and has maintained its opposition to the manner of Indonesia's incorporation of East Timor.[34] In a statement of 30 October 1975 the Australian Foreign Minister said:

> "The Australian Government has urged that Indonesia pursues her interests through diplomatic means. We have told the Indonesians that we remain opposed to the use of armed force. We have also said that we are firm in the view that the people of Portuguese Timor should be allowed to determine their own future. We have urged the Indonesian

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33 Reply of Portugal, para.3.78.

34 Counter-Memorial of Australia, paras.61, 68, 69.

> authorities to reaffirm their own public commitment to the principle of self-determination in Portuguese Timor."[35]

In a statement on 29 November 1975, the Foreign Minister in the Australian Government that had replaced the former government on 11 November said:

> "The Australian Government's view remained that talks between the Timorese parties and Portugal offered the best hope of bringing an end to the continuing bloodshed in Timor and of restoring an orderly process of decolonisation in the territory which would enable the people of the territory to decide their own future. It was in the hope of facilitating these talks that the Australian Government had recently reiterated the offer of an Australian venue for them."[36]

After the Indonesian occupation of East Timor, Australia continued to maintain its opposition to Indonesia's use of force — see the statement of 7 December 1975 and subsequent statements by the Minister for Foreign Affairs.[37] And this position has been consistently maintained since. Thus, when in January 1978 Australia announced its decision to recognise de facto Indonesian sovereignty over East Timor, it reiterated that Australia "remains critical of the means by which integration was brought about". The statement by the Foreign Minister said that the Australian Government "deplored" the developments in East Timor "above all the use of force by Indonesia".[38] And again, as the Foreign Minister said in December 1978 when it was announced that the negotiations over the seabed between Australia and East Timor would commence, this did not "alter the opposition which the Government has consistently expressed regarding the manner of incorporation".[39]

In a note to Portugal in January 1990, following the signing of the Timor Gap Treaty in December 1989 it was said:

> "Australia reiterates that Australia's recognition of the incorporation of East Timor into Indonesia in no way condones the use of force by Indonesia. Australia's active

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35 Counter-Memorial of Australia, Annex 10.
36 Counter-Memorial of Australia, Annex 11.
37 Counter-Memorial of Australia, Annexes 12, 13, 14 and 17.
38 Counter-Memorial of Australia, Annex 21.
39 Memorial of Portugal, Annex III.37.

> support for the rights of the people of East Timor is well documented."[40]

42. An examination of Australian actions during the 1974-75 period indicates an awareness of the difficult situation that existed in East Timor and of the reality that simple solutions were not possible. It encouraged Portugal and the East Timorese parties to resolve their differences peacefully, which is precisely the United Nations position. It was not for Australia, however, to assume a principal role in this dialogue and it cannot be criticised for not doing so.[41] It supported United Nations resolutions in 1975 and 1976 and continues to support United Nations involvement in a settlement of the East Timor situation. As Australian statements since 1978 have stressed, its principal motivation in relation to its policy on East Timor has been the need to take account of realities. And this necessitates a willingness to deal with Indonesia, as the State in actual control of the territory. Only in this way is it possible for Australia to ensure that the needs of the East Timorese for humanitarian aid and other assistance can be met and that Australia's own legitimate and legally protected interests in its offshore areas can be protected.

43. The reaction by Australia to the killings in Dili in 1991 also indicates Australia's continuing concern at the human rights situation in East Timor. Australia strongly condemned the killings and called on the Indonesian government to ensure proper steps were taken to discipline those responsible. The texts of Australian government statements on East Timor at this time are set out in Annex 1 to this Rejoinder. For instance, the Australian Prime Minister said in the Australian Parliament on 13 November 1991:

> "We are, of course, as a government, very deeply disturbed by the reports of this tragedy in Dili yesterday. We deplore the loss of innocent life. While many details remain unclear, it is now evident that an appalling tragedy has occurred in which many people have been killed ... We have urged the Indonesian Government to conduct a thorough investigation and publish a full and factual account of what happened and why."[42]

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40 Memorial of Portugal, Annex III.26.
41 Cf Reply of Portugal, para.3.71.
42 Annex 1, p. A2.

Subsequently on 27 November, the Prime Minister said:

> "The essence of the approach that we intend to adopt in the wake of what is undoubtedly a tragedy is to use the close and effective working relationships that we have built up with Jakarta in recent years to urge the Indonesian Government to respond positively to this tragedy which has occurred. When I talk about a positive reaction from the Indonesian Government, we believe that that positive response requires, without any question, an objective and thorough inquiry, and it certainly requires appropriate punishment for those found responsible. We believe also that it requires a new momentum initiated by the Government of Indonesia in achieving a resolution of the conflict in East Timor.
>
> I do not avoid the fact in any way ... that there is a continuing conflict in East Timor. The Indonesian Government, in our view has to seek a resolution of that continuing conflict and understand that the military solution is no solution. It will not solve the continuing running sore and tragedy of East Timor in military terms. It must understand that. I have said that the Indonesian Government must make renewed efforts not to meet just in some formal tokenistic way but to sit down and talk with the people of East Timor, including the people from the resistance."[43]

The Australian Senate also adopted a resolution on 27 November condemning the Dili killing.[44] Strong responses were made by Australia and by other States calling on Indonesia to deal with those responsible. But these responses themselves illustrate that the reality of Indonesian control of the territory cannot be ignored. Portugal is clearly in no position to take action. The most recent statement on East Timor, made in May 1993 by the Australian Foreign Minister, following the Xanana Gusmao trial, is at Annex 3.

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43 Annex 1, p.A5.

44 Annex 2.

Section II: The recognition of the status of East Timor by the international community

44. The reality of Indonesian control of East Timor has been recognised by a significant number of States. The assertion by Portugal that only Australia has recognised Indonesian sovereignty over East Timor[45] is untrue.

45. The position of States in relation to Indonesian control of East Timor takes a variety of forms. There are those States who say that a valid act of self-determination took place in 1976 as a result of which the East Timorese people have chosen integration with Indonesia. This includes the Philippines, Singapore, Thailand and Malaysia.[46] These are the States geographically closest to Indonesia. See also the statements of Bangladesh, India, Iran, Iraq, Jordan, Morocco and Singapore, set out at paragraph 175 of the Australian Counter-Memorial.[47] The position of these States goes further than that of Australia, which does not accept the validity of the 1976 act of self-determination.[48] Their action in recognising the act of self-determination plainly involves the unqualified recognition of Indonesian sovereignty.

46. A number of other States accept the reality of the incorporation of East Timor, but without expressing any view whether the people of East Timor have already exercised their right of self-determination. Among these are certainly the United States and New Zealand, which have made official statements to that effect. These statements have been understood as a legal recognition of the situation. For example, the United Kingdom Minister of State at the Foreign Office on 25 November 1991 asserted that Canada, New Zealand and the United States had given de jure recognition to Indonesia's incorporation of East Timor.[49] A number of other States have also made statements in the United Nations accepting the reality of the incorporation. These States include Canada, Japan and Papua New Guinea.[50]

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45 Reply of Portugal, paras.5.76, 6.60, 9.19.
46 Counter-Memorial of Australia, para.175.
47 See also Counter-Memorial of Australia, paras.128, 134, 136, 140.
48 Counter-Memorial of Australia, Annex 20.
49 Reproduced in British Yearbook of International Law, Vol. 62, 1991, p.569.
50 See Counter-Memorial of Australia, paras.175, 339-345.

47. In the United States of America, in testimony in 1977 before the House of Representatives Committee on International Relations by the Deputy Legal Adviser, Department of State, the position was stated as follows:

> "The US Government did not question the incorporation of East Timor into Indonesia at the time. This did not represent a legal judgment or endorsement of what took place. It was, simply, the judgment of those responsible for our policy in the area that the integration was an accomplished fact, that the realities of the situation would not be changed by our opposition to what had occurred, and that such a policy would not serve our best interests in light of the importance of our relations with Indonesia.
>
> It was for these reasons that the United States voted against UN General Assembly Resolution 31/53 of December 1, 1976, which rejected the incorporation of East Timor into Indonesia and recommended that the Security Council take immediate steps to implement its earlier resolutions to secure exercise by the people of East Timor of their rights of self-determination.
>
> I think it is important to state that I do not view US policy in the case of East Timor as setting a legal precedent for future cases. The fact is that decisions whether or not to treat an entity as part of another entity are most often taken as political decisions on the basis of all the circumstances of the particular case in what is perceived as the national interest. An important factor to be considered obviously is our commitment under articles 55 and 56 of the UN Charter to promote respect for human rights including the right of self-determination.
>
> However, the question remains what we are required to do if this right is not observed as we might wish in a situation in which we believe that efforts by us to change the situation would be futile, probably would not be of any help to the people concerned, and would be injurious to other national interests of the United States. We do not believe that we are required in such circumstances to refrain from acting on the basis of the prevailing factual situation."[51]

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51 Annex 4.

In a statement in September 1982 before the Committee on Foreign Affairs of the United States House of Representatives, the Assistant Secretary for East Asian and Pacific Affairs said:

> "We accept the incorporation of East Timor into Indonesia, without recognising that a valid act of self-determination has taken place there.
>
> We simply say it is impossible and impractical to turn back the clock. Our efforts now are concentrated on doing what we can to improve the welfare of the Timorese people. Particularly, we have found that progress can be achieved only by working closely with the Indonesian Government and with the international organisations active in East Timor."[52]

This position has been repeated subsequently by the United States.

48. In December 1978, the New Zealand Minister for Foreign Affairs said:

> "New Zealand abstained on the United Nations resolution about East Timor because it feels that the situation there is irreversible ... we could not in good conscience support a resolution that would clearly encourage those people to continue their struggle when we believe that they cannot succeed."[53]

49. Portugal attempts to show that a number of European States, including the United Kingdom, Switzerland or Sweden do not recognise Indonesian sovereignty. These views are far less significant than the views and actions of the regional States who are required, as is Australia, to deal on a regular basis with Indonesia in relation to the situation in East Timor. But an examination of what the European States have said discloses that they use measured and restrained wording. They do not explicitly assert that the people of East Timor have a right to self-determination. For instance, the Council of Europe Committee of Ministers on 26 November 1991 said:

> "The Ministers reaffirmed their support for a just, comprehensive and internationally acceptable settlement of the issue, respecting the principles of the United Nations' Charter, taking into account the need to defend human rights and fundamental freedoms, and the full respect of the

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52 Annex 5.
53 Annex 6.

> legitimate interests and aspirations of the population of this territory."[54]

The European Commission has expressed almost identical views.[55] This is a statement with which Australia would agree. But it should be noted how far the reference to "the legitimate interests and aspirations of the population of the territory" is from the formulation "the right to self-determination of the people of East Timor".

50. When one examines the various statements by States as to the status of East Timor, the only conclusion that one can draw is that a large number recognise the reality of Indonesian control. Whether this is expressed as a situation existing de jure, de facto or only implicitly does not matter. The distinction in the nature of the recognition is irrelevant for present purposes. International law is "indifferent to the form of recognition".[56]

51. One would expect a different reaction to the question of the recognition of a territorial situation from a neighbouring State that is required to deal on a day to day basis with the State laying claim to that territory and in effective control of it than one would from a State that is not geographically proximate. In Australia's case, the sorts of transactions in relation to East Timor which it needs to enter into with Indonesia to protect its own interests are significantly different from those of other States. There is no other State that is geographically situated so that it asserts coastal State jurisdiction in the waters and seabed in the area necessitating a delimitation with the waters and seabed appurtenant to East Timor. Australia is in a unique position in this regard and it is not, therefore, altogether surprising if this necessitates a different practical response to the situation in East Timor from the response of other States.

52. Portugal seeks to dismiss Australian reliance on double tax treaties as evidence of implicit recognition of Indonesian sovereignty.[57] It seeks to say that the acceptance by States in a bilateral treaty of a definition of a State as defined in its domestic law carries no implication of recognition on the international plane. But this is to ignore the situation. The position of Indonesia is that East Timor was incorporated as its twenty-seventh province, following an act of self-determination in 1976.[58] Since then, East Timor has

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54 Reply of Portugal, Annex III.16, Vol.III, p.324.
55 See Reply of Portugal, Annex III.9, Vol.III, p.304.
56 DP O'Connell, International Law (1970) Vol. 1, p.162. See further para.226 below.
57 Reply of Portugal, para.6.14.
58 See Counter-Memorial of Australia, paras.54-55.

been treated by Indonesia as having the same status as any other Indonesian territory.[59]

53. Whatever the position may be with regard to multilateral treaties, or treaties containing temporary arrangements, bilateral treaties regulating without reservation or qualification the relations between States in respect of defined territory must be taken to show that the territory is recognised as subject to the sovereignty of each of the States party to the treaty. This is the case with the double tax treaties referred to by Australia. Portugal argues that the acceptance by States in such treaties of definitions of "Indonesia", which quite clearly embrace East Timor as part of its territory to which the treaty will apply, does not amount to acts of recognition of Indonesian sovereignty or jurisdiction over that territory. But this argument is quite unfounded. Such an act is a categorical example of the contracting State's willingness to deal with Indonesia in relation to all its claimed territory, including East Timor, on a basis of normality. As Lauterpacht said:

> "In the case of bilateral treaties the presumption of recognition appears to be cogent to the point of being conclusive."[60]

The significance of the particular double tax treaties is apparent by a comparison with the wording used prior to 1976. Those treaties concluded before 1976 (e.g., those with the United Kingdom, the Netherlands and Belgium) refer simply to Indonesia as comprising "the territory of the Republic of Indonesia". Those concluded after 1976, with the exception of those with Australia and the United States, refer to "the territory of the Republic of Indonesia as defined in its law...."[61] It is impossible to believe that States entering into such agreements, knowing of the United Nations consideration of East Timor and the Indonesian attitude thereto, entered into the treaties so worded without understanding the meaning of the phrase "the Republic of Indonesia as defined in its law". The effect of the treaty, in each case, is to commit the other States to treating East Timor as part of Indonesia for the purposes of the treaties. That is equivalent to recognition of that fact.

54. Portugal's suggestion that the revised wording was adopted to avoid any effect on the international law plane is incorrect. The treaties are as much a

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59 See further para.227 below.

60 H Lauterpacht, Recognition in International Law (1947), p.375.

61 See Counter-Memorial of Australia, Appendix C.

dealing with Indonesia in relation to the territory of East Timor as is Australia's actions under the Timor Gap Treaty. The tax treaties accept that tax liability in relation to income from the territory of East Timor will in certain cases be governed by Indonesian law. That is the same in kind as a treaty whereby Australia agrees that Indonesian tax law will govern exploration in one part of the offshore area between Australia and East Timor (the situation in Zone C, the northern part of the Zone of Co-operation) and whereby the two States agree to regulate the application of tax and other laws on a shared basis, as in Zone A. The Timor Gap Treaty contains its own tax regime, similar in broad terms to that provided in double tax treaties.[62] The bilateral treaties referred to by Australia are therefore significant evidence of recognition by the international community of Indonesian sovereignty and jurisdiction over East Timor.

Section III: East Timor and the United Nations

55. An examination of United Nations consideration of East Timor in recent years discloses a consistent failure to take any substantive action on the issue. The issue has been on the agenda of a number of United Nations organs.[63]

56. The General Assembly since 1983 has received reports from the Secretary-General related to the exercise of his good offices, and at each session has deferred consideration of the question. There have been no resolutions or substantive action by the Assembly.

57. The Committee of 24 has continued to review the question and has heard statements by Member States and petitioners, but has taken no other action.

58. The Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1989 and 1990 adopted resolutions on East Timor whereby it recommended to the Commission on Human Rights that it consider the situation pertaining to human rights and fundamental freedoms in East Timor. It also encouraged the Secretary-General in his efforts to find a durable solution to the situation in East Timor.[64] The Commission did not, however, act on these resolutions. In 1991 no resolution was adopted by the Sub-Commission. In 1992 it adopted a resolution (1992/20) which dealt with the human rights

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62 See Annex D to the Treaty.

63 See the summary in the working paper prepared by the Secretariat, 17 July 1992 (A/AC.109/1115) (reproduced in Annex 12 to this Rejoinder).

64 See Memorial of Portugal, Annexes II.100 and II.102, Vol.IV, pp.242-243, 249-250.

situation in East Timor.[65] This focussed particularly on the killings in Dili, and sought the co-operation of the Indonesian authorities in providing information and access. The resolution took no position on the broader aspects of the dispute.

59. The Commission on Human Rights has also taken little action. In 1983 it adopted a resolution.[66] Since then, in 1985 it was announced by the Chairman after action in private session that the situation was no longer under consideration by the Commission. In 1992 a statement was read out by the Chairman of the Commission on Human Rights, agreed by consensus, which noted with serious concern the human rights situation in East Timor and deeply deplored the violent incident which occurred in Dili on 12 November 1991.[67] It did not address the question of self-determination.

60. In 1993 the Commission on Human Rights adopted a further resolution on East Timor by 22:15:12.[68] Australia voted in support. The resolution expressed deep concern at reports of continuing human rights violations in East Timor, made a number of comments on the aftermath of the Dili killing and welcomed the agreement given by Indonesia to a visit to East Timor by the Personal Envoy of the Secretary-General. It also welcomed the resumption of talks on the question of East Timor and encouraged the Secretary-General to continue his good offices for achieving a just, comprehensive and internationally acceptable settlement of the question of East Timor. There is no reference in the resolution to self-determination. There is no reference to Portugal as administering Power or its role in discharging any particular responsibilities in relation to the territory.

61. What is noticeable about these resolutions and actions by the various human rights bodies is the understandable focus on the general human rights situation within East Timor and the role of Indonesia in relation to human rights there. They are silent, however, so far as the right to self-determination is concerned, and contain no recommendation for action by States, in particular by third States. This is despite the fact, as Portugal stresses, that self-determination is one of the human rights in relation to which these bodies have a role. It appears to be accepted by the human rights bodies that any action in relation to

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65 See Reply of Portugal, Annexes III.11, Vol.III, pp.308-310.
66 Resolution 1983/8: see Memorial of Portugal, Annex II.75, Vol.IV, p.136.
67 Reply of Portugal, Annex III.10, Vol.3, p.305.
68 Text at Annex 7.

self-determination in East Timor is dependent on the results of the negotiations occurring under the auspices of the Secretary-General.

62. Portugal in its Reply refers to a number of national reports to the Human Rights Committee, made pursuant to Article 40 of the International Covenant on Civil and Political Rights, and observations by the Committee.[69] It is not clear what conclusion Portuguese seeks to draw from these documents. It is noticeable that, in the reports by the Netherlands and Finland dealing with Article 1 and the right to self-determination, reference is made to those States' actions with regard to Namibia. No reference is, however, made to East Timor. Australia has reported in 1981 and 1987 to the Human Rights Committee under Article 40 of the International Covenant on Civil and Political Rights. It has not been questioned about East Timor. In its first Report in 1981, Australia said the following in relation to self-determination:

> "At the international level, Australia has traditionally been a strong supporter of the right to self-determination. In relation to Australia's dependent territories, see Part 1, paragraphs 9-16, which contain a note of the discharging of Australia's obligations in relation to its Territories. The note refers to Australia's former Territory of Papua and trust Territory of New Guinea; to Australia's conformity to its obligations under Article 73(e) of the United Nations Charter in relation to the Territory of Cocos (Keeling) Islands; and to its role recently in furthering the goal of complete internal self-government in relation to the Northern Territory and Norfolk Island."[70]

There was no question in relation to East Timor, but in response to other questions on self-determination Australia said:

> "Replying to questions concerning Australia's position on current international situations involving questions of self-determination, and in particular that of Namibia and the Palestinian people, (he said that) Australia was actively committed to the achievement of the right of peoples to self-determination. As an active member of the Committee of 24, Australia had played an important role in the United Nations decolonization activities, with particular emphasis on the South Pacific. As a member of the United Nations Commission on Human Rights, it had supported a number

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69 Reply of Portugal, Annexes II.34-38, Vol.III. pp.127-214.

70 Annex 8.

> of resolutions reaffirming the right of peoples to self-determination, for example in Afghanistan and Kampuchea. As a member of the United Nations Council for Namibia, Australia had worked consistently towards securing for the Namibian people the full exercise of their right to self-determination which was at present denied them."[71]

In the second report in 1987, Australia referred to the act of self-determination in the Cocos (Keeling) Islands in 1984 and the fact that the United Nations Visiting Mission was unanimously of the view that the people of Cocos had exercised their right to self-determination.[72] No reference was made in the Report to East Timor, but Australia was specifically asked about its position with regard to self-determination in general and specifically with regard to the South Africa, Namibian and Palestinian people. Australia's response is at Annex 11.

The statement said in part:

> "We have followed with interest the international focus on continuing application of self-determination to all citizens. It is significant that self-determination is the first Article of both International Covenants. This right is not extinguished or discharged by a single act of self-determination on independence after a colonial era. We interpret self determination as the matrix of civil, political and other rights which are required to ensure meaningful participation of citizens in relevant decision making processes which enable individuals to have a say in their future. The process of self-determination involves a number of aspects including participation in free, fair and regular elections, the ability to seek public office and to enjoy freedom of speech and association. Full respect for self-determination therefore requires that all members of society can participate in political processes."[73]

63. What is significant both in the treatment of the reports by Australia and those of other countries is not that questions may be asked generally by the Committee as to the attitude of countries to self-determination, but that the Committee has not paid any particular attention to East Timor or raised with

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71 Annex 9.
72 Annex 10.
73 Annex 11. See also Reply of Portugal, Annex II.37, Vol.III, p.203.

Australia the question of its policy towards East Timor, including the negotiations with Indonesia in relation to the Timor Gap Treaty. That these negotiations were continuing was well known internationally in 1988.

64. The Portuguese Reply pays little attention to the most recent dealings of Portugal with the United Nations Secretary-General on the issue of East Timor. As a result of discussions between Portugal and Indonesia under the auspices of the Secretary-General beginning in May 1989, agreement was reached in August 1991 on terms of reference for a visit by a Portuguese parliamentary delegation to East Timor in order to obtain first hand information on the situation existing in the country. Further talks were held to define the practical aspects of the visit.[74] Freedom of movement and contacts were established in the agreement as an essential condition to achieve the purpose of the visit.[75] In October 1991 the visit was cancelled after disagreement arose between Indonesia and Portugal over the presence in the Portuguese delegation of a journalist resident in Lisbon, Ms Jolliffe.[76]

65. More recently, in January 1992, Portugal informed the Secretary-General that it was ready to participate in a dialogue "sans conditions préalables", under the auspices of the Secretary-General, with Indonesia and all directly interested parties. It has never been suggested that Australia is a "directly interested Party" for this purpose. Portugal proposed that talks resume under the mediation of an experienced person of international prestige accepted by the Parties.[77] Since then the Secretary-General has pursued further talks with both Indonesia and Portugal with a view to the Parties engaging in a serious dialogue on the issue of East Timor.[78]

66. This record of action highlights the point that Portugal is principally seeking a solution to the East Timor issue through United Nations auspices. It also indicates a willingness by Portugal to deal with and accept the reality that Indonesia is in fact in occupation of East Timor.

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74 See 1991 Report by Secretary-General, A/46/456, Memorial of Portugal, Annexes II.71 and II.72, Vol.IV, pp.122, 123.

75 See also the statement by Mr Quartin-Santos to the Committee of 24, 28 July 1992, Reply of Portugal, Annex I.22, Vol.II, pp.121-2.

76 See Reply of Portugal, Annex II.18, Vol.II, p.267.

77 Reply of Portugal, Annex II.21, Vol.II, p.283. See also the statement in the Committee of 24, 28 July 1992, Reply of Portugal, Annex I.22, Vol.II, p.134.

78 See Reply of Portugal, Annex I.8, Vol.II, p.63.

PART I

THE INADMISSIBILITY OF THE APPLICATION

CHAPTER 1

PORTUGAL'S CLAIMS REQUIRE THE COURT TO PASS ON THE RIGHTS AND OBLIGATIONS OF A THIRD STATE IN ITS ABSENCE AND WITHOUT ITS CONSENT

Section I: General considerations

67. Portugal's Reply fails adequately to respond to Australia's contention that this case cannot be decided in the absence of Indonesia and without its consent. Australia continues to maintain this contention, although it does not repeat the numerous supporting considerations already advanced in Part II, Chapter 1 of its Counter-Memorial. This Chapter is primarily concerned to answer the matters specifically raised by Portugal in Part II, Chapter VII of its Reply.

68. Portugal advances a variety of arguments in support of its contention that the absence of Indonesia is not a bar to the Court's adjudication. It asserts that:

(a) because the principal matters on which it relies have already been decided by the competent organs of the United Nations, the Court is not required to decide the facts in favour of Portugal and against Indonesia in order to rule against Australia;

(b) because it impugns only Australia's conduct in so far as it consists of a breach of the right of self-determination of the people of East Timor, it does not impugn the validity of the 1989 Treaty as such, and thus does not ask the Court to pass on the rights of Indonesia;[79]

(c) because the right to self-determination is a right erga omnes, Portugal as administering Power may choose to sue any State which contests the right of the people of East Timor to self-determination, whether or not there are other States also engaged in the same alleged wrongdoing; and, therefore, Portugal may sue Australia in the absence and without the consent of Indonesia.[80]

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79 Reply of Portugal, paras.2.15, 2.19.
80 Reply of Portugal, paras.7.12-7.15.

69. Portugal's arguments are deceptively simple and entirely misleading. Portugal claims that the main issue is one of opposability and, in so doing, refers to its specific request that the Court adjudge and declare that the rights claimed for it and the people of East Timor are opposable to Australia.[81] But this singular request cannot define the dispute. Even if the Court were so to adjudge and declare, it would not follow that Australia had committed any international wrong. Australia might admit opposability but there might still not necessarily be any wrongdoing. It is in its other submissions and requests that Portugal marks out the subject of the dispute — Australia's entry into the 1989 Treaty with Indonesia. Portugal requests a declaration as to opposability only because its other submissions must fail, unless Portugal persuades the Court to accept that the rights which it invokes are opposable to Australia. It is for this reason that Australia maintains that Portugal's first so-called submission is in truth a mere proposition purporting to "justify" a contention, i.e., a "moyen", not a "conclusion".[82] In consequence, it cannot be said that the dispute in this case concerns only the opposability of certain rights to Australia. Portugal must show that Australia infringed these rights. But to do so the Court cannot avoid pronouncing on the validity of the Treaty itself and the rights of Indonesia. Australia contends that, absent Indonesia, this challenge necessarily involves a contravention of the principle of the Monetary Gold case.[83]

Section II: Portugal has not shown that Indonesia's situation differs in any relevant respect from that of Albania in the Monetary Gold case

70. A detailed examination of the Portuguese arguments which seek to avoid the Monetary Gold principle follows in sections IV, V, and VI. Portugal's basic contention is, however, that the principle simply does not apply in this case. It asserts that as the right of self-determination is a right erga omnes, opposable to all States equally, Portugal may sue whomsoever it chooses from among those States contesting the right.[84] It is for this reason that Portugal says the Monetary Gold principle does not apply.

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81 Reply of Portugal, paras.7.06 and p.273.
82 Counter-Memorial of Australia, para.10.
83 ICJ Reports 1954, p.19.
84 Reply of Portugal, paras.7.12-7.15.

71. Thus, Portugal contends that the situation which arose in the Monetary Gold case was relevantly different from that which arises in this case. The difference, according to Portugal, lies in the fact that the right at issue between Italy and Albania was a right erga singulum, whereas the right at issue in this case is a right erga omnes.[85] But this consideration is not in fact material to the application in this case of the Monetary Gold principle — that the Court will not adjudicate where the subject-matter of the decision sought is the international responsibility of another State which has not consented to the Court's adjudication.[86] The decision in the Monetary Gold case is itself no more than an application of the basic principle that the Court will not decide the rights and obligations of a State without its consent. This fundamental principle applies in every case, whether involving rights erga singulum or rights erga omnes.

72. Accordingly, where State A, together with State B, is said to be under an obligation erga omnes resulting from the prior unlawful conduct of State B, State C cannot bring an action against State A alone for breach of that obligation, if the decision sought would also require a decision on the lawfulness of the prior conduct of State B. In this situation, the principle in the Monetary Gold case, as elucidated in the Phosphate Lands case, would apply. See Section III below. This is the very situation which arises in this case: see Sections IV and V below. See also Counter-Memorial of Australia, paragraphs 199-204.

73. The position might be otherwise if the international responsibility of State B had already been authoritatively determined, or the decision sought would give rise to no more than some adverse implication against State B. But neither of these situations arises here. See Sections IV and V below and paras.221-223. The situation which arises in this case falls entirely within the Monetary Gold principle. This is because (1) the Court must first decide whether Portugal or Indonesia was the proper coastal State to make the Treaty in 1989, before it can decide whether Australia incurred any international responsibility (Sections IV and V); and (2) if the decision sought were given, the Treaty would be invalidated as between Indonesia and Australia (Section VI) and would affect Indonesia's rights as much as those of Australia.

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85 Reply of Portugal, para.7.13.

86 ICJ Reports 1954, pp.32-33; Counter-Memorial of Australia, paras.192-193.

74. Portugal cannot rely on the supposed erga omnes quality of the rights which it invokes to overcome the fact that Indonesia has not consented to an adjudication in which the crucial issue to be resolved concerns its international responsibility. Indonesia's responsibility, that is to say a finding as to the illegality of its conduct, is an essential prerequisite of any claim by Portugal against Australia with regard to the 1989 Treaty. In such a situation, "the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it".[87] Further, whilst the obligation not to use force might be an obligation erga omnes, the obligation, if any, not to recognise a situation created by a violation of that obligation does not itself arise as a breach of that erga omnes obligation. Any such obligations could only arise as a result of a decision by the Security Council requiring States not to recognise the resulting situation.[88] A failure to comply would then be a breach of Article 25 of the Charter and not a breach of Article 2 (4) and of an erga omnes obligation itself.

Section III: The Court has confirmed the Monetary Gold principle

A. DECISIONS OF THE COURT BEFORE THE PHOSPHATE LANDS CASE

75. Prior to the Case Concerning Certain Phosphate Lands in Nauru,[89] the Court had affirmed the validity of the Monetary Gold principle in a number of decisions (e.g., Continental Shelf (Libyan Arab Jamahiriya/Malta);[90] Military and Paramilitary Activities in and against Nicaragua;[91] Frontier Dispute (Burkino Faso/Mali);[92] Land, Island and Maritime Frontier Dispute (El Salvador/Honduras).[93]

76. Portugal relies on the Military and Paramilitary Activities in and against Nicaragua case to avoid the consequences of the Monetary Gold principle.[94]

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87 Monetary Gold case, ICJ Reports 1954, p.33.
88 See Counter-Memorial of Australia, para.365.
89 ICJ Reports 1992, p.240.
90 ICJ Reports 1984, p.3.
91 ICJ Reports 1984, p.392.
92 ICJ Reports 1986, p.554.
93 ICJ Reports 1990, p.92.
94 Reply of Portugal, para.7.53.

But this reliance is entirely misplaced. In that case, the Court clearly affirmed the principle. It simply declined to extend its application to the situation in which although the rights and obligations of non-party States were implicated, they did not form the subject-matter of the proceeding. The reasons were twofold: first, Nicaragua asserted "claims against the United States only, and not against any other State";[95] and secondly, the Court accepted that it was not required to exercise its jurisdiction over any other State. Thus the Court wrote:

> "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 when 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'. ...
>
> 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."[96]

The point was that the submissions made by Nicaragua concerned only the alleged use of force by the United States, and not the conduct of third States. It was thought possible, therefore, to rule on Nicaragua's submissions, without passing on the rights of non-parties. Nicaragua's application did not directly call into question, so the Court held, such matters as the right of other States to receive military aid from the United States.[97]

77. As the following discussion shows (Sections IV, V and VI), Portugal's Application is altogether different. Though Portugal does not in its final submissions refer to Indonesia by name, these submissions would, if accepted, not simply implicate Indonesia's rights and duties, they would require a ruling expressly or by implication as to Indonesia's international responsibility, just as acceptance of Italy's claim would have required a ruling on Albania's responsibility in the Monetary Gold case.

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95 ICJ Reports 1984, p.430.
96 ICJ Reports 1984, p.431.
97 ICJ Reports 1984, p.430.

78. In this connection, Australia does not dispute that the right to self-determination is an erga omnes principle. But this means simply that each and every State must respect it. In the present case, the breach of this principle is constituted, according to Portugal, by the failure to negotiate and conclude a treaty with it. But this is not so. Whether Portugal is the administering Power or not, in any event Australia would have had no obligation to conclude a treaty of any kind with it. Thus, the only question is to determine if, in concluding this treaty with Indonesia, Australia has infringed the principle. And this, of course, requires that the Court determine what are the rights (or responsibilities) of Indonesia. But in order to do this the Court would be compelled to determine if Indonesia had a right to enter into the Treaty. This necessarily implies that the Court determine the status of Indonesia in East Timor. It is only then that the application of the principle of self-determination in this case can be determined.

79. Each of the other decisions to which Portugal also refers gave rise to a situation different from that which arises in this case. Thus, neither the decision of the Court in the Frontier Dispute (Burkino Faso/Mali) case nor in the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) case detract from the proposition that the Monetary Gold principle applies to Portugal's Application here. In these cases, the Court distinguished between two situations: (1) that in which the resolution of the dispute submitted to the Court would have required it to pass on the legal rights and obligations of a non-party State; and (2) that in which the legal interests of a non-party were affected (even substantially so) only as a practical or logical consequence of the Court's judgment.

80. In the Frontier Dispute (Burkina Faso/Mali) case the Court held that it could fix the end-point of a land frontier between the two State parties to the dispute, even though that end-point lay on the frontier of a third State not party to the dispute, because the determination of the end-point did not determine the legal interests of the non-party. The Court's finding could give rise to no more than an implication that the parties before it had exclusive sovereignty up to that end-point.[98]

81. In the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) case the question was whether or not the Gulf of Fonseca was subject to a condominium or a "community of interest" of the three riparian

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98 ICJ Reports 1986, p.579.

States, El Salvador, Honduras and Nicaragua. The Court granted Nicaragua's application to intervene, on the basis that Nicaragua's legal interest might be affected by the decision. But it rejected Nicaragua's further contention that the Court could not proceed in its absence, holding that when judgment was given, it could do no more than declare which particular regime was opposable to one or other of the parties, not to Nicaragua. This was so even though, by rejecting the submissions of one party, the actual decision on the point, "would be tantamount" to a finding that one or other regime did not exist at all.[99]

82. In the present case, however, it is not said that a judgment in the terms sought would simply imply, or even be tantamount to, a finding against Indonesia. Rather the necessary basis for such a judgment is a prior finding by the Court adverse to Indonesia's claimed entitlements. See Sections IV and V below. Such a judgment would also terminate Indonesia's rights under the 1989 Treaty. See Section VI below. Clearly, this is a very different situation from that which has arisen in either of the previous cases.

83. The operation of the consensual principle (the basis of the Monetary Gold case) in the context of an international adjudication is well demonstrated by the Continental Shelf (Libya/Malta) case. It will be recalled that, in that case, the principle had two significant consequences. First, the Court refused to allow Italy to intervene in the proceeding, because such intervention would have changed the very nature of the dispute. Thus, the Court said:

> "Whether the relations between Italy and the Parties in the matter of continental shelf delimitation be regarded as three disputes, or one dispute, the fact remains that the Court cannot adjudicate on the legal relations between Italy and Libya without the consent of Libya, or on those between Italy and Malta without the consent of Malta."[100]

Consistently with the principle of consent, however, the Court limited its final decision to the area over which Italy had made no claims because, as the Court explained:

> "The Court has not been endowed with jurisdiction to determine what principles and rules govern delimitations with third States, or whether the claims of the Parties

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99 ICJ Reports 1990, p.122 (emphasis added).

100 ICJ Reports 1984, p.20.

> outside the area prevail over the claims of those third States in the region."[101]

No part of the dispute in this case can be decided, however, without first passing on Indonesia's claims (Sections IV and V below), so that the Court cannot, by parity of reasoning, decide any part of this case without offending the principle of consent.

B. THE PHOSPHATE LANDS CASE

84. Portugal contends that the Case Concerning Certain Phosphate Lands in Nauru[102] provides authoritative support for its contention that it can choose to sue whomsoever it chooses from amongst those States which contest the right of self-determination of the people of East Timor; and that the absence of Indonesia does not, therefore, prevent the Court from deciding the case.[103] But the case is not authority for any such proposition.

85. In the Phosphate Lands case, Australia submitted that, because the Administering Authority under the 1947 Nauru Trusteeship Agreement consisted of three States jointly, the decision sought by Nauru against Australia would, if given, simultaneously decide the responsibility of the other two States. Australia did not contend that the Phosphate Lands case situation was precisely the same as that which arose in the Monetary Gold case. It was acknowledged by Australia and Nauru that, in the Monetary Gold case, Italy's claims against the actual parties to the proceeding (France, the United States of America and the United Kingdom) could not have been decided in Italy's favour unless and until the Court decided that Albania, a non-party, had incurred international responsibility to Italy. And Australia accepted that, in the Phosphate Lands case, a decision against the other two States (New Zealand and the United Kingdom) was not a prerequisite to a decision against it, but rather that a decision against Australia would at the same time be a decision against the other two States. It was for this latter reason that Australia contended that the Monetary Gold principle applied.

86. The Court held, however, that the interests of the other two States could not for this reason be said to constitute "the very subject-matter of a judgment

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101 ICJ Reports 1985, p.26.
102 ICJ Reports 1992, p.240.
103 Reply of Portugal, para.7.37.

to be rendered" and that the situation was, therefore, different from that of the Monetary Gold case. The Court said:

> "In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim."[104]

It added:

> "In the Monetary Gold case the link between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical".[105]

It concluded:

> "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".[106]

87. The Phosphate Lands case in no way supports Portugal's position in this case. Quite clearly, that case confirms the continuing validity of the Monetary Gold principle.[107] Nauru argued successfully in that case that the Court could make its decision without referring to the conduct of any State other than Australia. The present is clearly not a case in which Portugal's claim rests exclusively on Australia's own acts. Australia's contention in this case is not simply that a decision against Australia would constitute a simultaneous decision against another State. Rather, Australia maintains that, as in the Monetary Gold case, a decision must first be made by the Court as to a non-party's international rights and obligations, before a decision can be made as to a respondent party's alleged international responsibility. This is because the

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104 ICJ Reports 1992, p.261.
105 Ibid.
106 Ibid., pp.261-2.
107 ICJ Reports 1992, p.261.

legal elements of Portugal's case against Australia necessarily require the Court to pass on the rights and obligations of Indonesia before it would be able to decide Australia's responsibility. That is to say, Australia's conduct can be held to be unlawful, if at all, only on the basis that Indonesia had assumed control of East Timor unlawfully, prior to the conclusion of the 1989 Treaty.

Section IV: A decision as to Indonesia's rights and obligations is a prerequisite to a decision on Australia's responsibility, if any

88. Portugal does not allege that Australia failed in some general and abstract way to recognise the non-self-governing status of East Timor, or Portugal as administering Power. On the contrary, Portugal specifies the acts constituting this alleged failure to be the negotiation and conclusion of the Treaty in December 1989. The primary "faits illicites" are, on Portugal's own account, "la négociation, la conclusion et le commencement d'exécution de l''Accord'".[108] Portugal's reproach is not simply that Australia made a treaty. Portugal challenges the making of the treaty concerning East Timor's maritime territory with Indonesia. Portugal alleges that an otherwise lawful act is in breach of the right of self-determination of the people of East Timor, because done with a third State (Indonesia), not with Portugal. Portugal's ultimate submissions are inconsistent with any other interpretation.[109] The supposed wrong must, therefore, lie in the fact that Australia concluded the Treaty with Indonesia, not Portugal. Portugal thus implicitly (but unavoidably) challenges Indonesia's competence to represent East Timor in making the Treaty.

89. Thus, the crucial issue becomes whether Portugal, not Indonesia, was the proper coastal State to conclude a treaty on matters of maritime concern relating to East Timor in December 1989. If no, Portugal's case against Australia must fail. Portugal must obtain an affirmative answer to this question, before it can take the next step and challenge Australia's acts of negotiating and concluding the Treaty with Indonesia. Indonesia's claim to represent the people and territory of East Timor forms the very subject-matter of the dispute. For Portugal's case against Australia inevitably depends on a successful challenge to Indonesia's claim that it (not Portugal) is the proper coastal State to represent the maritime interests of East Timor.

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108 Reply of Portugal, para.6.02 and pp.273-5.
109 Cf Reply of Portugal, pp.274-5.

90. Portugal asserts that the act of making the Treaty with Indonesia in December 1989 was unlawful, because it constituted a breach of the right of the people of East Timor to self-determination. And why? Because, according to Portugal, in so doing Australia failed to recognise the non-self-governing status of the territory and Portugal as administering Power. But this is a non-sequitur. Australia did no more than enter into a treaty with a State which claims sovereignty over the territory to which, in part, the treaty relates. The conclusion of a treaty with a State claiming sovereignty over territory is not unlawful per se. The only possible breach of a legal rule would be if Indonesia's claim is ill-founded. This very evidently supposes that the Court adjudicates on this claim, which appears, therefore, as the "very subject-matter of the dispute".

91. If, as Australia contends, entry into the Treaty signified no more than Australia's recognition of Indonesian sovereignty over East Timor, Portugal cannot challenge Australia's entry into the Treaty except on the basis that that recognition was unlawful, because Indonesia's continued occupation of East Timor was unlawful at international law at the crucial time, December 1989. Portugal must establish the unlawful nature of Indonesia's occupation in December 1989 before any decision can be made as to the lawfulness of Australia's recognition and before any consideration can be given to the consequences of that decision for Australia's entry into the Treaty. But this prior finding cannot, under the Monetary Gold principle or the more general principle requiring consent, be made in the absence and without the consent of Indonesia.

92. Furthermore, to determine the nature of Indonesia's occupation in 1989 will inevitably involve a judgment on the initial validity of Indonesia's conduct. And this would require an examination of the events of 1975 and of the Indonesian claim that an act of self-determination occurred in 1976. Indeed, even Portugal itself concedes that, because Indonesia is not a party to the proceeding, the Monetary Gold principle prevents it from alleging that Indonesia's use of force gave rise to a duty of non-recognition.[110] The same principle would also prevent Portugal from challenging the lawfulness of Indonesia's continued occupation or possession of East Timor. But if Portugal is to challenge Australia's act of recognition, the need to challenge the lawfulness of Indonesia's conduct with respect to East Timor remains, despite

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[110] Reply of Portugal, paras.7.28, 9.23.

Portugal's disclaimer to the contrary.[111] This is confirmed by the fact that in the course of its Reply Portugal persistently refers to the illegality of Indonesia's conduct with respect to East Timor, and goes so far as to say that Indonesia has violated norms which are jus cogens.[112]

93. Furthermore, despite the fact that Portugal says it does not challenge Indonesia's military intervention or occupation, it concedes that it was in fact this action which gave rise to Australia's supposed delict.[113] This concession is revealing. By it, Portugal admits that Australia's entry into the Treaty was unlawful only because of the prior acts of Indonesia. Given Portugal's challenge to Australia's act of de jure recognition and to Indonesia's authority to act as the proper coastal State in concluding the Treaty, Portugal's concession can mean only that Australia's alleged wrongdoing was the making of the Treaty, notwithstanding that Indonesia's occupation of East Timor was not only in itself unlawful, but remained so. To decide this, however, the Court would first need to decide whether Indonesia was in lawful occupation of East Timor in December 1989, a decision it cannot make in Indonesia's absence and without its consent.

94. What is more, if Portugal does not challenge the lawfulness of Indonesia's occupation of the territory in December 1989,[114] the Court is bound to presume that such occupation was lawful. The presumption that States act in accordance with international law is a necessary condition of the Court's proper operation.[115] It follows from this initial presumption that the Court is bound to find that Australia's entry into the 1989 Treaty was also lawful, there being no rule that one State may not enter into a treaty with another State in lawful occupation of the maritime territory to which the proposed treaty is to relate. Of necessity then, Portugal must challenge Indonesia's occupation of East Timor in December 1989. But the Court cannot, consistently with the Monetary

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111 Reply of Portugal, paras.2.20, 2.21, 6.30, 7.26, 9.02.

112 See especially Reply of Portugal, paras.2.19, 5.51, 6.15, 6.29, 6.34, 6.36 ("... soutenir que ... les Etats tiers seraient libres de reconnaître des événements constituant des violations de principes fondamentaux du droit international général, c'est méconnaître l'existence d'un principe pertinent et obligatoire du droit international général ..."), 6.37-6.41, 6.55-6.56. See also Reply of Portugal, paras.3.01-3.12, 3.18 (footnote 98), 3.20-3.21, 3.50, and the Annexes referred to in those paragraphs. See further e.g. Memorial of Portugal, paras.1.66, 2.13, 4.62, 8.23.

113 Reply of Portugal, paras.1.14-1.15.

114 Cf Reply of Portugal, paras.2.20, 2.21, 6.30, 7.26, 9.02.

115 North Atlantic Coast Fisheries case (1910), United Nations Reports of International Arbitral Awards, Vol. 11, p.173 at p.186; Lac Lanoux case (1957), United Nations Reports of International Arbitral Awards, Vol. 12, p.281 at p.305.

Gold principle, determine de novo whether or not Indonesia's claim to sovereignty in December 1989 was justified.

95. Portugal seeks to avoid the operation of the Monetary Gold principle by reference to United Nations resolutions. Portugal contends that the political organs of the United Nations have already declared that East Timor is a non-self-governing territory and that Portugal is the administering Power in relation to it; that these findings constitute the given facts ("les données"), binding on all Member States as well as the Court; and that Australia has acted unlawfully in failing to recognise East Timor's non-self-governing status and Portugal as administering Power.[116] Thus, says Portugal, the Court need do no more than interpret the resolutions in which the given facts ("les données") are said to appear, and for this, Indonesia's consent is unnecessary.[117]

96. The resolutions of the political organs of the United Nations do not, however, answer the crucial question, whether, in December 1989, Portugal or Indonesia was the proper coastal State to make a maritime treaty for East Timor. More than 13 years had by then elapsed since the Security Council had passed resolution 389 of 22 April 1976, and there is nothing in the resolutions of the Security Council or of the General Assembly which could answer this question.

97. Put another way, Portugal must first show how the conclusion of the Treaty in 1989 constituted a breach on Australia's part of the right of self-determination of the people of East Timor. This is not established by the so-called given facts ("les données") on which Portugal relies. For one thing, even if the non-self-governing status of East Timor and Portugal's status as administering Power were accepted at the time of the last United Nations resolution on East Timor (i.e., General Assembly resolution 37/30 of 23 November 1982), it does not follow that Australia's entry into the 1989 Treaty some seven years later was in breach of any rights then pertaining to that status or title, even if the resolutions contained "les données" at the time they were adopted.

98. Nor can Portugal rely on its own status as administering Power to avoid the need for a judicial determination of Indonesia's legal interest. As Part II, Chapter 1 shows, whilst Portugal may be the administering Power for certain

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116 Reply of Portugal, paras.2.22, 2.29, 7.07, 7.08.
117 Reply of Portugal, para.7.11.

United Nations purposes, it does not follow that, as such, Portugal had exclusive capacity to make a treaty of this kind — a treaty which could only be given effect by the State in control of the territory to which the Treaty related. The United Nations has recognised Indonesia's vital interest in East Timor. Portugal's requests would, if granted, require the Court to ignore these interests.

99. For Portugal to be entitled to present this case, and a fortiori to succeed on the merits, it must first establish Indonesia's lack of authority stemming from the illegality, if any, of that State's conduct. The resolution of this case, therefore, requires much more than a judicial interpretation of the United Nations resolutions: it requires the Court to decide the international responsibility of Indonesia in occupying East Timor, and to rule on the competing claims of Portugal and Indonesia to conclude a maritime treaty relating to East Timor. Portugal's principal submissions are, as already noted, to the effect that Portugal, not Indonesia, was the proper coastal State with which Australia ought to have negotiated and concluded the treaty; and that Australia acted unlawfully in concluding the Treaty with Indonesia. The Court is thus asked to decide which State, Portugal or Indonesia, was competent to make the 1989 Treaty. Portugal must obtain an answer in its favour before it can take the next step, and challenge Australia's action in entering the Treaty. If Portugal does not challenge Indonesia's claim to be in lawful occupation in December 1989, it must find some other basis upon which to challenge Indonesia's alleged lack of capacity. But whatever that basis be, the Court cannot in fact decide whether or not Indonesia had such capacity in Indonesia's absence and without its consent. Because such a decision is a prerequisite to a claim against Australia, the situation clearly falls within the parameters set in the Monetary Gold case, as explained in the Phosphate Lands case.

100. The situation which arises in the present case is thus very different from that which arose in the Phosphate Lands case. It was not said there that the responsibility of the non-party States was a prerequisite to Australia's responsibility, if any. In this case, however, Portugal must establish Indonesia's lack of capacity before it can succeed against Australia. If Portugal does not have, as it claims, the exclusive right to make such a treaty, then Portugal's case against Australia must fail. As Portugal's claim to exclusive competence is essential to its case, Indonesia's lack of entitlement is part of the very subject-matter of the decision sought by Portugal.

Section V: Indonesia's responsibility, if any, cannot be merely concurrent with Australia's supposed responsibility

101. Portugal contends that by making the 1989 Treaty, Australia has breached rights erga omnes belonging to the people of East Timor and to Portugal, as administering Power,[118] and that these rights are binding as much upon Australia as upon any other State. According to Portugal, the breaches occurred either because the Treaty was concluded without the consent of the people, represented by Portugal as administering Power;[119] or because the Treaty dealt unlawfully with rights over natural resources belonging to the people of East Timor.[120]

102. If, however, there was a culpable failure to consult the people of East Timor, the failure was that of Indonesia, as the State claiming sovereignty over East Timor. Equally, if there was a culpable failure to deal lawfully with the natural resources of the people of East Timor, that failure was solely that of Indonesia, as possessor of the territory. Indonesia, rather than Australia, bears responsibility for the well-being of the inhabitants of the territory, and this, to the United Nations as the ultimate guardian and determiner of the rights in question. None of the Portuguese allegations are, however, maintainable in the absence and without the consent of Indonesia. This case is, therefore, quite unlike the Phosphate Lands case.

103. Australia's position, as a third State, is very different from that of Indonesia. In the absence of any direction to the contrary by the United Nations, Australia has dealt with Indonesia on the basis that it is in possession of East Timor, without seeking to derogate from the rights of the people of East Timor. See Part II, Chapter 3. The allegation that the 1989 Treaty constitutes a derogation from these rights, apart from striking at Australia's own rights in the area in question (Counter-Memorial of Australia, Part III, Chapter 3), could only be substantiated if Indonesia had initially acted in breach of those rights by its occupation of East Timor and by its subsequent exercise of control over the territory. For if Indonesia was in lawful occupation of the territory in December 1989, there can be no question that Australia was entitled to enter into the 1989 Treaty. Hence, the only ground upon which Australia's recognition of Indonesia's position or Australia's entry into the Treaty can be characterised as

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118 Reply of Portugal, para.7.13.
119 Reply of Portugal, para.5.65.
120 Reply of Portugal, para.5.62.

a breach of an obligation owed either to Portugal or East Timor is that Indonesia's actions with respect to the territory and its continued presence there is illegal.

104. Thus, Portugal's case is but an artificial attempt to construct a claim against Australia. In Australia's view this is both unjustifiable and contrary to the very foundation of international jurisdiction.

105. Portugal contends that the decisions of the Central American Court of Justice in Costa Rica v Nicaragua (1916) and El Salvador v Nicaragua (1917)[121] support its contention that the Court can in this case pronounce on Australia's responsibility to Portugal, notwithstanding Indonesia's absence.[122]

106. But Portugal's reliance on these decisions is misplaced. As already noted,[123] each of the Applicant States, Costa Rica and El Salvador, alleged that Nicaragua had breached independent obligations owed to each separately by entering into the Bryan-Chamorro Treaty with the United States. The Court held, in each case, that it was competent to decide the issue, notwithstanding the absence and lack of consent of the United States.[124] In each case too, it upheld the Applicants' complaints, although it declined to declare that the treaty with the United States was void, on the ground that the United States was not subject to the Court's jurisdiction.[125] In El Salvador v Nicaragua, the Court even went so far as to declare that Nicaragua was under an obligation "to take all possible means sanctioned by international law to re-establish and maintain the legal status that existed between the two countries prior to the conclusion of the Bryan-Chamorro Treaty".[126] But having said that, the Court specifically declined to declare the treaty void, or to enjoin Nicaragua from fulfilling the treaty.[127] It said:

> "The Court is without competence to declare the Bryan-Chamorro Treaty to be null and void, as in effect, the high party complainant requests it to do when it prays that the Government of Nicaragua be enjoined 'to abstain from fulfilling the said Bryan-Chamorro Treaty.' On this point

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121 American Journal of International Law, Vol. 11, 1917, at p.181 and at p.674 respectively. Also Counter-Memorial of Australia, para.189.
122 Reply of Portugal, para.7.21-7.22.
123 Counter-Memorial of Australia, para.189.
124 American Journal of International Law, Vol. 11, 1917, pp.209, 292, 730.
125 Ibid., p.728.
126 Ibid., p.728.
127 Ibid., p.729.

> the Court refrains from pronouncing decision, because, as it has already declared, its jurisdictional power extends only to establishing the legal relations among the high parties litigant and to issuing orders affecting them, and them exclusively, as sovereign entities subject to its judicial power. To declare absolutely the nullity of the Bryan-Chamorro Treaty, or to grant the lesser prayer for the injunction of abstention, would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court."[128]

107. Both cases affirm the principle that the rights of a third State cannot be determined in a proceeding to which it is not a party,[129] but they do not support Portugal's contention that, because it seeks no actual declaration or order against Indonesia,[130] it can proceed against Australia alone. In this connection, two situations may be distinguished:

(1) If State A breaches an obligation [erga singulum] to State B not to make a treaty with State C, then State B can seek a declaration of right in respect of State A (although it cannot insist on consequential relief against State C). This situation arose in Costa Rica v Nicaragua and El Salvador v Nicaragua, but it does not arise here.

(2) In this case, State B asserts that the unlawful conduct of State C gave rise to an obligation erga omnes which has been contravened subsequently by the further actions of State A and State C (in making the 1989 Treaty). In this circumstance if States A and C have breached the asserted obligation erga omnes (by entering into a treaty with one another), State B cannot seek a declaration of invalidity against State A in the absence of State C, for to do so, would require a ruling on the lawfulness of the conduct of State C said to give rise to the erga omnes obligation. Further, it would also involve the determination of the rights of State C under the treaty, although State C had not given its consent to the adjudication. This would clearly offend the principle of consent as elucidated by the Central American Court in Costa Rica v Nicaragua and El Salvador v Nicaragua, as well as by this Court. See

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128 Ibid., 729.
129 Counter-Memorial of Australia, para.189.
130 Reply of Portugal, paras.5.79, 7.33.

Sections II and III above. Even on Portugal's own analysis, this is the situation here.

Section VI: The decision sought would deprive Indonesia as well as Australia of the benefit of the Treaty

108. Portugal says that it complains only of a delict on Australia's part, but it is impossible to isolate Australia's alleged delict from the rights and obligations of Indonesia, as Portugal seeks to do. Portugal contends that it does not challenge the validity of the 1989 Treaty.[131] But this assertion is clearly ill-founded.[132] Even if Portugal's express challenge is to Australia's conduct only, the substance of the dispute in this case involves an inevitable challenge to the validity of the 1989 Treaty.[133] In this case, to challenge the negotiation, conclusion and performance of the Treaty is to challenge its validity.[134]

109. Portugal in its Reply takes a lot of pain to try to justify, in a very abstract manner, an alleged distinction between questions "de liceité" and "de validité".[135] But this so-called distinction is entirely inapplicable in this case. It is true, as Portugal says, that an act may retain its validity (i.e., its intended legal effect) though attended by some unlawfulness.[136] Thus, a treaty may be valid as between State A and State B, even though in making it, State A contravened an obligation owed by it to State C. In this circumstance, the treaty will have its intended legal effect, so that States A and B will be entitled (and obliged) to give effect to their respective obligations under the treaty. Whilst there will be legal consequences for State C, particularly in relation to State A, this will not detract from the fact that the treaty is to be given effect by the parties according to its terms. It is only when the exterior obligation strikes at the validity of the treaty and that consequence can be established (in this case as against Indonesia) that the treaty will be deprived of effect.

110. But it is not the function of the Court to settle doctrinal controversies, but to decide concrete disputes submitted to it. There might be some intellectual and doctrinal merit in the distinction between "illiceité" and "invalidité". But it

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131 Reply of Portugal, paras.2.15, 2.19, 7.19, 7.21.
132 See paras.8 (1) and 18 above.
133 Counter-Memorial of Australia, paras.12-17.
134 Counter-Memorial of Australia, paras.220-226.
135 Reply of Portugal, paras.2.11 and 7.21.
136 Reply of Portugal, para.2.11.

is plain that, in the present case, the supposed unlawfulness of Australia's conduct in negotiating, concluding and applying the 1989 Treaty can only be affirmed if this Treaty is invalid:

— Australia cannot be held responsible because it has negotiated "a" treaty: since negotiating a treaty is not, by itself, impermissible in international law, it could be responsible only if negotiating this Treaty were unlawful;

— Australia cannot be held responsible because it has concluded "a" treaty; but only if the conclusion of this Treaty were internationally unlawful; and

— complying with a valid treaty is not a breach of international law; on the contrary, pacta sunt servanda, and it would only be if this Treaty were invalid that Australia could be responsible.

111. Therefore, the lawfulness of the Australian conduct can only be judged in relation to the facts of the present case and, as Australia has shown in its Counter-Memorial (see e.g. paras.6-7), the central fact — the only real fact — that Portugal reproaches Australia for is the 1989 Treaty. If it were invalid then Portugal could hold the Australian conduct as being unlawful. But there is no possibility for the Court to appreciate the validity (or invalidity) of this Treaty without determining, at the same time, the lawfulness of Indonesia's conduct. Portugal knows this and it is precisely why it desperately tries to make this very artificial distinction between "illiceité" and "invalidité". But:

— Australia has not negotiated in the abstract; it has negotiated with Indonesia;

— Australia has not concluded the Treaty with itself; it has signed it with Indonesia (and there is no justification for trying to obscure this fact by qualifying this Treaty as being "plurilateral" (Reply of Portugal, para.6.03); it is but a classic bilateral agreement); and

— Australia complies with this bilateral Treaty and applies it in co-operation with Indonesia.

Moreover, as established in other parts of the present Rejoinder, if the Treaty were to be held invalid, quod non, it could only be because Indonesia, not Australia, had no capacity to negotiate, conclude and apply it.[137]

112. Portugal also places great stress on the notion of "opposabilité" (opposability).[138] It is seen as centrally relevant in relation to the 1989 Treaty. But this agreement was concluded between Australia and Indonesia. It is, therefore, not "opposable" as such to Portugal as established in the Australian Counter-Memorial[139] and in conformity with the principle pacta tertiis nec nocent nec prosunt (see Article 34 of the Vienna Convention on the Law of Treaties).

113. Consequently a third State, such as Portugal, cannot invoke its invalidity except, perhaps, if it contradicts a rule of jus cogens. But:

(i) Portugal does not contend this; and

(ii) even if it did, it would then, very evidently, have to show that the Treaty is invalid which would unavoidably touch upon the rights of Indonesia (see para.13 above).

As long as Portugal asserts that it does not challenge the validity of the Treaty, it cannot invoke any international wrongful act; and, if it bases itself on the invalidity of the Treaty,

(i) it cannot establish this without implicating Indonesia's responsibility; and

(ii) there is, anyhow, no cause of action since the Treaty is not opposable to it.

114. Nevertheless, in this case, Portugal seeks to prevent the 1989 Treaty operating according to its terms. If the Court were to enjoin Australia from further acts of exploration or exploitation in the Timor Gap, as Portugal requests,[140] the Treaty would fail, because it could no longer be performed. There is no basis for the Court to enjoin Australia from carrying out its obligations or pursuing its rights under the 1989 Treaty, unless the invalidity of

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137 See paras.18 and 73 above. See also Counter-Memorial of Australia, para.184.
138 Reply of Portugal, e.g., para.7.06.
139 See Counter-Memorial of Australia, paras.10, 409.
140 Portuguese Submission 5, Reply of Portugal, pp.274-275.

the Treaty can be established, because the mere infraction of third party rights by virtue of a treaty is no ground for a Court to grant the equivalent of injunctive relief.

115. Invalidity is, moreover, the necessary consequence of Portugal's claim to exclusive treaty-making competence. Although Portugal denies that it challenges Indonesia's capacity to conclude the Treaty,[141] this denial lacks any credibility. The Court could not answer Portugal's claim to exclusive *competence without stating that Indonesia lacks capacity to conclude this* Treaty. Therefore, if Portugal obtained a decision in the terms sought, that decision would necessarily deny Indonesia's competence to make agreements concerning the maritime territory of East Timor.[142] If Indonesia was not competent to make the Treaty in December 1989, because it was not the proper coastal State to represent East Timor's maritime interests, then the Treaty must fail. Even Portugal admits, in a half-hearted sort of way, that its Application necessarily calls into question the Treaty's status as such. Thus, whilst denying it challenges validity, Portugal throughout its Reply, refers to the Treaty not as "l'Accord" but as "l''Accord'". What can this be if not a challenge to validity? Portugal cannot escape the consequence of its own submissions simply by saying that it does not ask the Court to rule upon the matter. Actually, if Portugal is right, there can be no conflict of obligations. What obligations could arise from a treaty made with a State entirely lacking competence to make it?

116. Portugal requires the Court to declare the consequences for both Portugal and Australia of Australia's supposed obligations to Portugal. Portugal cannot escape the difficulties to which its submissions give rise by saying that it does not ask the Court to resolve any conflict of obligations which may arise if it were successful;[143] for the Court is itself bound to take account of the fact that the judgment requested by Portugal will certainly give rise to a conflict of obligations. If the Court were to hold, as Portugal requests, that Australia may not perform its obligations under the Treaty, this would be on one of two possible bases. Either because the Treaty is invalid, which Portugal does not allege because the effect on Indonesia's rights under the Treaty is patent: or because, as Portugal does allege, the Treaty remains valid but Australia is alone precluded from performing its obligations under the Treaty because this would

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141 Reply of Portugal, para.7.20.
142 Cf Reply of Portugal, pp.273-275.
143 Reply of Portugal, para.7.23.

involve breaches of other duties owed by Australia to Portugal (denial of its status as administering Power) or to the people (denial of the right of self-determination).

117. But in the latter case the conflict of obligations for Australia would remain. Australia would have no option but to comply with the Court's judgment and refuse to perform its obligations under the Treaty. Indonesia's rights under the Treaty would clearly be affected, for Australia would be bound to refuse to give effect to them. It is no answer to say, as Portugal does, that it is a matter for Australia to draw from the Court's judgment whatever conclusions are appropriate, and the Court can thus avoid passing directly on Indonesia's rights and obligations.[144] The conclusion would be absolutely clear, and Australia would have no choice: it could not perform the Treaty. To pretend that this would not necessarily affect Indonesia's rights is sheer pretense. The effect would be inescapable. Indonesia would be denied effective enforcement of its rights because Australia would be bound to refuse to perform its obligations towards Indonesia.

118. Finally, as already noted, if the right of self-determination is held to give rise to a rule of jus cogens, and if the Court were to find, as Portugal submits, that the act of making the Treaty constituted a breach of the right of self-determination, then as breach of a peremptory norm such a finding would inevitably determine the rights of both contracting States. By virtue of such a finding and of Article 53 of the Vienna Convention on Treaties, the treaty would be void.[145] And it would be void for both Parties. In these circumstances, Portugal's claim cannot, as Portugal alleges, concern only the alleged delict by Australia.

119. Even if it were permissible for Portugal to argue that it does not contest the validity of the treaty but merely requires that Australia be prevented from performing it, the effect would be to deprive Indonesia of its rights under the Treaty. This is a step which the Court is unable to take in the absence of Indonesia as a party to the case. The situation which arises here is quite different from that which arose in the Phosphate Lands case, where the Court asserted its power to adjudicate on a dispute with one alleged tortfeasor even though its judgment was, in principle, equally applicable to other alleged tortfeasors not before the Court. Here, an adjudication upon Australia's

144 Reply of Portugal, para.9.34.
145 Counter-Memorial of Australia, para.223.

position would, if the claimant's case were upheld, deprive Indonesia of its entitlements under a valid treaty in litigation to which it was not a party, contrary to the principles upon which the cases dealt with in Section III were based.

120. It is also no answer to say, as Portugal does, that Indonesia might intervene in the proceeding pursuant to Article 62 of the Statute of the Court.[146] Even if Indonesia has a right to intervene, it is under no compulsion to do so; and the existence of such a right does not diminish the need for consent before the Court can hear a case directly involving the rights and obligations of third States.[147] Albania could have intervened in the Monetary Gold case, and indeed was invited to do so. But the decision did not treat its failure to intervene as a form of consent to the jurisdiction. The Court has never treated the failure to exercise the right to intervene as indicative of consent.

121. Nor can Article 59 of the Statute of the Court overcome the essential need for consent, before the Court can pass directly on the rights of third parties.[148] This is established not only by the Monetary Gold case, but by the decisions to which reference has already been made. See section III above.

Section VII: Summary

122. Portugal's case against Australia entirely depends on the Court's prior decision as to Indonesia's rights and obligations, competence and responsibility. Findings against Indonesia are essential legal elements of Portugal's claim. From any perspective, the rights and obligations of Indonesia form the very subject-matter of the dispute. And if the decision sought were given, both contracting States would lose the benefit of the Treaty. For these reasons and for the reasons already given in Australia's Counter-Memorial (Part II, Chapter I), Portugal's Application is inadmissible.

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146 Reply of Portugal, para.1.14.

147 Monetary Gold case, ICJ Reports 1954, p.32; Maritime Frontier Dispute (El Salvador/Honduras), ICJ Reports 1990, pp.114-116.

148 Reply of Portugal, para.7.11.

CHAPTER 2

THE STANDING OF PORTUGAL

123. In Part II, Chapter 2 of its Counter-Memorial, Australia asserted that Portugal could not establish its right to bring its claims against Australia. This was because of a lack of sufficient legal interest and because any judgment would not benefit Portugal which was, in any event, not in a position to carry out any judgment.[149]

124. Portugal in Chapter VIII of its Reply responded to these contentions. Australia considers the Portuguese response does not detract from the Australian arguments and does not establish the standing of Portugal in these proceedings. It notes, particularly, that Portugal clarifies that it does not assert that its claims are based simply on its status as a Member of the United Nations.[150] Portugal does not seek to rely on any notion of an actio popularis.[151] Instead Portugal seeks to establish that its interest and the right to act on behalf of the people of East Timor arises either in its capacity as administering Power or alternatively as representative of a separate and distinct subject of international law, namely the people of East Timor.

Section I: Portugal as administering Power

125. Portugal considers that its "status" as administering Power gives it the necessary right to bring actions in its own name in international bodies with a view to the peaceful settlement of disputes with other States on questions relating to the territory it administers. This right to represent internationally the non-selfgoverning territory is asserted as a general right belonging to an administering Power. The significance of references by the United Nations to a particular State as the "administering Power" of a non-self-governing territory is considered in detail in Part II, Chapter 1 below. That Part demonstrates that there is no distinctive status of "administering Power" in international law. It confirms that in a case such as the present where a former colonial Power has

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149 See Counter-Memorial of Australia, paras.235-236.
150 Reply of Portugal, para.8.15.
151 Cf Counter-Memorial of Australia, paras.258-265.

lost all control over the territory in question, the mere fact that the United Nations has subsequently referred to that State as the "administering Power" of the territory does not provide a basis for asserting standing in proceedings such as these.

126. Portugal also assumes that its status as administering Power enables it to allege that Australia has failed to comply with a duty to co-operate with the United Nations. Whatever arguments it may address as to standing based on its status of administering Power for purposes of its claims related to the rights of the people of East Timor, Portugal points to no basis whereby its status of administering Power entitles it to bring a general claim of failure to co-operate with the United Nations.

127. As Portugal recognises, the Court has never pronounced explicitly on the standing of an administering Power.[152] The cases to which it refers to support its proposition do not deal with a situation like the present, where the administering Power is not in physical control or possession of the territory and is in no position to give effect to any judgment.

128. Thus, the fact that the United Kingdom in the Minquiers and Ecrohos case[153] was able to represent a separate and distinct political entity, Jersey, is no more than a recognition that the United Kingdom on the international plane is effectively the representative of Jersey for foreign relations purposes. That representative capacity is exercised in fact and is not challenged. That is not the situation here. Similarly, the cases involving protectorates such as Morocco involved representation by a State in effective day-to-day control of the territory in question. That is not the situation here.

129. The reference to the Right of Passage case,[154] referred to in paragraph 8.06 of the Reply of Portugal is also misplaced. In that case the Court deliberately refrained from dealing with the consequences of the Indian intervention in the enclaves. And that was an immediate consequence, not one produced after 15 years of international inaction. Even though the case did not deal explicitly with the standing of Portugal, it can hardly point to that case to support its position that it has sufficient legal interest for the Court to decide the alleged dispute simply by showing that it is designated administering Power.

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152 Reply of Portugal, para.8.06.
153 ICJ Reports 1953, p.47.
154 ICJ Reports 1960, p.6.

130. In order to determine whether Portugal's designation as administering Power in fact gives it sufficient legal interest to bring the present proceedings in its own name and on its own behalf one must examine the circumstances in which Portugal has been designated as administering Power by the United Nations. Australia set out the relevant material on this in paragraphs 243-252 of its Counter-Memorial. A further consideration of the issue is warranted in the light of the Portuguese Reply.

131. The Australian submission in relation to the standing of Portugal as administering Power is very simple: even if Portugal is described as administering Power by the United Nations for certain purposes, the fact that it is not in effective control of the territory of East Timor means that it has no standing to bring its present claims against Australia. In other words, it is not sufficient for Portugal to establish that it is described by the United Nations as administering Power. It must also demonstrate that that capacity in the particular circumstances gives it a right or a sufficient legal interest to bring the present proceedings. And Australia says it does not, given that it is not a relevant coastal State (Section III). It is not unusual for a term to be used only in a descriptive way and without legal consequences flowing from its use. That is the case here: the description of Portugal as administering Power does not by that fact alone have legal consequences so as to confer standing.

132. Portugal relies on a passage in the Namibia case, which quotes from the South West Africa cases in 1962 to the effect that the rights of a mandatory "are, so to speak, mere tools to enable it to fulfil its obligations".[155] But it is a mistake to interpret this as meaning that an administering Power necessarily has at all times the right to exercise all powers which it might be entitled to exercise if it were in sovereign possession of the territory concerned. In the circumstances of East Timor, where Portugal has not been in possession or control since 1975 and where before 1975 it had not fulfilled its obligations as administering Power, its duties are now limited to acting in co-operation with the United Nations in order to give effect to the resolutions of the United Nations.[156]

133. The correct legal position is that an administering Power's competence to sue is limited by the circumstances in which it exercises its powers and

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155 Reply of Portugal, para.8.03, referring to ICJ Reports 1962, p.32.

156 See Namibia case, ICJ Reports 1971, p.46; Counter-Memorial of Australia, paras.248-249.

responsibilities as administering Power. So, once a process of liberation in a colonial territory has reached the stage of an armed uprising and has thus encroached on the powers of a colonial administration, that administration can no longer legitimately conclude treaties concerning the disposition of the natural resources of the territory.[157] In the same way, once a colonial power ceases to have any effective control in a territory, it no longer has standing to bring an action against another State concerning the conclusion of a treaty in relation to that territory as it is no longer in a position of control in that territory. That Portugal is referred to as an administering Power by the General Assembly does not alter the fact that such a State is also a colonial power.

134. It must be remembered that in 1975 at the time of Indonesian occupation of East Timor, there was already a Provisional Government proclaimed by FRETILIN and a counter proclamation by UDT/Apodeti declaring "the independence and integration of the whole of the former colonial territory of Portuguese Timor with the Republic of Indonesia".[158] And subsequent United Nations resolutions have recognised the reality that there are separate parties in East Timor other than Portugal who must be part of any settlement.

135. Australia does not deny that Portugal is referred to as administering Power in United Nations resolutions on East Timor. But a reference such as this does not establish that Portugal is entitled to act as if it remained in sovereign control of the territory.[159] Portugal itself acknowledges that East Timor is not an integral part of its territory but a separate and distinct territory.[160]

136. Whatever rights Portugal may continue to have as administering Power to promote the rights of the people of East Timor, they are limited rights, that must have regard to the reality of the situation in East Timor. Hence, Australia pointed in its Counter-Memorial to the lack of United Nations authorisation or expectation that Portugal would take action such as this, and the lack of support by the people of East Timor for the exercise of power by Portugal in this way. Apart from the position under Portuguese law, developments in international law concerning non-self-governing territories confirm that sovereignty does not reside in the colonial power. Hence the reference in United Nations resolutions to Portugal as administering Power is not a continuation of a prior sovereignty

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157 Guinea-Bissau—Senegal Arbitration, 31 July 1989 — see paras.201-207 below.
158 Counter-Memorial of Australia, Annex 3. See Counter-Memorial of Australia, para.38.
159 See Part II, Chapter 1 below.
160 Reply of Portugal, paras.4.50-4.56.

along the lines of a government-in-exile. Portugal clearly is not this. Portugal is not an administering Power with the full attributes such a Power might have in a situation when in effective control of territory prior to the effective assertion of control by an independence movement. Portugal, however, remains ambivalent as to whether its powers are in any way limited.

137. Portugal, in its Memorial, asserts that it is in the position of having been entrusted with the sacred duty of ensuring self-determination for the people of East Timor; and claims to be the only State with "l'autorité juridique" to promote a self-determination exercise in East Timor.[161] In that capacity Portugal feels entitled to oppose any State which it considers is placing obstacles in the way of fulfilling that alleged duty, including by bringing proceedings in this Court.

138. But this self-assumed position is mistaken and unfounded. The Portuguese Government ignores its past record of non-compliance with the obligations imposed by the Declaration on the granting of independence to colonial countries and peoples (Resolution 1514 (XV)) and more particularly, Article 73 of the Charter. Its own non-compliance could not fail to have significant influence on the role that Portugal may be called upon and authorised to play in an eventual future implementation of self-determination in East Timor. Portugal is not an administering Power with a record of actual responsibility for administration of the territory in accordance with the Charter. One would not expect such a State to be entitled to bring proceedings such as these to uphold its continuing responsibility in this regard.[162]

139. Portugal wrongly believes that, as administering Power, it has a protagonist role sufficient to give it standing in these proceedings. It states, for instance, at paragraph 8.03 of its Memorial that it is incumbent on Portugal to set up the "moyens juridiques adéquats" for implementing self-determination in East Timor, "éventuellement" with the co-operation and under the supervision of the United Nations (emphasis added). And in the Reply, Portugal again claims that the General Assembly has considered that the responsibility of promoting and ensuring the exercise of the right of the people of East Timor to self-determination belongs to Portugal.[163] This is a mistaken view and the situation is exactly the reverse.

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161 Memorial of Portugal, para.8.03.
162 See the Appendix to this Rejoinder.
163 Reply of Portugal, para.4.25.

140. An administering Power with the colonial record of Portugal could not be left alone by the United Nations to implement self-determination and to decide on its own the terms of an eventual consultation as to the wishes and the choices of the people. For these reasons the United Nations resolutions upon which Portugal bases its claims contain categorical reservations in the form of expressions of regret. What is more important, these resolutions have taken away from the Portuguese Government the protagonist role it claims to perform including in the eventual consultation to determine the wishes of the people.

141. Security Council Resolution 384 (1975), which is the mainstay of the Portuguese argument, contains in its preamble an expression of regret that the Portuguese Government "did not discharge fully its responsibilities as administering Power in the Territory under Chapter XI of the Chapter". And paragraph 3 of the same Security Council resolution gives operative effect to that expression of regret by calling upon "the Government of Portugal, as administering Power, to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right of self-determination". The significant part of this operative paragraph 3 is not the description of Portugal as administering Power, but the calling upon the Portuguese Government to co-operate fully with the United Nations, which clearly — and accurately — implies that it had not done so in the past.

142. And what is more important, paragraph 5 of the same Security Council resolution puts in the hands of the Secretary-General "the implementation of the present resolution", which includes, according to paragraph 3, the setting up of the necessary means "to enable the people of East Timor to exercise freely their right of self-determination". According to the terms of paragraph 3 of the Security Council resolution it is Portugal which must co-operate fully with the United Nations and not vice-versa, as claimed in paragraph 8.03 of the Memorial and in paragraph 4.25 of the Reply. And this function, taken away from Portugal and entrusted to the Secretary-General is confirmed, and even enlarged, in the final General Assembly resolution on East Timor, General Assembly resolution 37/30 of 1982. Paragraphs 1 and 2 of the operative part entrusts these functions to the Secretary-General and the Committee of 24, to report back to the General Assembly.

143. From the relevant United Nations resolutions it results then that the provisions concerning the implementation of self-determination in East Timor, as established in paragraph 6 of Security Council resolution 384 (1975), in

paragraph 4 of Security Council resolution 389 (1976), and in paragraph 7 of General Assembly resolution 37/30 (1982), place the overall responsibility for all aspects of that implementation squarely on three organs of the United Nations: the Security Council, the General Assembly and the Secretary-General.

144. It follows that, in order to respect and apply the right of self-determination of the people of East Timor, third States Members of the United Nations, such as Australia, should be guided, in their dealings with East Timor, by the decisions and instructions that may be made or given by the Security Council on the basis of the reports of the Secretary-General, and with the requests of the General Assembly, and not by any restrictions or limitations which may occur to the Government of Portugal, as a self-appointed (and belated) guardian of the right of self-determination of the population of East Timor. In particular, Portugal cannot, unilaterally and without United Nations authority, bring these proceedings in purported discharge of this protagonist role. And no United Nations organ has found Australia to have breached the right of self-determination or even suggested it.

Section II: Portugal as representative of the people of East Timor

145. Nor does Portugal show any sound legal basis on which it can assert before this Court the legal rights of East Timor if one accepts the "separate and distinct" status of the people of East Timor. Portugal argues that Article 34 of the Statute, which provides that only States can be parties before the Court, does not limit the States which can appear before the Court to States whose interests are directly affected.[164] But this again proves nothing. What Portugal must show is that international law allows a State, whose only basis for acting is its description by the United Nations as administering Power, to bring an action before the Court on behalf of a separate and distinct entity such as a people amounting to a self-determination unit against a third State. Yet it denies that it is asserting a general right in any State Member of the United Nations to represent such a people.[165]

146. It asserts that States have a right to bring a dispute before the Court on behalf of the people of a separate and distinct territory "dont ils ont

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[164] Reply of Portugal, para.8.12.
[165] Reply of Portugal, para.8.15.

l'administration".[166] This is an important limitation which recognises that it is the administration in fact which is important and necessary. But Portugal clearly does not have this in relation to East Timor and did not have it in 1989 or for that matter in 1978. The people of East Timor and the United Nations have rejected such a role for Portugal.[167]

147. Whatever claims Portugal might have against Indonesia as the State that has displaced its administration of the territory in question, it is unsound as a matter of legal principle and good judicial administration to accord standing to a State on behalf of a separate and distinct people where the State is in no position to represent those people in fact. Australia does not deny that a State in actual control of the territory of a separate and distinct people can represent them internationally, at least until the process of liberation has begun.[168] But the same cannot be said of a State with no ability to take action in the territory in question or to exercise its governmental powers in a way to implement any judgment rendered by this Court.

148. While Portugal "considers itself still to be the repository of the rights of the people of East Timor"[169] there is no justification for such a subjective appreciation, since there has been no delegation of powers or of rights, either by the people of East Timor or by the United Nations.[170] On the contrary, Security Council Resolution 389 in its preamble makes a distinction between Portugal "and the representatives of East Timor".

149. The historical record confirms that none of the conflicting local political forces wanted to depend on Portugal as a continuing administering authority; one of them proclaimed independence on 28 November 1975; another, two days after, proclaimed integration with Indonesia.[171] Portugal, in its Memorial, seeks to establish that the various independence forces now wish to rely on Portugal fully to assume responsibilities with respect to the people of East Timor.[172] In its Reply, it returns to this issue.[173]

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166 Reply of Portugal, para.8.12.
167 See paras.140-143 above, paras.148-150 below.
168 Guinea-Bissau—Senegal Arbitration, 31 July 1989 — see paras.201-207 below.
169 Application, para.14.
170 Counter-Memorial of Australia, para.249. See, however, the Portuguese claim in Reply of Portugal, para.4.57.
171 See Application, para.9, and Counter-Memorial of Australia, para.2.42.
172 Memorial of Portugal, paras.1.67-1.72.
173 Reply of Portugal, paras.3.13-3.18.

150. Portugal points to expressions of support from leaders of the East Timorese resistance movement for its role as administering Power on the diplomatic and political level with a view to bringing about the self-determination of the people of East Timor. However, the various statements relied upon by Portugal do not suggest that there is any support among the people of East Timor for Portugal to resume sovereignty or the actual administration of the territory in a way that would enable it to claim to be the relevant coastal State. Portugal cannot, therefore, legitimately seek to bring the present proceedings as representative of the people of East Timor for purposes related to the possible offshore petroleum resources of that territory. The independence parties see the people of East Timor as separate parties in any negotiation to find a solution to East Timor: see e.g. the statement by the Fretilin representative in 1992 to the Committee of 24.[174] And so does the United Nations.

151. It follows that there is no basis, in fact or law, for Portugal to assume the role of representative of the people of East Timor, as the one and only agent authorised to act on their behalf.

Section III: Portugal is not a coastal State

152. Even if Portugal could establish that its status as administering Power gives it capacity to bring certain claims before this Court in relation to East Timor whether on its own behalf or on behalf of the people of East Timor, it must be considered whether the present claim is such a claim. As indicated above, the dispute and claims of Portugal relate to actions by Australia under the 1989 Treaty. Insofar as Portugal argues that Australia should have negotiated with it, and not Indonesia, it raises the question of who is the proper coastal State for the purposes of this particular treaty. So the issue is not the abstract one of the capacity of Portugal as delegate or representative of the people of East Timor or whether Portugal's status per se as administering Power gives it standing, but whether Portugal has the capacity as a coastal State to represent the territory in a suit concerned with a treaty on maritime rights. In the absence of a determination of that question, Portugal cannot demonstrate its capacity to bring these proceedings against Australia, raising as they do

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[174] Reply of Portugal, Annex I.22, Vol.II, pp.119-120.

questions concerning the ability of both parties to the action to negotiate over rights each asserts over the seabed of the Timor Gap.

153. Portugal itself insists that it does not ask the Court to divide the relevant continental shelf area.[175] If this is so, the Court cannot simply assume that the natural resources of the area belong to Portugal (or the people of East Timor whom Portugal says it is representing). Because Portugal does not ask the Court to decide the appropriate sharing, Portugal deprives itself of any possibility to establish real and actual damage. It cannot establish that it is the relevant coastal State. This is reflected in the Guinea-Bissau—Senegal Arbitration,[176] where it is said that no breach of permanent sovereignty can be established until the location of an appropriate delimitation line has been established. As the tribunal said: "Any State claiming to have been deprived of part of its territory or natural resources must first demonstrate that they belonged to it".[177] This Portugal does not do.

154. The rights of a State to maritime areas such as the territorial sea and the continental shelf only arise as a consequence of the rights over the adjacent territory. To be an administering Power in name does not establish any necessary concomitant maritime rights — they can only be ascertained by an examination of the actual situation. In this case, whatever the nature of the rights Portugal might retain as administering Power, they clearly do not embrace rights that are dependent on some association with the territory in question, such that maritime rights appurtenant to the territory can be attributed to it. In the North Sea cases the Court said that rights of a coastal State over the continental shelf exist ipso facto and ab initio "by virtue of its sovereignty over the land".[178] Maritime rights attach to a territory, not directly to a people. When a State acts as a coastal State and makes treaties on maritime rights, such treaties invariably impose obligations. If a State is not in a position to carry out such a treaty, as is Portugal in relation to East Timor, it can not be described as a coastal State nor be accorded the legal interest of a coastal State. Hence, until Portugal establishes that it is in fact the relevant coastal State with the rights and ability to assert those rights on behalf of the territory it can not be accorded the legal interest to represent the people of the territory of East Timor in

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175 See paras.5 (4) and 7 (4) above.
176 Guinea-Bissau—Senegal Arbitration, 31 July 1989 — see para.201 below.
177 Ibid., para.39.
178 ICJ Reports 1969, para.19.

CHAPTER 3

JUDICIAL PROPRIETY

Section I: Illegitimate object

155. In Chapters 3 and 4 in Part II of its Counter-Memorial Australia set out a number of reasons why the Court should not adjudicate upon the Portuguese claim. Australia maintains those grounds which are based on fundamental considerations of judicial propriety.[179] The present case is an example par excellence where considerations of judicial propriety should lead the Court to decline to decide the claims, even if it were otherwise satisfied that the Court has jurisdiction and that the claim is admissible.

156. Australia in the very first chapter of this Rejoinder has shown the abstract and unreal nature of the Portuguese claim against Australia. Australia has pointed to the very large number of negative propositions made by Portugal and the contradictions and inconsistencies in its case. This illustrates the fact that the Portuguese claims have no legitimate object.

157. Portugal responds in its Reply at some length to Australia's contentions on judicial propriety set out in the Counter-Memorial.[180] Central to this response is Portugal's statement that all it seeks from the judgment is an affirmation that Australia is under an obligation to respect Portugal's status as administering Power for East Timor and to recognise Portugal's right to defend the rights of the people of East Timor.[181] Portugal criticises Australia for wrongly defining the dispute and seeks to avoid the significant arguments raised by Australia by itself redefining the dispute. An examination of some of Portugal's contentions demonstrates, however, as the first chapter of this Rejoinder has already shown, the artificial nature of its defence to Australia's contentions. This confirms the illegitimate object of the Portuguese claim. This is reinforced by particular statements in the Reply.

158. In one place Portugal says that the dispute involves the obligation of Australia not to act in a manner which by disregarding ("méconnaissant") the

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179 Counter-Memorial of Australia, paras.269-270.
180 Reply of Portugal, paras.9.01-9.49.
181 Reply of Portugal, paras.9.31-2, 9.43.

rights of the people of East Timor "rendrait plus difficile" the achievement of self-determination.[182] But if this is a correct description of the dispute then it confirms Australia's view that the dispute is not appropriate for adjudication. Portugal invokes a political judgment, and a question of degree, as central to the dispute. And this highlights the close link between the particular dispute with Australia and the broader political dispute that is being dealt with in the political organs of the United Nations.

159. In any event, how Portugal itself envisages the right of the people of East Timor to self-determination actually being achieved by recognition of its responsibility as administering Power is not clear. Yet this is critical to the issue whether the Portuguese claim has a legitimate object. In the only definite plan put forward in this regard by FRETILIN, to which Portugal refers with apparent approval at paragraphs 3.16-3.17 of its Reply and which it includes as an Annex, it is contemplated that there would be a long period of 5 to 15 years under restored Portuguese administration before the people were, if they chose, able to exercise the right to independence — see the Araujuo proposal set out in Annex II.9 of the Reply.[183] This appears to be more a restoration of a colonial power than an exercise of the right to self-determination.

160. In paragraphs 9.31 and 9.40 of its Reply Portugal says that a judgment in Portugal's favour would serve a useful purpose in that its object would be to conserve ("conserver") the natural resources of the people of East Timor. Apparently the way in which this would occur is by the area remaining unexploited. This is because Portugal cannot force Australia to reach an agreement with it and Portugal is in no position itself to exercise the rights.[184] Not only would a result of no exploitation deny Australia its rights, but it would also be a most improbable result. Faced with a situation such as postulated by Portugal, both Australia and Indonesia are likely unilaterally to exploit the area, without the Treaty, avoiding jurisdictional conflicts on a purely pragmatic basis.[185] The Treaty is potentially far more beneficial to the people of East Timor provided Indonesia passes on an equitable part of the benefits to the people. But that is a matter the United Nations should ensure. The benefits will

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182 Reply of Portugal, para.9.02.

183 Reply of Portugal, Annex II.9, Vol.II, pp.194-6.

184 See Counter-Memorial of Australia, para.283.

185 This assumes, so far as Australia is concerned, that the Court's judgment would not deny it the right to exploit its own continental shelf in the region (although Portugal argues that the Court cannot determine, let alone delimit, that continental shelf). By reason of Article 59 of the Statute of the Court Indonesia would not be constrained in any way by the Court's judgment.

not be ensured by denying the right of Australia to negotiate with Indonesia over the exercise by Australia of its own coastal State rights. Judicial recourse by Portugal against Australia is not, therefore, "le moyen le plus effectif"[186] by which the rights of the people of East Timor to their natural resources can be protected.

161. Portugal also insists that it does not ask the Court to resolve any conflict of obligations that Australia may incur if the Court were to say that the negotiation of the Timor Gap Treaty violated the rights of the people of East Timor.[187] But this does not avoid the difficulties outlined by Australia in its Counter-Memorial (at paras.279-282). Portugal argues that it is for Australia to draw the appropriate conclusions from a judgment of the Court and that therefore the Court is not required to determine matters which will have a direct legal effect on Indonesia. But what would happen if Australia drew the wrong conclusions from the Court's judgment? The Court could be asked to interpret its judgment so as to make it clear what the right conclusions are. If such an interpretation directly impinged on a third State (as in this case it inevitably would), then the original judgment would have done so. And hence, the judgment of the Court could only be given effect with the subsequent approval of Indonesia. Hence, as a matter of judicial propriety and for the reasons previously set out in its Counter-Memorial, the Court should decline to decide the case.

162. Portugal seeks to distinguish the Northern Cameroons[188] and Nuclear Tests[189] cases relied upon by Australia.[190] Yet this attempt to show that the situations in those two cases are different from that in the present case misses the point. Those cases are illustrative of a much more fundamental and important proposition: namely, the Court will not allow itself to give fruitless judgments that a Party has no authority or ability to satisfy. And this is for good reason. It is an issue that goes essentially to the maintenance of the judicial function, on which there are inherent limitations, regardless of the desires of either or both parties to an action. This issue was canvassed at considerable length in the Northern Cameroons case.[191] The response Portugal gives in its Reply fails to address this fundamental proposition. No matter how

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186 Reply of Portugal, para.9.40.
187 Reply of Portugal, para 9.37.
188 ICJ Reports 1963, p.34.
189 ICJ Reports 1974, p.271.
190 Counter-Memorial of Australia, paras.271-278. Reply of Portugal, paras.9.33-9.35.
191 ICJ Reports 1963, pp.30-38.

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

163. The illegitimate object of Portugal's claims becomes even clearer when one considers the possible relief which Portugal seeks (see Chapter IX of the Reply of Portugal).

164. As to its claim for damages, Portugal can point to no material injury. It would be inappropriate for the Court to anticipate that Portugal may be able to establish such damage in future. Nor should the Court make a declaration that there is a duty to provide reparation in a situation where no evidence has been placed before the Court which would establish any particular loss or damage that the declaration sought was designed to cover.[192]

165. As to its claim for a declaration of principles to the effect that Australia by the conclusion of the 1989 Treaty has breached certain obligations arising under international law, such a declaration could in no way advance the asserted Portuguese aim of promoting an exericse of a right to self-determination by the people of East Timor. It would leave the control by Indonesia of the territory unaffected.

166. Portugal also seeks an order of cessation to the effect that Australia not perform the Treaty. This appears, in fact, to be the principal Indonesian remedial claim. But such an order would have the consequence that Australia was put in the position it would have been in before the Treaty was concluded. This is a situation involving a conflict of maritime claims with Indonesia. In such a situation Indonesia could unilaterally attempt to exploit to the median line and Australia could unilaterally attempt to exploit to the edge of the Timor Trough. This would exacerbate the conflict of maritime claims. Or else, both sides would be prevented from exploiting the disputed area. This would deprive Australia of the benefits of its sovereign rights in the area. Indonesia and the people of East Timor would be deprived of the benefits that result from the Treaty. By contrast, if the Treaty continued this would provide benefits to the parties. It is the political organs of the United Nations which should ensure

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[192] Temple of Preah Vihear case, ICJ Reports 1962, p.36; Icelandic Fisheries case (Germany v Iceland), ICJ Reports 1974, p.205.

that, if it thinks appropriate, any such benefits received by Indonesia are received by the people of East Timor. This is not a result that any remedy by this Court can ensure. Portugal demonstrates no legitimate object for its claim.

Section II: Inappropriate means

167. In its Counter-Memorial, Australia identified a further ground of judicial propriety on the basis of which the Court should decline to determine the case.[193] This is that the Court is an inappropriate forum for the resolution of the dispute. The situation is that the United Nations has assumed responsibility for negotiating a settlement of the East Timor question — and this must include a resolution of the status and responsibility, if any, of Portugal in relation to East Timor. Yet Portugal asks this Court to make determinations which will prejudge, and possibly prejudice, the outcome of the negotiation taking place under the auspices of the Secretary-General.[194] Australia does not say that the Court cannot exercise its jurisdiction just because the dispute is concurrently before the political organs of the United Nations,[195] although Portugal appears to consider this to be the Australian argument.[196] Australia says that the Portuguese claims are not justiciable principally because political organs of the United Nations have deliberately refrained from taking action on matters which the Court would be obliged to decide, and given that those matters are questions peculiarly within the competence of those organs — this refers, for example, to the imposition of a duty not to recognise or deal with Indonesia in relation to East Timor. No one, Portugal included, has asked the General Assembly or Security Council to decide such questions, even though they are appropriate bodies to do so.[197] No other body, such as the Human Rights Committee, has been asked to rule on Australia's conduct. Portugal can only point to a private body, the Permanent People's Tribunal, which is clearly lacking in judicial impartiality, which has purported to judge the East Timor situation. As one commentator has said about a similar non-governmental gathering "any group of persons has a right to get together and produce a statement of moral or political principles said to govern a certain subject matter".[198] This does not

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193 Counter-Memorial of Australia, paras.287-305.
194 Reply of Portugal, Annex I.8, Vol.II p.63.
195 Counter-Memorial of Australia, para.299.
196 Reply of Portugal, paras.9.10-9.14.
197 Cf Reply of Portugal, para.9.07.
198 I Brownlie in J Crawford (ed), The Rights of Peoples (1988), p.11.

determine the situation in international law. For that purpose, the United Nations could have asked this Court for an advisory opinion if it considered that appropriate. But it did not.

168. This case is not a situation where the Court and some other United Nations organ are concurrently dealing with different aspects of a dispute. In this case, the fundamental propositions on which Portugal must rely to sustain its legal argument are peculiarly within the jurisdiction of the United Nations political organs. Portugal in fact emphasises that certain of these decisions — namely that East Timor is non-self-governing and the status of Portugal as administering Power — are not matters that the Court can itself determine.[199] But just as Portugal contends that these are matters for the United Nations, so the consequences of those decisions for third States are also the responsibility of the United Nations. This is not, therefore, a situation where the Court can pass on the legal aspects of a dispute without impinging on the proper performance of functions by the political organs of the United Nations. As Judge Lachs said in the Lockerbie case:

> "it is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony ... and that each should perform its functions ... without prejudicing the exercise of the others' powers."[200]

As was recognised in the Nicaragua (Preliminary Objections) case, the Court and Security Council have "separate but complementary functions with respect to the same event".[201] But this does not mean that it is always appropriate for the Court to exercise its powers. It must be satisfied that judgment by the Court would be appropriate in the particular circumstances of the case.

169. As Judge Bedjaoui recognised in the Lockerbie case:

> "it is as a rule not the Court's role to exercise appellate jurisdiction in respect of decisions taken by the Security Council in the fulfilment of its fundamental mission of maintaining international peace and security."[202]

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199 As to which see below, Part II, Chapter 1.

200 (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p.139.

201 ICJ Reports 1984, p.435.

202 (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p.145.

In the present case the Security Council has considered the situation, given the Secretary-General a specific mandate and failed to give any direction to States not to deal with Indonesia — in contrast to other situations raising similar questions where a direction was given.[203] And despite what Portugal asserts, the dispute before this Court is not a "quite specific juridical dispute"[204] separate from the broader dispute the subject of action under the auspices of the Secretary-General. Australia's actions can only be judged having regard to the position of Indonesia and the response of the United Nations to those actions. It would be contrary to judicial propriety and to any concept of "fruitful interaction"[205] for this Court to pronounce on the Portuguese claims when the whole dispute is, in all the circumstances, one that depends inextricably on decisions by the United Nations. In this case the particular claims by Portugal against Australia cannot be separated out and dealt with in isolation as some distinct, narrow bilateral legal claim.

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203 See Counter-Memorial of Australia, Appendix A.

204 Lockerbie case (Libyan Arab Jamahiriya v United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p.154, per Judge Bedjaoui.

205 Ibid., p.138, per Judge Lachs.

PART II

THE MERITS OF THE CASE

INTRODUCTION

ISSUES STILL IN DISPUTE BETWEEN AUSTRALIA AND PORTUGAL

170. Portugal complains of a number of acts of Australia which in Portugal's contention are all linked to the breach of one fundamental obligation — an obligation to refrain from any failure to respect the right of the people of East Timor to self-determination.[206] A substantial portion of the Memorial of Portugal is devoted to demonstrating the existence of the rights of peoples to self-determination and to permanent sovereignty over their natural resources in United Nations law, conventional international law and general international law.[207] The Memorial of Portugal also seeks to establish that East Timor is a non-self-governing territory, that the people of East Timor have a right to self-determination and to permanent sovereignty over their natural resources, and that the people of East Timor have not yet exercised their right to self-determination.[208] However, the present proceedings are concerned with none of these matters. Australia does not ask the Court to determine that East Timor is not a non-self-governing territory, or that the people of East Timor do not have a right to self-determination, or that such right has already been validly exercised. Nor does Australia deny the existence, under United Nations law, conventional law and general international law, of the right of peoples to self-determination and to permanent sovereignty over their natural resources. Australia has always acknowledged the existence of these rights. Australia's record in relation to Nauru, Papua, New Guinea and the Cocos (Keeling) Islands indicates its commitment to, and active participation in, the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, which is one of the purposes of the United Nations.[209]

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206 Memorial of Portugal, especially para.8.22.

207 Memorial of Portugal, especially Chapter IV. Also e.g. Reply of Portugal, paras.5.17-5.33.

208 Memorial of Portugal, especially Chapters I and VI. Also e.g. Reply of Portugal, paras.4.31-4.40.

209 See e.g. General Assembly Resolution 3163 (XXVIII), 14 December 1973 ("Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples"), preambular paragraph 7: "Noting with satisfaction the constructive results achieved as a consequence of the active participation in the work of the Special Committee of representatives of the Governments of Australia and New Zealand as administering Powers, as well as the continued readiness of those Governments to receive United Nations visiting missions to the Territories under their administration, and deeply deploring the negative attitude of those administering Powers

171. The present case is concerned with the content, not the existence, of the rights to self-determination and to permanent sovereignty over natural resources. In particular, it is concerned with the content of the corresponding obligations arising for third States. Portugal's analysis of the content of the obligations of third States such as Australia is cursory.[210] Ultimately, Portugal merely states that:

(a) All States have a duty to respect the right of the people of East Timor to self-determination and permanent sovereignty over natural resources, to facilitate and promote the realisation of that right, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principles;[211] and

(b) All States have a duty to respect the powers and duties of the administering Power,[212] and to do nothing to impede or prevent the administering Power from fulfilling the obligations incumbent upon it.[213]

Portugal asserts that Australia has acted in breach of international law by disregarding or failing to respect the status of East Timor as a non-self-governing territory and the status of Portugal as its administering Power.[214]

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which, despite the repeated appeals addressed to them by the General Assembly and the Special Committee, persist in their refusal to co-operate with the Special Committee in the discharge of the mandate entrusted to it by the Assembly".
See also AC Castles, "The United Nations and Australia's Overseas Territories" in DP O'Connell (ed), International Law in Australia (1965), p.368, at p.368, referring to N Harper and D Sissons, Australia and the United Nations (1959), pp.69-77: "The inclusion of Chapter XI in the Charter ... was in no small measure due to persistent advocacy by the Australian delegates at the San Francisco Conference. At this gathering, which drafted the Charter in its final form, the Australian delegation strongly affirmed that the advancement of all colonial peoples was a matter of international concern. Indeed, this country went so far as to argue, until late in the proceedings, despite strenuous opposition, that all colonial territories should be brought within the ambit of the proposed trusteeship system. The resulting compromise, nevertheless, in which two separate chapters on non-self-governing territories were included in the Charter, owed much to the initiatives taken by Australia".

210 For instance, paragraphs 4.57 to 4.61 of the Memorial dealing with the "Content of the rights of peoples" merely indicate that the rights of peoples include the principles of self-determination and permanent sovereignty over natural resources.

211 Memorial of Portugal, paras.3.01, 4.27, 4.61-4.62, 5.39, 8.03-8.08, 8.12; Reply of Portugal, paras.4.55, 5.02, 6.06; Portuguese submission 2 (a), Memorial of Portugal, p.235, Reply of Portugal, p.273.

212 Memorial of Portugal, paras.3.01, 6.64 (c), 8.02; Reply of Portugal, paras.5.02 (a), 5.05.

213 Memorial of Portugal, para.5.39, 8.13; Portuguese submission 2 (b), Memorial of Portugal, p. 235-236, Reply of Portugal, p.274.

214 Memorial of Portugal, paras.3.05, 8.02, 8.25-8.27; Reply of Portugal, paras.6.06, 6.18.

172. The obligation to "respect" the right to self-determination and to "promote" its exercise is expressed in very general terms, and would need to be defined in far more detail before it could be determined in a concrete case whether or not there had been a failure to fulfil that obligation.[215] Portugal does not do this, because all of the acts complained of by Portugal in fact concern alleged breaches of an alleged duty to "respect" the powers and rights of the administering Power. Portugal contends that Australia has acted contrary to international law in that Australia:

— has negotiated, concluded, initiated performance of, and given effect in municipal law to, the Treaty with a State other than Portugal;[216]

— is continuing to negotiate with a State other than Portugal with respect to the delimitation of the continental shelf in the area of the Timor Gap;[217]

— has excluded any negotiation with Portugal with respect to the exploration and exploitation of the continental shelf in that area;[218] and

— contemplates exploring and exploiting the subsoil of the sea in the Timor Gap on the basis of a plurilateral title to which Portugal is not a party.[219]

Thus, although Portugal continually maintains that it is bringing the present proceedings to vindicate the rights of the people of East Timor, in fact all of the acts complained of by Portugal concern Australia's failure to respect what Portugal claims to be its powers and rights as the administering Power of that territory. Portugal goes so far as to assert that Australia would not be in breach of international law if it dealt with Portugal in respect of the Timor Gap area, even if Portugal itself was in breach of its own obligations as administering

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215 As to the Portuguese argument that recognition of Indonesian sovereignty over East Timor of itself necessarily amounts to a failure to respect the right of the people of East Timor to self-determination, see paras.264-267 below.

216 Memorial of Portugal, paras.3.04 (a) and (b), 8.01 (a) and (b), 8.26; Reply of Portugal, para.6.02 (a) and (b); Portuguese submission 2, Memorial of Portugal p.235, Reply of Portugal, p.273.

217 Memorial of Portugal, para.3.04 (c), 8.01 (c), 8.26; Reply of Portugal, para.6.02 (c); Portuguese submission 2, Memorial of Portugal p.235, Reply of Portugal, p.273.

218 Memorial of Portugal, paras.3.04 (d), 8.01 (d), 8.26; Reply of Portugal, para.6.02 (d); Portuguese submissions 2 and 3, Memorial of Portugal pp.235-236, Reply of Portugal, pp.273-274.

219 Memorial of Portugal, para.3.04 (e), 8.01 (e), 8.26; Reply of Portugal, para.6.02 (e); Portuguese submission 2, Memorial of Portugal p.235, Reply of Portugal, p.273.

Power,[220] which, incidentally, it was throughout the whole period from 1955 to 1974.[221] The whole foundation of Portugal's case is the contention that Australia has breached an alleged obligation under international law not to disregard or fail to respect ("méconnaître") the status of Portugal as the sole State with the power and right to deal with other States in respect of East Timor.[222] In Australia's submission, so far as the merits are concerned, the issue in dispute between Portugal and Australia in the present case is the question whether all States including Australia are under an obligation in international law to treat Portugal as the sole State entitled to deal with other States in relation to East Timor, and in particular, in relation to the natural resources of East Timor. Portugal asserts the existence of such an obligation; Australia denies it.

173. The Portuguese argument that Australia has failed to respect the right of the people of East Timor to self-determination is based on the alleged failure to respect the powers and rights of Portugal as administering Power. It is argued by Portugal that to disregard or fail to respect ("méconnaître") the status and rights of Portugal as the sole State entitled to deal with other States in respect of East Timor is necessarily to disregard or fail to respect the status of East Timor as a non-self-governing territory, and the rights of the people of East Timor to self-determination and to permanent sovereignty over their natural resources.[223] As Portugal says in its Reply:

> "Les conduites australiennes sont illicites non parce que l'Australie a traité specifiquement avec l'Indonésie ..., mais parce qu'elle a traité avec quelqu'un d'autre que la Puissance administrante et en des termes qui concrétisent un déni au Portugal de la qualité de Puissance administrante et

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220 Reply of Portugal, para.5.09.

221 The Appendix to this Rejoinder sets out the principal United Nations resolutions dealing with the territories under Portuguese administration, demonstrating the consistent record of criticism by the United Nations of Portugal's administration of its non-self-governing territories, including, inter alia, in relation to East Timor.

222 See e.g. Reply of Portugal, paras.5.05, 6.16 and 6.49, indicating that the duty alleged by Portugal is one of "non méconnaissance", rather than a duty or "reconnaissance".

223 Reply of Portugal, para.6.12: "Ce qui importe aux fins de l'espèce et ce que dit le Portugal c'est que de traiter sur une base de jure par rapport à un territoire non-autonome, avec une puissance autre que la puissance administrante, méconnaît nécessairement non seulement les droits de la Puissance administrante mais encore le droit du peuple de ce territoire à disposer de lui-même ainsi que sa souveraineté permanente sur ses richesses et ressources naturelles."

> un déni au Timor oriental de la qualité de territoire non-autonome."[224]

This argument proceeds from the notion that there is an inseverable link between the right of the people of a non-self-governing territory to self-determination and the powers and rights of the administering Power to administer that territory. Portugal does not seek to establish the existence of such a link by any analysis of State practice, judicial decisions or opinions of writers, nor by relevant general principles of law. It merely makes the assertion that the duty to respect the rights of the people of East Timor "of itself, implies a duty to respect the powers and duties of the administering Power".[225] Similarly, in its Memorial, Portugal merely asserts, without any supporting legal analysis, that it is inconsistent with Portugal's status as "administering Power", and hence with the status of East Timor as a non-self-governing territory, for Australia to deal with any State other than Portugal in respect of the natural resources in the Timor Gap area.[226]

174. This argument is unfounded. Australia is under no obligation under the United Nations Charter, General Assembly resolutions, international human rights conventions or general international law to refrain from dealing with any State other than Portugal in respect of East Timor, and it is not inconsistent with the status of East Timor as a non-self-governing territory for Australia to do so. Australia's reasons were given in Part III of its Counter-Memorial. In its Reply, Portugal has developed at greater length an argument that was referred to more briefly in its Memorial.[227] Portugal contends that the status of "administering Power" is an objective juridical status in international law, opposable erga omnes. Portugal further contends that the United Nations has final power to determine which State has this status in relation to a particular non-self-governing territory, and that the United Nations has determined that Portugal has this status in relation to East Timor and has not since revoked that determination. Portugal argues that the exclusive right to exercise the powers of a State in respect of East Timor is inherent in its status as administering

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224 Reply of Portugal, para.6.15. See also Memorial of Portugal, para.8.14: "Ce n'est non plus pour avoir traité avec l'Etat X, Y, ou Z, une affaire concernant exclusivement elle-même et le Timor oriental que l'Australie a méconnu les pouvoirs et les devoirs de la Puissance administrante, mais pour ne pas l'avoir traité avec le Portugal, quelle qu'en soit la cause".

225 "... ce devoir implique, par lui-même, celui de respecter les pouvoirs et les devoirs de la Puissance administrante": Memorial of Portugal, para.3.01.

226 Memorial of Portugal, paras.3.05, 8.10.

227 See Memorial of Portugal, paras.6.54, 6.56, 6.59, 6.61.

Power. This argument is dealt with in Chapter 1 of this Part, in which it is demonstrated that neither the United Nations Charter nor general international law recognises a special juridical status of "administering Power", having the effects contended for by Portugal, and that references by the United Nations to a particular State as an "administering Power" give rise to no specific obligations for third States.

175. As indicated in Australia's Counter-Memorial, the position may be different where there is a binding Security Council resolution requiring States not to recognise a particular State as entitled to administer a particular territory, but there are no such binding resolutions relevant to the instant case.[228] Portugal maintained in its Memorial, and continues to maintain in its Reply, that such an obligation is imposed by Security Council Resolutions 384 and 389.[229] The Portuguese arguments are considered in further detail in Chapter 2 below, where it is demonstrated that they are unfounded.

176. Once it is demonstrated that Australia is under no obligation to refrain from dealing with any State other than Portugal in respect of East Timor, the Portuguese claim that the acts of Australia described in paragraph 172 above are contrary to international law necessarily fails, insofar as it is based on the argument that Australia is in breach of an alleged duty to deal solely with the "administering Power". Chapter 3 will then consider why the acts of Australia complained of by Portugal are not otherwise inconsistent with the rights of the people of East Timor to self-determination and to permanent sovereignty over their natural resources.

177. In its Application and Memorial, Portugal also contends that by excluding any negotiation with Portugal with respect to the exploration and exploitation of the continental shelf in the area of the Timor Gap, Australia "has failed and is failing in its duty to negotiate in order to harmonise the respective rights in the event of a conflict of rights or of claims over maritime areas" (Portuguese submission 3). This same submission is repeated in the Reply. This contention, which is rejected by Australia, is dealt with in Chapter 4.

178. Before proceeding to consider the substance of the case in detail, two essential preliminary points need to be emphasised. The first point is that in this case the Court is only asked to determine whether States are under an

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228 Counter-Memorial of Australia, Part III, Chapter 1.

229 Reply of Portugal, paras.5.34-5.61.

obligation to refrain from dealing with any State other than Portugal in respect of East Timor. Portugal's argument does not proceed from any analysis of the position of any other State in relation to East Timor. In particular, Portugal does not ask the Court to adjudge that Indonesia has no right or power to deal with other States in respect of East Timor.[230] Rather, the Portuguese argument takes as its focus the status of Portugal itself as "administering Power", and seeks to demonstrate that it is inherent in this status that other States may not deal with anyone other than Portugal in respect of the territory.[231] As Portugal says, it does not complain of the fact that Australia has dealt with Indonesia in respect of East Timor. What it complains of is that Australia has failed to deal with Portugal.[232] Portugal thus concedes that in the event that the Court determines that States are not under an obligation to deal solely with Portugal in respect of East Timor, the Court — by virtue of the Monetary Gold principle — would not be able to consider with which State, if any, Australia is entitled to deal. In particular, the Court would not be able to consider what rights and powers Indonesia may validly exercise in relation to East Timor. Should the Court determine either that other States are not entitled to deal with Portugal, or that other States may deal with Portugal but are not required to deal exclusively with Portugal, the Portuguese claim, in so far as it is based on Australia's failure to deal with Portugal, would fail.

179. The second essential preliminary point is that the Court in the present case cannot determine the legality of the conduct of Indonesia in relation to East Timor. Portugal's argument on the merits seeks to derive much of its support from an underlying assumption that Indonesia's occupation of East Timor is illegal, and in fact a violation of jus cogens.[233] A further underlying assumption

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230 See Reply of Portugal, para.7.10: "... cette démarche ne concerne pas la prétention d'un Etat ou d'un autre au sujet du Timor oriental et par conséquent elle n'exige pas qu'une quelconque prétention de ce type fasse l'objet d'une nouvelle décision". See also paras.5 (3) and (7) above (the sovereignty point and the Indonesian non-involvement point).

231 Reply of Portugal, para.6.63: "La seule autorité autorisée à agir pour le compte de Timor oriental est le Portugal, qui demeure encore sa Puissance administrante." See also Memorial of Portugal, para.8.10.

232 See paras.172-173 above.

233 See especially Reply of Portugal, paras.2.19 (referring to "les obligations de l'Australie de ne pas reconnaître une situation de fait créée par la force"), 5.51, 6.15, 6.29, 6.34, 6.36 ("... soutenir que ... les Etats tiers seraient libres de reconnaître des événements constituant des violations de principes fondamentaux du droit international général, c'est méconnaître l'existence d'un principe pertinent et obligatoire du droit international général ..."), 6.37-6.41, 6.55-6.56. See also Reply of Portugal, paras.3.01-3.12, 3.18 (footnote 98), 3.20-3.21, 3.50, and the Annexes referred to in those paragraphs. See further e.g. Memorial of Portugal, paras.1.66, 2.13, 4.62, 8.23.

on which the Portuguese case relies by implication is the assumption that Indonesia presently denies that the people of East Timor have any right to self-determination and that Indonesia is not administering that territory in the best interests of the people of East Timor. Although Portugal does not as such seek a declaration that Australia has breached international law by dealing with Indonesia in respect of a territory which Indonesia is illegally occupying, this is implicit or inferred throughout the Portuguese Memorial and Reply. However, it is clear that the Court cannot be called upon in this case to determine the legality of the Indonesian occupation of East Timor, since Indonesia is not a party to the present proceedings.[234] Portugal seeks to overcome this difficulty by arguing that the Court is not required to determine the legality of the Indonesian occupation, since the Security Council has already established the illegality in Resolutions 384 and 389.[235] In fact, neither of these resolutions purports to establish that the Indonesian occupation is unlawful, and even if they did purport to be declaratory of the illegality of the Indonesian occupation at the time the resolutions were adopted, they could not establish that the Indonesian occupation was still unlawful at the time that the Treaty was negotiated and entered into.[236] In this case, the Court can take judicial notice of the fact that Indonesia is in effective control of the territory of East Timor. However, the Court cannot merely assume that Indonesia's occupation is unlawful. It would be necessary to decide that it is.

180. Similarly, although Portugal seeks to establish that Indonesia is oppressing the people of East Timor and violating human rights in that territory,[237] the Court in these proceedings is not asked to, and cannot, judge the conduct of Indonesia. It is not for Australia to rebut this evidence or to defend the conduct of Indonesia, and Indonesia is not before the Court to rebut this evidence or to defend its own conduct. Accordingly, Australia makes no submissions on the conduct of Indonesia in respect of East Timor. As the power in effective control of the territory of East Timor, Indonesia may well have certain responsibilities in respect of the people of East Timor, in particular obligations arising under Chapter XI of the United Nations Charter.[238]

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234 See Part I, Chapter 1 of this Rejoinder. Portugal itself states that the Court is not requested to determine whether Indonesian military intervention in East Timor was lawful or unlawful, or to determine for itself the legal consequences for States of any such illegality: see para.5 (2) above (the Indonesian intervention point).

235 Reply of Portugal, paras.6.38-6.44, 7.28.

236 See paras. 219-225 and Chapter 2 below.

237 See especially Reply of Portugal, paras.3.01-3.12, 3.18 (footnote 98), 3.20-3.21, and the Annexes referred to in those paragraphs.

238 Cf Namibia Advisory Opinion, ICJ Reports 1971, p.54.

However, the Court cannot assume that Indonesia is under such obligations, or that it is in default of them. Nor can the Court make any finding or proceed on the basis of any assumption that Indonesia will not permit the people of East Timor to enjoy the benefits of the Treaty with Australia. What Portugal needs to establish in the present case is that regardless of whether the conduct of Indonesia in relation to East Timor is lawful or unlawful, Australia is nonetheless under an obligation to deal solely with Portugal in respect of that territory.

181. To summarise, according to Portugal's own view, the Court is not called upon to judge the conduct of Indonesia in relation to East Timor, or to determine the issue of what rights and powers Indonesia may exercise in respect of East Timor consistently with international law. The only question for determination by the Court is whether all States including Australia are under an obligation in international law to treat Portugal as the sole State entitled to deal with other States in relation to East Timor, notwithstanding that Portugal before 1975 consistently ignored or violated its obligations with respect to the territory, notwithstanding that Portugal in 1975 (to no small extent by reason of those violations) lost all effective control over that territory, notwithstanding that Portugal is now incapable of giving effect to any agreement which it might enter into with other States in respect of the territory, and notwithstanding that Portugal is now incapable of discharging the obligations of an administering State under Article 73 of the United Nations Charter — obligations which, in the view of the United Nations organs, it had not discharged before 1974.

CHAPTER 1

THE STATUS OF AN "ADMINISTERING POWER" UNDER GENERAL INTERNATIONAL LAW

182. Portugal maintains that where the United Nations General Assembly or Security Council refers in a resolution to a particular State as the "administering Power" of a non-self-governing territory, that reference constitutes a "determinative designation or finding" that is "incontestable", having as a matter of law an erga omnes effect.[239] According to Portugal, once the General Assembly has thus determined by any valid resolution that a particular State has the "status" or "quality" of "administering Power" — the size of the majority supporting the resolution being irrelevant[240] — this determination overrides the reserved domain of States in matters of recognition.[241] Furthermore, the status of "administering Power", so determined, is said to have continuing legal effect, until such time as the United Nations expressly terminates that status. It is the Portuguese contention that unless the United Nations declares that Chapter XI no longer applies to a territory or expressly revokes the status of "administering Power", that juridical status will continue indefinitely, presumably in perpetuity.[242] The fact that the State in question loses completely all control over the territory is said not to affect the continuing effect of the status.[243] The fact that the State itself has previously denied that it had that status, and has never taken the responsibilities flowing from that status seriously, is also irrelevant. Similarly, the fact that the General Assembly has ceased to adopt resolutions referring to a particular State as the "administering Power" following its loss of control is also said to be irrelevant, since the status, once determined by the United Nations, has continuing legal effect, without the need for it to be continuously reiterated.[244] Portugal maintains that the United Nations resolutions which "designate" it as the "administering Power" of East Timor remain in force and that Portugal's status as "administering Power" is therefore a given fact in this case.[245]

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239 Reply of Portugal, paras.4.02 to 4.11, and also e.g. paras.4.16, 4.22, 4.27-4.28, 5.01-5.02.

240 Reply of Portugal, paras.4.16-4.17.

241 Reply of Portugal, para.4.08.

242 Reply of Portugal, paras.4.16, 4.18, 4.22.

243 Reply of Portugal, paras.4.11, 4.65-4.66, 6.45.

244 Reply of Portugal, para.4.22, 4.24.

245 Reply of Portugal, paras.2.22 ("une donnée"), 4.28 ("res decisa"), 4.30 ("chose réglée", "données preétablies"), 6.45, 6.62-6.63, 7.08-7.09.

It is said that all States are under a corresponding obligation not to disregard or fail to respect ("méconnaître") the powers, duties and rights of Portugal as administering Power,[246] including the right to exercise over the territory "toutes les compétences propres aux Etats".[247] In other words, it is said that States must not conduct themselves in their international relations as if Portugal were not the administering Power of East Timor.[248] To deal on a de jure basis in respect of East Timor with a State other than Portugal, is, says Portugal, necessarily to disregard or fail to respect ("méconnaître") the status and rights of Portugal as administering Power.[249]

183. For the reasons given in Section I of this Chapter, Australia submits that the status of a particular territory under international law as a non-self-governing territory does not of itself give rise to any obligation to recognise a particular State as entitled to administer it pending the outcome of a valid act of self-determination. While the status of non-self-governing territory may be a special juridical status under international law, the history of Chapter XI of the Charter and the authorities relating to its interpretation do not support Portugal's contention that there is any special juridical status of "administering Power", or that there is any inseparable link between the rights of the people of a non-self-governing territory to self-determination and the right of any particular State to administer that territory until a valid act of self-determination has taken place. Of course, in cases where a former colonial power has remained in control of a non-self-governing territory after the coming into effect of the Charter, that State has invariably continued to be recognised by other States, and by the United Nations, as the State which has "responsibilities for the administration" of the territory within the meaning of Article 73 of the Charter of the United Nations. However, as explained in Section II of this Chapter, where that State loses all control over the territory in question, and another State has assumed effective control, other States are not required to await a determination by the United Nations before ceasing to recognise the former State as the State entitled to exercise powers of sovereignty over it. It is not inherently inconsistent with the status of the territory as a non-self-governing territory for others to recognise that there has been a change in the State administering that territory, and to deal with the State in effective control.

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246 Portuguese submission 2 (b), Memorial of Portugal, pp.235-236; Reply of Portugal, pp.274.

247 Reply of Portugal, para.4.60.

248 Reply of Portugal, paras.5.02 (a), 5.05, 5.12, 6.45.

249 Reply of Portugal, paras.6.12, 6.15. See also footnotes 223-224 above.

The question of which State is entitled to exercise sovereignty over the territory pending an act of self-determination is answered by the general principles of international law concerning recognition. As explained in Section III, because Indonesia is in effective control of East Timor and likely to remain so in future, Australia is entitled to recognise its sovereignty over East Timor. Recognition of Indonesia's sovereignty does not imply any approval of the means by which it came to assume control over East Timor, nor does it necessarily imply that Australia no longer regards East Timor as having the status of a non-self-governing territory or that the people of East Timor no longer have a right to self-determination.

Section I: No special status of "administering Power" exists in international law

184. Portugal's assertion that there is a special juridical status of "administering Power", opposable erga omnes, even after a complete loss of control of the territory in question, is simply that — an assertion. Without undertaking any legal analysis in support of this proposition, Portugal simply states that the power of the General Assembly to adopt "constitutive" resolutions determining that a particular territory has the status of non-self-*governing territory includes the power to adopt constitutive resolutions* determining that a particular State has the status of "administering Power".[250]

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[250] E.g., Memorial of Portugal, paras.6.29, 6.54 ("Pour que les organes des Nations unies puissent se prononcer sur les rapports dont le peuple non autonome est sujet, il leur faut individualiser un autre sujet nécessaire de ces rapports juridiques: la Puissance administrante" (emphasis added)); 8.10 ("Le devoir de traiter le peuple titulaire du droit d'autodétermination et son territoire comme des unités juridico-politiques spécifiques et individualisées a comme conséquence que les rapports avec ce peuple et son territoire ne peuvent s'établir qu'à travers un sujet de droit international ayant des pouvoirs d'administration et de représentation reconnus par les Nations Unies"); Reply of Portugal, paras.4.09 ("Selon la philosophie du chapitre XI de la Charte des Nations Unies, la qualification déterminative par laquelle un territoire donné est non-autonome implique la détermination d'une certaine entité titulaire des droits et devoirs relatifs à l'administration d'un tel territoire et à la promotion de son processus d'autodétermination"); 4.40 ("Cette qualité du Portugal est, à son tour, un élément du statut du territoire ..."). In paragraphs 6.55-6.60 of its Memorial, Portugal cites authorities in support of the proposition that the General Assembly can adopt "constitutive" resolutions, determining that a particular territory has the status of a non-self-governing territory. From this, Portugal leaps to the conclusion, not supported by any of those authorities, that "The designation of a State as administering Power has its place as an item connected with the régime of non-self-governing territories in resolutions of all these types" (Memorial of Portugal, para.6.54). See also Reply of Portugal, paras.4.01-4.07.

Portugal also merely asserts that the duty to respect the right of the people of East Timor to self determination "of itself, implies a duty to respect the powers and duties of the administering Power".[251] A further mere assertion, not supported by any authority, is that the State determined by the United Nations to be the "administering Power" has the sole right and power to deal with others in relation to that territory,[252] so that to deal with any State other than the administering Power constitutes an illegal "méconnaissance" of the status of the administering Power. Portugal does not refer to the practice of States or of the United Nations, or to any decisions of international or municipal courts or tribunals, or to opinions of any writers in support of any of these propositions.[253] The relevant existing authorities in fact directly contradict the Portuguese argument.

185. An examination of United Nations practice 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. The 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. It is therefore necessary that there be some mechanism for determining which territories have that status. In its Counter-Memorial, Australia observed that the question of whether or not a territory is a non-self-governing territory requires the involvement of the United Nations.[254] The United Nations has over the decades consistently concerned itself with this question.[255] The General Assembly has adopted resolutions concerning the factors which should be taken into account in deciding whether a territory is a

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251 E.g., Memorial of Portugal, para.3.01 ("... ce devoir implique, par lui-même, celui de respecter les pouvoirs et les devoirs de la Puissance administrante"); Reply of Portugal, para.5.05 ("... les simples qualifications du Timor oriental comme territoire non-autonome et du Portugal comme sa Puissance administrante entraînent, à elles seules, l'obligation pour tous les Etats Membres, et donc pour l'Australie, de ne pas se conduire comme si le Timor oriental n'était pas un territoire non-autonome et le Portugal n'en était pas la Puissance administrante").

252 Reply of Portugal, paras.6.12, 6.63.

253 The one precedent referred to by Portugal, that of Rhodesia, is completely distinguishable from the present case. In the case of Rhodesia there were binding Security Council resolutions requiring States not to recognise the independence of Rhodesia — see para.229 below. The case of Rhodesia thus provides no support for the Portuguese argument.

254 Counter-Memorial of Australia, paras.318-327.

255 See generally R Higgins, The Development of International Law Through the Political Organs of the United Nations (1963), pp.110-116. Cf also Memorial of Portugal, paras.5.07-5.26.

non-self-governing territory.[256] It has affirmed that it is for the United Nations itself to determine whether a territory is or is not a non-self-governing territory, and that this is not a matter within the reserved domain of the State responsible for the administration of that territory.[257] The United Nations has also assumed the responsibility of determining when Chapter XI ceases to apply to a non-self-governing territory.[258]

186. In contrast to this, it can be seen that Chapter XI of the Charter makes no reference to the concept of an "administering Power".[259] Early General Assembly resolutions dealing with non-self-governing territories did not in fact use the expression "administering Power" in relation to such Territories — rather, reflecting the language of Article 73 of the Charter, they referred to "Members of the United Nations which have or assume responsibilities for the administration" of such Territories;[260] or to "Members having or assuming responsibilities for the administration of Non-Self-Governing Territories",[261] "Members responsible for the administration of Non-Self-Governing Territories",[262] or "Governments responsible for Non-Self-Governing

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256 See e.g. Resolutions 334 (IV), 2 December 1949; 567 (VI), 18 January 1952; 648 (VII), 10 December 1952; 742 (VIII), 27 November 1953 ("Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government"); 1467 (XIV), 12 December 1959; 1541 (XV), 15 December 1960; 1542 (XV), 15 December 1960 (dealing with the territories under the administration of Portugal).

257 See General Assembly Resolution 222 (III), 3 November 1948: "Considers that, having regard to the provisions of Chapter XI of the Charter, it is essential that the United Nations be informed of any change in the constitutional position and status of any such territory as a result of which the responsible Government concerned thinks it unneccessary to transmit information in respect of that territory under Article 73 e of the Charter". See also, e.g., Resolutions 448 (V), 12 December 1950; 568 (VI), 18 January 1952; 650 (VII), 20 December 1952; 747 (VIII), 27 November 1953; 748 (VIII), 27 November 1953; 1051 (XI), 20 February 1957.

258 E.g., Resolutions 748 (VIII), 27 November 1953 (Puerto Rico) ("Bearing in mind the competence of the General Assembly to decide whether a Non-Self-Governing Territory has or has not attained a full measure of self-government as referred to in Chapter XI of the Charter"); 849 (IX), 22 November 1954 (Greenland); 945 (X), 15 December 1955 (Netherlands Antilles and Surinam); 1469 (XIV), 12 December 1959 (Alaska and Hawaii); 2064 (XX), 16 December 1965 (Cook Islands).

259 Cf the perplexing reference in the Memorial of Portugal, para.8.27, to "la 'Puissance administrante' du Timor oriental, au sens donné à cette expression par l'article 73 de la Charte".

260 See General Assembly Resolutions 9 (I), 9 February 1946; 222 (III), 3 November 1948.

261 Resolution 67 (I), 14 December 1946.

262 Resolutions 143 (II), 3 November 1947; 144 (II), 3 November 1947; 220 (III), 3 November 1948; 327 (IV), 2 December 1949; 446 (V), 12 December 1950; 551 (VI), 7 December 1951; 644 (VII), 10 December 1952; 1048 (XI), 20 February 1957; 1328 (XIII), 12 December 1958; 1462 (XIV), 12 December 1959; 1537 (XV), 15 December 1960; 1694 (XVI), 19 December 1961. Also Resolutions 445 (V), 12 December 1950; 564 (VI), 18 January 1952; 643 (VII), 10 December 1952; 645 (VII), 10 December

Territories".[263] Other early resolutions concerning the transmission of information under Article 73 (e) of the Charter referred to "information ... transmitted ... by Members of the United Nations under Article 73e of the Charter relating to economic, social and educational conditions in the territories for which they are responsible",[264] or simply to "Members transmitting information under Article 73 e of the Charter".[265] Some resolutions dealing with non-self-governing territories generally used the expression "Administering Members"[266] or "Members administering Non-Self-Governing Territories",[267] and it is abundantly clear that these expressions were merely a shorthand way of referring to "Members responsible for the administration of Non-Self-Governing Territories".[268] Thus, Members of the United Nations

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1952; 1152 (XII), 26 November 1957 ("Members of the United Nations responsible for the administration of Non-Self-Governing Territories"). See also Resolution 221 (III), 3 November 1948, paragraph 1.

263 Resolution 336 (IV), 2 December 1949.

264 Resolution 66 (I), 14 December 1946. See also Resolution 9 (1), 9 February 1946.

265 Resolution 142 (II), 3 November 1947. See also Resolutions 146 (II), 3 November 1947; 219 (III), 3 November 1948; 332 (IV), 2 December 1949.

266 Resolutions 220 (III), 3 November 1948; 328 (IV), 2 December 1949; 329 (IV), 2 December 1949; 331 (IV), 2 December 1949, paragraph 1; 444 (V), 12 December 1950; 566 (VI), 18 January 1952; 742 (VIII), 27 November 1953, paragraph 3; 743 (VIII), 27 November 1953, paragraphs 4-5; 744 (VIII), 27 November 1953; 845 (IX), 22 November 1954; 847 (IX), 22 November 1954; 932 (X) and 933 (X), 8 November 1955; 1049 (XI), 1050 (XI) and 1053 (XI), 20 February 1957; 1328 (XIII); 1329 (XIII), 1330 (XIII), 1331 (XIII) and 1332 (XIII), 12 December 1958; 1463 (XIV), 1464 (XIV), 1465 (XIV), 1466 (XIV), 1468 (XIV); 1470 (XIV) and 1471 (XIV), 12 December 1959; 1534 (XV), 1535 (XV), 1536 (XV); 1538 (XV), 1539 (XV) and 1540 (XV), 15 December 1960; 1695 (XVI), 1696 (XVI), 1697 (XVI) and 1698 (XVI), 19 December 1961.

267 Resolution 647 (VII), 10 December 1952. Also Resolution 929 (X), 8 November 1955 ("Members of the United Nations administering Non-Self-Governing Territories").

268 Compare Resolutions 327 (IV), 2 December 1949 (referring to "Members responsible for the administration of Non-Self-Governing Territories") and 328 (IV), 2 December 1949 (referring to "Administering Members"), which were adopted on the same day. Compare also Resolutions 444 (V), 12 December 1950 (referring to "Administering Members") and 445 (V), 12 December 1950 (referring to "Members of the United Nations responsible for the administration of Non-Self-Governing Territories"), which were also adopted on the same day; and see Resolution 143 (II), 3 November 1947, paragraphs 1 ("Members responsible for the administration of Non-Self-Governing Territories") and 3 ("the administering Member or Members concerned"); Resolution 644 (VII), 10 December 1952, paragraphs 1 (referring to "Members responsible for the administration of Non-Self-Governing Territories") and 2 (referring to "Administering Members"); Resolution 647 (VII), 10 December 1952, (referring both to "Members administering Non-Self-Governing Territories" and "Administering Members"); Resolution 743 (VIII), 27 November 1953, paragraphs 4-5 ("Administering Members") and 6 ("Members of the United Nations responsible for the administration of Non-Self-Governing Territories"); 848 (IX), 22 November 1954, (referring to "Members administering Non-Self-Governing Territories", "Members responsible for the administration of Non-Self-Governing Territories" and "Administering Members"); Resolution 929 (X), 8 November 1955, (referring to "Members of the United Nations responsible for the administration of Non-Self-Governing Territories", "Members of the

which did not administer any non-self-governing territories were sometimes referred to as "non-Administering Members".[269] The expression "responsible government" is also used.[270]

187. The common usage of the expression "administering Power" in relation to non-self-governing territories, dates only from the seventeenth session in 1962. In Resolution 1810 (XVII), of 17 December 1962 ("The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples"), the General Assembly solemnly reiterated and reaffirmed the objectives and principles enshrined both in the Declaration contained in Resolution 1514 (XV) and in Resolution 1654 (XVI). It then deplored "the refusal of certain administering Powers to co-operate in the implementation of the Declaration in territories under their administration", called upon the administering Powers concerned "to cease forthwith all armed action and repressive measures directed against peoples who have not yet attained independence", and urged all administering Powers "to take immediate steps in order that all colonial territories and peoples may accede to independence without delay". Other resolutions adopted at the same session in relation to particular non-self-governing territories use the expression "administering Power" in relation to that territory.[271] This terminology was adhered to in resolutions adopted at subsequent sessions.[272] However, some

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United Nations administering Non-Self-Governing Territories" and "Administering Members"); 1328 (XIII), 12 December 1958, paragraph 2 ("Members responsible for the administration of Non-Self-Governing Territories") and paragraphs 1 and 3 ("Administering Members"); 1465 (XIV), 12 December 1959, Preamble ("Member States ... which have or assume responsibilities for the administration of Non-Self-Governing Territories") and paragraphs 1-2 ("Administering Members"); 1466 (XIV), 12 December 1959, paragraphs 1, 3, 4 ("Administering Members") and 2 ("all Member States administering Non-Self-Governing Territories in Africa"). Resolution 143 (II), 3 November 1947, paragraph 3, used the expression "the administering Member or Members concerned". The French version read "le Membre ou les Membres qui assument l'administration". Resolution 220 (III), 3 November 1948, paragraph 2, used the expression "Administering Members". The French version read "Membres qui ont charge de l'administration".

269 E.g., Resolution 1332 (XIII), 12 December 1958, paragraph 2; 1467 (XIV), 12 December 1959, paragraph 2.

270 Resolution 222 (III), 3 November 1948; 448 (V), 12 December 1950. Also Resolutions 448 (V), 12 December 1950 (preambular paragraph 1); 568 (VI), 18 January 1952 (preambular paragraph 1).

271 Resolutions 1760 (XVII), 31 October 1962 ("Question of Southern Rhodesia"); 1811 (XVII), 17 December 1962 ("Question of Zanzibar"); 1812 (XVII), 17 December 1962 ("Question of Kenya"); 1817 (XVII), 18 December 1962 ("Question of Basutoland, Bechuanaland and Swaziland").

272 Resolutions 2022 (XX), 5 November 1965, paragraph 7 ("Question of Southern Rhodesia"); 2023 (XX), 5 November 1965, paragraph 9 ("Question of Aden"); 2063 (XX), 16 December 1965 ("Question of Basutoland, Bechuanaland and

resolutions continued to use general expressions such as "Member States responsible for the administration of non-self-governing Territories",[273] or the expression "Administering Members".[274] In relation to some States administering non-self-governing territories, including Portugal, the General Assembly also used the expression "colonial Power".[275]

188. While the General Assembly has sought to define the content of the status of "non-self-governing territory", and to define the criteria for determining whether a territory has this status, and has reserved to itself the right to make a final determination whether or not a territory possesses this status, there have never been similar attempts by the United Nations General Assembly, the Security Council, the Committee of 24 or any other organ, to define the content of a concept of "administering Power", nor to define the criteria for determining whether a particular State has that status in respect of a given non-self-

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Swaziland"); 2066 (XX), 16 December 1965 ("Question of Mauritius"); 2067 (XX), 16 December 1965 ("Question of Equatorial Guinea"); 2068 (XX), 16 December 1965 ("Question of Fiji"); 2071 (XX), 16 December 1965 ("Question of British Guiana"); 2072 (XX), 16 December 1965 ("Question of Ifni and Spanish Sahara). The expression "administering Powers" is used in Resolution 289 (IV), 21 November 1949, paragraphs 7 and 10, dealing with the question of the disposal of the former Italian colonies, referring to the four Allied Powers occupying those territories since the Second World War.

273 Resolution 1971 (XVIII), 16 December 1963. Also 2109 (XX), 21 December 1965 ("Member States having responsibilities for the administration of Non-Self-Governing Territories").

274 Resolution 1974 (XVIII), 16 December 1963; 2110 (XX), 21 December 1965, paragraph 4. See also e.g. Resolution 1883 (XVIII), 14 October 1963 ("Question of Southern Rhodesia") in which the United Kingdom of Great Britain and Northern Ireland is not referred to as the "administering Power". The United Kingdom is subsequently referred to as the administering Power in e.g. Resolution 2022 (XX), 5 November 1965, paragraph 7; Resolution 2151 (XXI), 17 November 1966, paragraphs 8-9. Rhodesia had been affirmed to be a non-self-governing territory within the meaning of Chapter XI in Resolution 1747 (XVI), 28 June 1962, in which the United Kingdom was referred to as the "Administering Authority".

275 See Resolution 2548 (XXIV), 11 December 1969 ("Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples"), preamble: "Deploring the refusal of the colonial Powers, especially Portugal and South Africa, to implement the Declaration and other relevant resolutions on the question of decolonization"; Resolution 2554 (XXIV), 12 December 1969 ("Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia, Namibia and Territories under Portuguese domination and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa"), paragraph 6: "Deplores the attitude of the colonial Powers and States concerned which have not taken any action to implement the relevant provisions of General Assembly resolutions"; Resolution 2708 (XXV), 14 December 1970 ("Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples"), preamble: "Deploring the continued refusal of the colonial Powers, especially Portugal and South Africa, to implement the Declaration and other relevant resolutions on the question of decolonization".

governing territory, nor has the General Assembly or any other organ purported to reserve to itself the competence to determine whether a particular State has this status. Relevant United Nations resolutions have never even remotely suggested that an acknowledgement by the United Nations that a particular State is an "administering Power" establishes a special juridical status in international law, having ipso jure effect, binding erga omnes, until such time as the status is subsequently modified by the United Nations. It will be seen, for instance, that in General Assembly Resolution 1514 (XV) of 14 December 1960 ("Declaration on the granting of independence to colonial countries and peoples"), there are express references to "Trust and Non-Self-Governing Territories", and to the rights of the peoples of these territories, thus recognising the special status of these territories and peoples. However, there is no positive reference at all to "administering Powers" or to "States responsible for the administration of" these territories, let alone any suggestion that the administering Powers have a special status or special rights or powers by virtue of the rights of the peoples of those territories to self-determination. Paragraph 5 of the Declaration merely provides that "Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories". Resolution 1654 (XVI), of 27 November 1961 ("The situation with regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples") calls upon "States concerned" to take action without further delay "with a view to the faithful application and implementation of the Declaration". (It should be pointed out in this context that Indonesia has been recognised by the United Nations as one of the "parties concerned" in relation to the question of East Timor).[276] By applying to East Timor the factors formulated by the General Assembly for determining whether a territory is or is not a non-self-governing territory,[277] it may be possible to determine that East Timor continues to be a non-self-governing territory, but these factors give no indication at all of which State is entitled to administer that territory. While Chapter XI of the Charter imposes certain obligations on States which happen to have or assume responsibilities for the administration of non-self-governing territories, Chapter XI, and the relevant United Nations resolutions, are silent on the question of the status of an administering Power, the extent of its powers of administration in respect of the territory, and in cases

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[276] Resolution 34/40, 21 November 1979, paragraph 4. Also Resolution 36/50, 24 November 1981, paragraph 3 (referring to Indonesia as one of the "interested parties").

[277] See footnote 256 above.

of a change in the State exercising control over the territory, the criteria for determining whether the change in administration should be recognised.

189. If the General Assembly had the power to confer and withdraw the objective status of "administering Power", it could be expected that the United Nations would have used this power to determine which State is entitled to administer a particular non-self-governing territory pending self-determination, in cases where this has been in dispute. In fact it has not done so. For instance, at the first session of the General Assembly, the United Kingdom transmitted information under Article 73 (e) of the Charter in relation to British Honduras (later Belize), and declared its intention of transmitting information in relation to the Falkland Islands.[278] Guatemala objected as it claimed sovereignty over British Honduras, and Argentina objected as it claimed sovereignty over the Falkland Islands.[279] The view was never expressed, either then or subsequently, that the General Assembly had the power to resolve the question of which State was entitled to administer those territories pending self-determination. In particular, it was never suggested that the General Assembly could, by making a "determinative designation" that the United Kingdom had the status of "administering Power" of the Falkland Islands, create an obligation binding on Argentina not to disregard or fail to respect that status. Instead, in subsequent resolutions, the General Assembly declared the need for negotiations between the United Kingdom and Argentina "in order to arrive at a peaceful solution of the conflict of sovereignty between them concerning the Falkland Islands (Malvinas)".[280] In relation to Belize, the General Assembly, while referring to the United Kingdom as "administering Power", at the same time called upon the governments of the United Kingdom and Guatemala "to pursue urgently their negotiations for the earliest possible resolution of their differences of opinion concerning the future of Belize".[281]

190. Similarly, in cases where a State administering a non-self-governing territory has failed to fulfil its obligations in respect of that territory, it has never been suggested that the status of "administering Power" might be terminated by the United Nations. For instance, General Assembly Resolution 1819 (XVII) of

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278 See Resolution 66 (I), 14 December 1946.

279 J Crawford, The Creation of States in International Law (1979), p.360.

280 Resolution 3160 (XXVIII), 14 December 1973, paragraph 2. See also Resolutions 2065 (XX), 16 December 1965; 31/49, 1 December 1976, paragraph 3.

281 Resolution 3432 (XXX), 8 December 1975. See also Resolutions 31/50, 1 December 1976, paragraph 4; 32/32, 28 November 1977, paragraph 3; 33/36, 13 December 1978, paragraph 3; 34/38, 21 November 1979, paragraph 2; 35/20, 11 November 1980, paragraph 5.

18 December 1962 ("The situation in Angola"), while solemnly reaffirming the inalienable right of the people of Angola to self-determination and independence, and while requesting the Security Council to take appropriate measures, including sanctions, against Portugal (whose actions had been found to be inconsistent with its membership in the United Nations), nowhere suggested that the General Assembly could terminate Portugal's existing "status" as administering Power of that territory. The 1972 resolution affirming "that the national liberation movements of Angola, Guinea (Bissau) and Cape Verde and Mozambique are the authentic representatives of the true aspirations of the peoples of those Territories"[282] is expressed as an acknowledgement of an existing situation (see further paragraph 203 below). It does not purport to be a "constitutive" resolution, revoking a prior "determinative designation" that Portugal has the status of "administering Power" of those Territories. It does not even acknowledge that Portugal ever had such a particular legal status. In fact, the first direct reference by the General Assembly to Portugal as "administering Power" in a resolution dealing specifically with the subject of territories under Portuguese administration came only in 1974,[283] that is, only after the General Assembly had already determined that Portugal no longer represented those territories internationally.[284] Previous resolutions of the General Assembly dealing with "Territories under Portuguese administration"[285] refer merely to "the Non-Self-Governing Territories under Portuguese administration", "Territories under Portuguese administration" and "Territories under Portuguese domination".[286] While thereby acknowledging

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282 Resolution 2918 (XXVII) of 14 November 1972, paragraph 2. See also Resolution 3113 (XXVIII), 12 December 1973, paragraph 2: "Reaffirms that the national liberation movements of Angola and Mozambique are the authentic representatives of the true aspirations of the peoples of those Territories and recommends that, pending the accession of those Territories to independence, all Governments, the specialized agencies and other organizations within the United Nations system and the United Nations bodies concerned should, when dealing with matters pertaining to the Territories, ensure the representation of those Territories by the liberation movements concerned in an appropriate capacity and in consultation with the Organization of African Unity". See also Security Council Resolution 322 (1972) of 22 November 1972, preambular paragraph 5.

283 Resolution 3294 (XXIX), 13 December 1974.

284 Resolution 2918 (XXVII) of 14 November 1972, and Resolution 3181 (XXVIII), 17 December 1973. The reference to Portugal as "administering Power" in Resolution 3294 indicates that the General Assembly had not changed its position on this issue, since it states that the national liberation movements of Angola and Mozambique participated in an observer capacity in the Fourth Committee's deliberations.

285 E.g. Resolutions 1807 (XVII), 14 December 1962; 1913 (XVIII), 3 December 1963; 2107 (XX), 21 December 1965; 2184 (XXI), 12 December 1966; 2270 (XXII), 17 November 1967; 2395 (XXIII), 29 November 1968; 2507 (XXIV), 21 November 1969; 2707 (XXV), 14 December 1970; 2795 (XXVI), 10 December 1971.

the status of these territories as non-self-governing territories, the references to "Portuguese administration" and "Portuguese domination" are merely factual.

191. Indeed, the numerous resolutions adopted by the General Assembly and the Security Council between 1961 and 1973 which dealt with the Territories under Portuguese administration are all condemnatory of Portugal.[287] They indicate that Portugal has certain obligations by virtue of the fact that it administers these territories,[288] and condemn Portugal for its persistent refusal to implement Resolution 1514 (XV) and other relevant resolutions of the General Assembly and the Security Council. They further condemn Portugal for the colonial war it waged against the peoples of Angola, Mozambique and Guinea (Bissau). In 1966 and 1967, the General Assembly characterised the policy of Portugal as a crime against humanity.[289] Several times, the General Assembly requested the Security Council to take obligatory measures against Portugal. In 1973, the General Assembly condemned Portugal's "illegal occupation of certain sectors of the Republic of Guinea-Bissau and the repeated acts of aggression committed by its armed forces against the people of Guinea-Bissau and Cape Verde" and demanded that it desist "from further violation of the sovereignty and territorial integrity of the Republic of Guinea-Bissau".[290] In none of these resolutions is there any suggestion that the General Assembly or the Security Council recognised Portugal as having any special juridical status or rights and powers in relation to these Territories, still less that these

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286 Some earlier resolutions contained provisions referring to "adminstering Powers" of non-self-governing territories generally, which would have included Portugal: see e.g. Resolution 2558 (XXIV), 12 December 1969 ("Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations"), paras.3 and 7. In Resolution 2703 (XXV), 14 December 1970, which applies to all territories under colonial domination but mentions Portugal specifically, the terms "administering Powers" and "colonial Powers" are used interchangeably. However, it is clear that the General Assembly did not intend, by the use of the expression "administering Powers", to make a determination that Portugal had the exclusive right to administer the territories concerned and that other States had a duty to cooperate with Portugal. Other resolutions adopted at the time call on States and specialised agencies in the United Nations system to withhold assistance of any kind from the Government of Portugal: see e.g. Resolution 2708 (XXV), 14 December 1970, paragraph 7 ("Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples").

287 See the Appendix to this Rejoinder for details of these resolutions.

288 E.g., Resolution 1699 (XVI) of 19 December 1961 refers to the obligation that "exists on the part of the Government of Portugal to transmit information under Chapter XI of the Charter of the United Nations concerning Non-Self-Governing Territories under its administration".

289 Resolutions 2184 (XXI), 12 December 1966, paragraph 3; 2270 (XXII), 17 November 1967, paragraph 4 ("Question of Territories under Portuguese administration").

290 Resolution 3061 (XXVIII), 2 November 1973 ("Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic").

resolutions themselves were intended to render the existence of such status, rights and powers certain and incontestable, and opposable erga omnes. In particular, there is no acknowledgement of any special right of Portugal to retain the administration of those territories until such time as self-determination is achieved, even if it should previously lose effective control of the territories. Had Portugal enjoyed any special juridical status as such, with particular powers and rights in respect of the territory (as opposed simply to obligations under Chapter XI of the Charter) one might have expected the General Assembly to have alluded to the fact.

192. On the contrary, the omission of the words "administering Power" in resolutions dealing with the subject of territories under Portuguese administration prior to 1974 seems to have been a deliberate attempt to avoid conveying the impression that Portugal did have any special powers and rights in respect of the territories, which would have undermined the resolutions' call for the immediate recognition by Portugal "of the right of the peoples of the Territories under its administration to self-determination and independence".[291] Resolutions of both the General Assembly and the Security Council between 1961 and 1973 repeatedly called on States not to give support or assistance to, or to co-operate with, Portugal in relation to its administration of those territories, but to adopt measures against Portugal. Conversely, many resolutions urged States to provide moral and material assistance to the national liberation movements in these colonial territories under Portuguese domination. It is an untenable interpretation to treat these resolutions as conferring on Portugal a juridical status, opposable erga omnes, giving it the exclusive right and powers to deal with other States in relation to these territories. It is all the more untenable, bearing in mind that Portugal voted against all these resolutions.[292] The fact that Portugal is referred to as the "administering Power" after the General Assembly had declared that Portugal no longer represented these territories merely confirms that the expression "administering Power" is not used by the General Assembly to refer to a particular juridical status.[293] The expression is no more than a reference to an ill-defined link between the State referred to and the territory in question, to which certain obligations are

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291 Resolution 1913 (XVIII), 3 December 1963.

292 Except Resolution 1742 (XVI), 30 January 1962 ("The situation in Angola"), where Portugal was absent.

293 It should be noted that although some of these resolutions dealt with specific Territories, general references in these resolutions to "Territories under Portuguese administration" were intended to include East Timor: see Resolution 1542 (XV), 15 December 1960, para.1 (i).

attached. Use of the expression is not intended to bestow rights upon the State thus referred to, far less to bestow rights opposable erga omnes which would survive a fundamental change of circumstances in the territory in question.

193. It is clear from this examination of United Nations practice, that the expression "administering Power", like the expressions "Administering Members", "Members responsible for the administration of Non-Self-Governing Territories", "colonial Powers" and other similar expressions, are mere references to present factual circumstances and are not intended to imply that the State referred to has any special juridical status under international law that would survive a change in those factual circumstances. Article 73 of the Charter imposes certain legal obligations on "Members of the United Nations which have ... responsibilities for the administration" of non-self-governing territories. It does not confer on such Member States, or authorise the General Assembly to confer on such Member States, any rights or powers in respect of such territories which those States would not otherwise have. Nor does Article 73 have the effect of "entrenching" the administering State's existing rights and powers in respect of a territory, pending the achievement of self-determination. Such an effect would be inconsistent with the very object and purposes of Chapter XI, which is concerned with the rights of the non-self-governing peoples, and is intended to bring about an early termination of colonial regimes of whatever kind.

194. Similarly, the mere fact that the United Nations has referred to a particular State as the administering Power of a non-self-governing territory does not preclude any future changes in the administration of that territory without United Nations approval. Article 73 of the United Nations Charter refers to United Nations Members which "assume" responsibilities for the administration of a non-self-governing territory, acknowledging that changes in the administering State may take place after the date of entry into force of the Charter. However, unlike the case of a Trust territory under Chapter XII, there is no mechanism for United Nations approval of such changes. These occur independently of the Charter. In other words, while the status of a particular territory as a non-self-governing territory may be determined under Chapter XI, Chapter XI says nothing about which State has sovereignty over, or is entitled to exercise powers of administration in relation to, that territory. The right of a particular State to administer a given non-self-governing territory exists independently of Chapter XI of the Charter, and a transfer of administration

from one State to another occurs outside Chapter XI.[294] Other States may be prevented from recognising such a transfer by a binding Security Council resolution, but nothing in Chapter XI prohibits such recognition.

195. This is demonstrated by the example of the Cocos (Keeling) Islands. Prior to 1955, the Cocos (Keeling) Islands were administered by the United Kingdom as part of the Colony of Singapore. Singapore was included in the original list of non-self-governing territories in General Assembly Resolution 66 (I), of 14 December 1946, and until 1955, the information provided under Article 73 (e) by the United Kingdom in respect of Singapore included information on the Cocos (Keeling) Islands. Authority over the Cocos (Keeling) Islands was transferred from the United Kingdom to Australia on 23 November 1955, by arrangement between the two governments.[295] From 1957, Australia transmitted information on that territory under Article 73 (e) of the Charter, until the General Assembly decided in 1984 that it was appropriate that the transmission of such information should cease.[296] No United Nations approval was sought for the transfer of this territory from the United Kingdom to Australia, either before or after it was effected. Nor did any United Nations organ ever formally purport to transfer the status of administering Power from the United Kingdom to Australia, or to make a "determinative designation" that Australia was now the administering Power. Australia's status as the administering Power was acknowledged for the first time by the General Assembly Resolution 2069 (XX), of 16 December 1965,[297] and even then, only indirectly. The first direct reference by the General Assembly to Australia as

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294 Separate issues can arise in cases of attempts to divide up a non-self-governing territory, which may give rise to disputes, as in the case of the British Indian Ocean Territory (see, e.g., A Rigo Sureda, The Evolution of the Right of Self-Determination (1973), pp.199-202). No such issue arises here.

295 The Yearbook of the United Nations, 1957, p.290, indicates: "The information transmitted by the United Kingdom on Singapore for the year 1955 stated that, as of 23 November 1955, the administration of the Cocos (Keeling) Islands had been transferred to Australia. At the 1957 session of the Committee on Information, the representative of India asked the representative of Australia what his Government's intentions were with regard to these islands. The reply was that the Australian Government intended to transmit information under Article 73e of the United Nations Charter on the Cocos (Keeling) Islands."

296 Resolution 39/30, 5 December 1984. In that resolution, the General Assembly expressed its appreciation "to the Government of Australia, as the administering Power concerned ... for the co-operation extended to the United Nations".

297 "Question of American Samoa, Antigua, Bahamas, Barbados, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Monserrat, New Hebrides, Niue, Papua, Pitcairn, St Helena, St Kitts-Nevis-Anguilla, St Lucia, St Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands".

the administering Power of the Cocos (Keeling) Islands was in Decision 32/408, of 28 November 1977 (and that resolution clearly did not purport to have any kind of "constitutive" effect). Yet prior to these resolutions, neither the United Nations nor any State had protested or expressed concerns in relation to the transfer, nor had any State refused to recognise it. In Decision 32/408, the General Assembly noted "with appreciation the continuing co-operation of the administering Power, in reporting on the implementation of ... resolution 1514 (XV) ... with regard to the Cocos (Keeling) Islands".[298] It would be absurd to maintain that until 1965, when the General Assembly referred to Australia as the administering Power of the territory, all other States were obliged not to disregard or fail to respect ("méconnaître") the status of the United Kingdom as the sole State entitled to deal with other States in respect of the natural resources of that territory.[299]

196. The situation is very different in the case of a territory administered under the International Trusteeship System, under Chapter XII of the Charter. Chapter XII provides that trusteeship agreements shall be entered into which "shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory" (Article 81). Such authority is referred to in the Charter as the "administering authority". Thus, in the case of a Trust Territory, there is clearly a specific State which enjoys the juridical status of "administering authority" by virtue of the relevant trusteeship agreement and the Charter, and which enjoys specific rights, powers and obligations in respect of the territory, as determined by the trusteeship agreement and the Charter (see e.g. Article 84). References in other provisions of the Charter to the "administering authority" (e.g. Articles 87(a)-(c), Article 88) are thus references to the State which enjoys that status by virtue of a trusteeship agreement. In contrast to this, Chapter XI dealing with non-self-governing territories contains no mechanism for determining which State is responsible for the administration of a particular

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298 Emphasis added. See also Decisions 33/411, 13 December 1978; 34/409, 21 November 1979; 35/407, 11 November 1980; 36/407, 24 November 1981; 37/413, 23 November 1982; 38/412, 7 December 1983.

299 Similarly, in the case of Western Sahara, the administering Power, Spain, transferred administrative authority over the territory to a tripartite administration, pursuant to the Tripartite Agreement of 14 November 1975 between Spain, Morocco and Mauritania. United Nations approval or ratification of this transfer was not sought. Nevertheless, in Resolution 3458B (XXX), the General Assembly "took note" of the Tripartite Agreement, and requested the interim administration "to take all necessary steps to ensure that all the Saharan populations originating in the Territory will be able to exercise their inalienable right to self-determination". See further para.211 below.

non-self-governing territory, or for defining what are the specific rights, powers and obligations of that State in relation to that territory, let alone for determining those issues with erga omnes effect.

197. A major difficulty with the Portuguese argument is that it necessarily implies that the United Nations has dispositive powers, enabling it to determine which State has legal rights of sovereignty or administration in respect of particular non-self-governing territories. Nothing in the Charter suggests that this is the case.[300] The United Nations may have certain dispositive powers in respect of Trust Territories under Chapter XII of the Charter (in particular, Article 85, which specifically confers on the General Assembly the function of approving the terms of trusteeship agreements, which designate the administering authority), and may be capable of having dispositive powers conferred on it by extrinsic agreements in specific cases.[301] However, as a general principle, the United Nations does not have the power to determine or alter territorial rights of States. The view that Chapter XI of the Charter does not affect territorial title was affirmed by this Court in the Western Sahara case, in which the Court held that an advisory opinion relating to the future status of a non-self-governing territory did not "call for adjudication upon existing territorial rights or sovereignty over territory".[302]

198. Portugal itself in fact admits that the right of a State to administer a particular non-self-governing territory is not created by the determination that it is the "administering Power". Portugal says in its Reply:

> "... ces déterminations [of the General Assembly] ne sont pas constitutives au sens de créer ex novo les situations déterminées: au contraire elles se limitent à constater des situations pré-existantes, même si elles ont l'effet de les rendre certaines et incontestables. Les Nations Unies qualifient un certain Etat comme puissance administrante

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300 See J Brink, "Non-Self-Governing Territories" in Encyclopaedia of Public International Law, Vol.10 (1987), p.316, at p.320: "Furthermore, Art. 73 [of the Charter] does not transfer to the United Nations any powers of territorial disposition with respect to the territories concerned".

301 E.g., paragraph (3) of Annex XI of the Italian Peace Treaty of 10 February 1947 (49 UNTS 1, 214) provided that if the Four Powers failed to agree on the disposal of the former Italian colonies in Africa, to which Italy had renounced title, the matter would be referred to the General Assembly for a recommendation, and the Four Powers agreed to accept the recommendation. In the event, such a recommendation was sought, and was given by the General Assembly: Resolution 289A (IV), 21 November 1947. See generally J Crawford, The Creation of States in International Law (1979), 325-333.

302 ICJ reports 1975, p.28.

> après l'examen de la situation concrète du territoire et de la position de cet Etat par rapport à ce territoire. Mais les pouvoirs propres de la puissance administrante ne lui sont pas conférés par les Nations Unies: ils sont inhérents à la qualité de puissance administrante."[303]

If the General Assembly cannot confer on a State ex novo the right to administer a particular non-self-governing territory, but can merely find or declare ("constater") existing facts, what basis is there for asserting that this finding or declaration ("constatation") of existing facts has binding erga omnes legal effect? More particularly, what basis is there for asserting that such a finding ("constatation") of existing facts has any legal effect after those existing facts have indisputably changed? If resolutions of the General Assembly have an "interpretative" value,[304] what is the legal effect of the General Assembly's "interpretation" of a state of fact once that state of fact no longer exists? Portugal does not directly address this question. Portugal does draw an analogy with principles in some systems of municipal law, under which certain "declaratory or recognitive acts" of a body endowed with powers of authority may render the existence and nature of the situation so declared certain and indisputable for all purposes.[305] However, in using this analogy, Portugal proceeds from a conclusion, namely that international law does recognise a particular juridical status of "administering Power" (as distinct from the status of a non-self-governing territory), which may continue to be opposable against other States notwithstanding a complete loss of control over the territory in question. This conclusion is not justified by Portugal. International law does not necessarily produce statuses and legal consequences for third parties in the same way as municipal law. None of the authorities cited by Portugal support the proposition that there is in international law a juridical status of "administering Power" which may survive a complete loss of control over the

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303 Reply of Portugal, para.4.59, referring to Memorial of Portugal, paras.6.56-6.57, which say that in this situation, the General Assembly "constat[e] une situation de fait et de droit qui existait déjà avant d'être reconnue comme telle". See also Memorial of Portugal, para.6.02 ("La qualité du Portugal comme Puissance administrante possède une origine historique, constituée par la colonisation du Territoire depuis le XVIème siècle"); Reply of Portugal, paras.3.19 ("La qualité du Portugal comme Puissance administrante du Timor oriental découle de la souveraineté coloniale que le Portugal a exercé sur le territoire dès le XVIème siècle"); 4.11 (the organs of the United Nations render "certaine et incontestable, par leur détermination, une situation préexistente" (emphasis added)).

304 Reply of Portugal, para.2.22.

305 Memorial of Portugal, para.6.57, footnote 350.

territory in question. As will be demonstrated in the next section, existing authorities directly contradict that proposition.

Section II: Effect of a complete loss of control by an administering Power in respect of a non-self-governing territory

A. LOSS OF CONTROL DUE TO AN UPRISING BY THE LOCAL POPULATION

199. In the case of certain non-self-governing territories, the former colonial power lost control of the territory due to an uprising by the local population. Such an uprising could not of itself have terminated the status of the territory as a non-self-governing territory, since the groups seizing control might not have been representative of the true aspirations of a majority of the people. As always, it was for the United Nations itself to determine, once the uprising had resulted in an effective new regime, whether self-determination had occurred and whether Chapter XI of the Charter had ceased to apply to that territory.

200. According to the thesis advanced by Portugal, during the course of such an uprising, all States would have been required to continue to recognise (or at least, to "not misrecognise") the sole right and competence of the former administering Power to exercise powers of sovereignty and to deal with other States in relation to the territory, until such time as the United Nations had determined that Chapter XI had ceased to apply to the territory, or had otherwise determined that the status of the administering Power had been terminated.

201. This thesis is contradicted by the arbitral award of 31 July 1989 in the Guinea-Bissau—Senegal Arbitration.[306] In its award, the Arbitral Tribunal noted the existence in international law of:

> "a corollary of the principle of self-determination of peoples, according to which a colonial State could not conclude, after the initiation of a process of national

[306] The text of the award of the Arbitration Tribunal for the Determination of the Maritime Boundary is contained in the Annex to the Application of the Government of Guinea-Bissau in the Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal), before this Court. A translation prepared by the Registry of this Court is reproduced in International Law Reports, Vol. 83 ("83 ILR"), p.1.

> liberation, treaties bearing on the essential elements of the rights of peoples".[307]

The Arbitral Tribunal elaborated the legal issues which arise in the application of this principle:

> "In this process of formation of a national liberation movement, the legal problem is not that of identifying the precise moment in which the movement as such is born. The important point to be determined is the moment from which its activity acquired an international impact.
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> ...
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> Such activities have a bearing at the international level from the moment when they constitute, in the international life of the territorial State, an abnormal event which compels it to take exceptional measures, ie, when in order to control, or try to control events, it is obliged to resort to means which are not those used normally to deal with occasional disturbances."[308]

What is significant is that the Arbitral Tribunal considered that Portugal had lost the capacity to conclude treaties bearing on the essential elements of the rights of peoples in respect of the then non-self-governing territory of Guinea (and in particular, to conclude treaties with respect to the maritime delimitation of that territory) at the point in time at which a process of national liberation had reached the stage that Portugal was compelled to take exceptional measures, and not at all at the point in time at which the United Nations General Assembly had recognised that Portugal was no longer the administering Power in respect of Guinea-Bissau.

202. The Arbitral Tribunal was concerned in that case with the capacity of Portugal to conclude a treaty for the maritime delimitation of the Portuguese territory of Guinea in 1960. It found that at that time the national liberation movement had not yet acquired "an international impact" ("une portée internationale"). However, the Tribunal observed that there had been repeated statements confirming the assertion that the war of national liberation had

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307 Award, pp.33-34; 83 ILR at pp.26-27. See also Award, p.40; 83 ILR at p.30, referring to "the norm which limits the capacity of the State to conclude treaties upon the initiation of a process of liberation".

308 Award, pp.38-39; 83 ILR at p.29. Although Mr Bedjaoui dissented, he did not expressly disagree with this principle, as formulated in the Award.

begun in 1963.[309] The Tribunal thus accepted that Portugal would have lost its capacity to enter into treaties bearing on the essential elements of the rights of peoples in respect of the territory of Guinea in 1963, notwithstanding that the United Nations General Assembly, as the Tribunal expressly observes, only recognised in 1972 "that the national liberation movements of ... Guinea (Bissau) ... are the authentic representatives of the true aspirations of the peoples of those territories", and in 1973 that Guinea-Bissau was an independent State.[310] Prior to that, Portugal had continued to represent the territory both in the United Nations and in other organisations.[311] Thus, the Arbitral Tribunal was willing to accept that between about 1963 and 1972, Portugal had no power to enter into treaties in respect of the territory bearing on the essential elements of the rights of peoples, especially treaties concerning the maritime delimitation of the territory, even though the General Assembly had at that time not yet done anything purporting to terminate the status of Portugal as administering Power, and notwithstanding that Portugal to some extent was still recognised as able to represent the territory in international fora.

203. As observed previously,[312] even though the General Assembly had recognised in 1973 "that the national liberation movements of Angola, Guinea (Bissau) and Cape Verde and Mozambique are the authentic representatives of the true aspirations of the peoples of those territories", the General Assembly did not thereby purport to terminate Portugal's status or "quality" as administering Power of those territories, since it subsequently referred to Portugal as the "administering Power" of Angola, Cape Verde and Mozambique in 1974. On the thesis advanced by Portugal, Portugal must therefore have also continued to retain the "status" of administering Power of Guinea-Bissau until the General Assembly finally recognised that Portugal ceased to have any rights or powers in respect of that territory when, on 2 November 1973, it welcomed "the recent accession to independence of the people of Guinea-Bissau, thereby creating the sovereign State of the Republic of Guinea-Bissau".[313] However, by that time, the Republic of Guinea-Bissau had already been recognised by some 40 States, following the proclamation of the independence of that country by the African Independence Party of Guinea and the Cape Verde Islands (PAIGC)

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309 Award, p.39; 83 ILR at p.30.

310 Award, p.36; 83 ILR, at p.28, referring to General Assembly Resolutions 2918 (XXVIII), 14 November 1972; 3061 (XXVIII), 2 November 1973 and 3181 (XXVIII), 17 December 1973.

311 Ibid.

312 See para.190 above.

313 Resolution 3061 (XXVIII), 2 November 1973.

on 26 September 1973.[314] This practice of 40 States is a clear indication that States do not consider themselves bound to await a determination of the General Assembly before deciding to recognise that a former colonial power, by force of events, has ceased to exercise, and ceased to have any right to exercise, any rights or powers in respect of a non-self-governing territory.

204. Other examples can be found where States have recognised that a non-self-governing territory had acceded to independence, and that the former administering Power had thus ceased to have any rights or powers of administration in respect of the territory, notwithstanding that the General Assembly itself had not yet recognised that a valid act of self-determination had taken place or that the former colonial power had lost its status of administering Power. For instance, by December 1960 the General Assembly had recognised the right of the Algerian people to self-determination and independence, and subsequently indicated that the Declaration on the Granting of Independence to Colonial Countries and Peoples applied to Algeria.[315] However, the first time that the General Assembly acknowledged that the people of Algeria had achieved self-determination was in October 1962, when Algeria was admitted to membership in the United Nations.[316] Nevertheless, by April 1961 (ie, 18 months earlier), the Algerian Republic had already been recognised by 29 States, following its proclamation on 19 September 1958.[317] In fact, in December 1961, even though a large number of States recognised the Algerian Republic, the General Assembly adopted Resolution 1724 (XVI), the language of which suggested that Algeria was still a non-self-governing territory to which Resolution 1514 (XV) applied.

205. The situation is different only where the United Nations takes positive action imposing a binding obligation on States not to recognise the new revolutionary regime, as occurred in the case of Rhodesia.[318] However, in the case of East Timor, unlike the case of Rhodesia, no binding United Nations resolutions were adopted which would have required Australia to recognise Portugal as the sole State entitled to deal with other States in respect of the territory, either at the time the 1989 Treaty with Indonesia was entered into or at

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314 Rousseau, Revue Général de Droit International Public, Vol. 78, 1974, pp.1166, 1168.

315 Resolutions 1573 (XV), 19 December 1960; 1724 (XVI), 20 December 1961.

316 Resolution 1754 (XVII), 8 October 1962. The Security Council had recommended on 4 October 1962 that Algeria be admitted. Algerian independence was not formally recognised by France until 3 July 1962.

317 Bedjaoui, Law and the Algerian Revolution (1961), 112-138, cited in J Crawford, The Creation of States in International Law (1979), p.260.

318 See Counter-Memorial of Australia, pp.182-184.

all.[319] The Rhodesian example cannot be used, as Portugal seeks to do, to support a more general proposition that the "administering Power" must still be recognised by other States as having exclusive rights to administer a territory notwithstanding a complete loss of control over it.[320]

206. The principle of international law acknowledged by the Arbitral Tribunal in the Guinea-Bissau—Senegal Arbitration[321] has important implications for the present case. It follows from this principle that Portugal had lost its capacity to enter into treaties bearing on the essential elements of the rights of peoples in respect of East Timor, including treaties with respect to maritime delimitation, by November 1975 at the latest. At that time, the majority of the territory of East Timor was controlled by FRETILIN.[322] On 28 November 1975, a few days before the Indonesian invasion, FRETILIN had actually proclaimed in Dili the Democratic Republic of East Timor (RDTL).[323] Clearly, by then the stage had been reached at which Portugal, in order to control, or try to control events, was obliged "to resort to means which are not those used normally to deal with occasional disturbances". That control was never restored, and has now been completely lost. The fact of the Indonesian occupation of East Timor, whether lawful or unlawful under international law, cannot have had the effect of restoring to Portugal an exclusive right to exercise de jure powers of administration over the territory, which it had previously lost. In any event, following the occupation of East Timor by Indonesia, FRETILIN continued until 1984 to assert the existence of the RDTL as an independent State[324] and rejected the view that Portugal was still the administering Power of the Territory.[325] Subsequent resolutions of the Security Council and General Assembly referring to Portugal as the "administering Power" similarly cannot have had the effect of reconferring powers of administration on Portugal (assuming this was their intention), since Portugal itself admits that the United Nations cannot "confer" powers of administration ex novo, but can merely "determine" or "find" ("constater") the existing situation.[326] As the precedents of Guinea-Bissau and Algeria demonstrate, at the time immediately prior to the

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319 See paras.218-223 and Chapter 2 below.

320 Cf Memorial of Portugal, paras.6.61-6.62; Reply of Portugal, paras.4.11, 4.42-4.44, 4.67-4.68, 6.48. See further Section III of this Chapter of this Rejoinder.

321 See paras.201-202 above.

322 Memorial of Portugal, paras.1.25, 1.31, 1.67; Counter-Memorial of Australia, paras.34-38, 83; Reply of Portugal, paras.3.24, 3.67.

323 Memorial of Portugal, para.1.67.

324 Ibid.

325 See Counter-Memorial of Australia, para.242.

326 See para.198 above.

Indonesian occupation of East Timor, there was no rule of international law prohibiting States from recognising Portugal as having lost all entitlement to exercise any rights or powers of administration in relation to East Timor, and as Portugal itself in its Memorial concedes, the RDTL was in fact recognised by some States as an independent State.[327] The practice of those States in particular contradicts the assertion of Portugal that in the absence of a United Nations determination to the contrary, all States remained under an obligation to recognise Portugal as the "administering Power" of East Timor with the exclusive rights and powers of administration in respect of that territory.

207. The reality is that at the time the United Nations resolutions on the question of East Timor were adopted, Portugal had lost all control over East Timor in fact, and had lost its capacity in law to enter into treaties with other States in respect of the territory. Calls by FRETILIN after 1986 for a solution to the question of East Timor which would involve the reestablishment of Portuguese control pending self-determination[328] cannot have produced an immediate effect in international law of conferring such authority on Portugal. Accordingly, at the time Australia negotiated and entered into the Treaty with Indonesia, there can be no doubt that Australia was not under an obligation to treat Portugal as the sole State entitled to deal with others in respect of East Timor.

B. LOSS OF CONTROL DUE TO OCCUPATION BY A THIRD STATE

208. The case of Guinea-Bissau did not involve a situation in which a non-self-governing territory had been occupied by a third State. However, as indicated above, Portugal's loss of control over East Timor did not result from the Indonesian occupation, at the time of which it had already lost its capacity to deal with other States in respect of the territory. Moreover, even if the Indonesian occupation were to be regarded as the cause of Portugal's loss of control over East Timor, the Guinea-Bissau—Senegal arbitration nonetheless contradicts the Portuguese assertion that the "administering Power" of a non-self-governing territory must continue to be recognised by other States as having sole right to exercise powers of sovereignty in respect of the territory, regardless of complete or partial loss of control, until such time as the United

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[327] Memorial of Portugal, para.1.67.

[328] See Memorial of Portugal, paras.1.67-1.72. Reply of Portugal, para.3.13-3.18.

Nations expressly decides otherwise. The decision of the Arbitral Tribunal clearly acknowledges that the capacity of the administering Power to deal with other States in respect of the territory may be lost by force of events, independently of any determination by the United Nations.

209. That this observation applies also in cases in which the administering Power has lost control of the territory due to its occupation by a third State is confirmed by the practice of States and of the United Nations in relation to other non-self-governing territories.

210. An example of where this occurred was the case of Goa. Prior to 1961, Goa was recognised by the United Nations as a non-self-governing territory "under the administration of Portugal".[329] Goa was occupied by force by India in 1961. The General Assembly has never passed a resolution formally indicating that the people of Goa have exercised their right to self-determination or that Portugal is no longer the "administering Power" of Goa. Nevertheless, various States recognised the annexation of Goa by India in subsequent years, and Portugal itself recognised the annexation in 1974.[330] Similarly, in July 1954 (before it had become a member of the United Nations), Portugal had lost control over its colonial enclaves of Dadra and Nagar-Aveli on the Indian subcontinent, due to an insurrection for which outside elements from neighbouring India appeared to be responsible. In the Case Concerning Right of Passage over Indian Territory,[331] this Court expressly confined itself to determining what rights of passage Portugal had for the exercise of its sovereignty over those enclaves on the eve of the events which occurred in 1954. The question whether those rights had subsequently lapsed as a result of those events was considered by the Court to be "open".[332] However, Judge Spiropoulos in a declaration stated that "the establishment of a new power in the enclaves must be regarded as having ipso facto put an end to the right of passage".[333] Judge Armand-Ugon in a dissenting opinion referred to the "existence of a de facto government" in the enclaves after July 1954 and said that "These new facts must lead to holding either that the right which has been recognized must be suspended or that it has become extinguished".[334]

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329 General Assembly Resolution 1542 (XV), 15 December 1960, paragraph 1 (g).
330 J Dugard, Recognition and the United Nations (Cambridge 1987), pp.115-116.
331 ICJ Reports 1960, p.29.
332 Ibid.
333 Ibid., at p.53.
334 Ibid., at p.87.

211. The case of Western Sahara is another in which the administering Power of a non-self-governing territory was displaced by a third State. Before 1975, Spain, the former colonial power, had been recognised by the United Nations as the "administering Power" of this non-self-governing territory (then called Spanish Sahara).[335] On 14 November 1975, Spain entered into a tripartite agreement with Morocco and Mauritania, by which it purported to relinquish its responsibilities and powers as administering Power.[336] The Agreement provided for the transfer of the responsibilities and powers of Spain to an interim government, which was to be established immediately by Spain with the participation of Morocco and Mauritania. The Agreement further provided that "The Spanish presence in the territory will come to a final end before February 28, 1976", and that "The views of the Sahrawi population as expressed through the Jemaa will be respected".

On 10 December 1975, the General Assembly adopted Resolutions 3458A (XXX) and 3458B (XXX) on the "Question of Spanish Sahara". In the former, the General Assembly reaffirmed "the inalienable right of the people of Spanish Sahara to self-determination in accordance with General Assembly resolution 1514 (XV)" and reaffirmed "the responsibility of the administering Power and of the United Nations with regard to the decolonization of the Territory". In the latter, the General Assembly took note "of the tripartite agreement concluded at Madrid on 14 November 1975 by the Governments of Mauritania, Morocco and Spain" and requested "the interim administration to take all necessary steps to

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335 Resolutions of the General Assembly from the mid-1960s reaffirmed "the inalienable right of the peoples of ... Spanish Sahara to self-determination in accordance with General Assembly Resolution 1514 (XV)": Resolution 2229 (XXI), 20 December 1966, para 1. See also Resolutions 2354 (XXII), 19 December 1967; 2428 (XXIII), 18 December 1968; 2591 (XXIV), 16 December 1969; 2711 (XXV), 14 December 1970; 2983 (XXVII), 14 December 1972; 3162 (XXVIII), 14 December 1973. Spain was first referred to as the "administering Power" of the territory in Resolution 2072 (XX), 16 December 1965. In October 1975, in the Western Sahara case, this Court also found that there were no legal ties between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity "of such a nature as might affect the application of resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the peoples of the Territory": ICJ Reports 1975, p.68. In that same year, the applicability of Resolution 1514 (XV) to the territory had also been confirmed in two resolutions of the Security Council: Resolution 377 (1975) of 22 October 1975; Resolution 379 (1975) of 2 November 1975. See also Resolution 380 (1975) of 6 November 1975.

336 Tripartite Agreement Among Spain, Morocco, and Mauritania, signed at Madrid on 14 November 1975. An English version of the text of this Agreement is reproduced in J Damis, Conflict in Northwest Africa: The Western Sahara Dispute (1983), pp.149-150. The Agreement provided that Spain was "putting an end to the responsibilities and powers that it holds as the administrative authority".

ensure that all the Saharan populations originating in the Territory will be able to exercise their inalienable right to self-determination".

This resolution is a clear indication that references by the General Assembly to a particular State as the "administering Power" of a particular non-self-governing territory and to its "responsibility ... with regard to the decolonization of the Territory" are not intended to mean that the State so described is the sole State entitled to exercise powers of administration in relation to the territory pending self-determination. Although describing Spain alone as the "administering Power" of Western Sahara, the General Assembly took note of the existence of the tripartite administration and of its responsibilities to ensure that the exercise of the right to self-determination would take place. At the same time, it is obvious that Resolution 3458B (XXX) was not intended to be a "constitutive" resolution, making a "determinative finding" that the tripartite administration had rights and powers in relation to the territory — it merely took note of a fait accompli.

212. Spain's presence in Western Sahara was terminated in February 1976. When the Spanish forces withdrew, Moroccan and Mauritanian troops moved in and took control of the main towns and settlements.[337] On 14 April 1976, in an attempt to establish formal sovereignty over the Western Sahara, Morocco and Mauritania signed an agreement to partition the territory, and purported to integrate their respective portions as part of their own territories.[338] In August 1979, Mauritania withdrew from the Western Sahara. Morocco then extended its occupation of the territory to the area evacutated by Mauritania, purporting to incorporate the area into the Kingdom of Morocco as a new province.[339]

The Moroccan position that the Sahrawi population had exercised its right to self-determination in 1975 in favour of integration with Morocco and Mauritania[340] was never accepted by the General Assembly, which in subsequent resolutions has repeatedly made clear the continuing application of Resolution 1514 (XV) to Western Sahara and reaffirmed the right of the people of Western Sahara to self-determination and independence.[341] In resolution

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337 T Hodges, Western Sahara: The Roots of a Desert War (1983), p.224.

338 J Damis, Conflict in Northwest Africa: The Western Sahara Dispute (1983), p.76-78.

339 Ibid., pp.89-90.

340 Ibid., 74-75. See also ibid., at p.91.

341 See Resolutions 31/45, 1 December 1976; 32/22, 23 November 1977; 33/31A and B, 13 December 1978; 34/37, 21 November 1979; 35/19, 11 November 1980; 36/46, 24 November 1981; 39/40, 5 December 1984; 40/50, 2 December 1985; 41/16, 31 October

34/37 of 21 November 1979, the General Assembly "Deeply deplore[d] the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania", and "Urge[d] Morocco to join in the peace process and to terminate the occupation of the Territory of Western Sahara".[342] These resolutions also make it clear that despite the proclamation of the independent Saharan Arab Democratic Republic (SADR) in 1976 (which has since been recognised by a large number of States and is a member of the Organization of African Unity), the General Assembly still regards Western Sahara as a non-self-governing territory whose people have not yet exercised the right to self-determination. Nor has the General Assembly ever purported to modify or terminate the status of Spain as the "administering Power" of Western Sahara — indeed, the last time that the General Assembly mentioned Spain in a resolution on Western Sahara in 1975, it expressly referred to it as the "*administering Power*" *with* "*responsibility ... with regard to the decolonization* of the Territory".[343] It is also clear that the General Assembly has never purported to determine that Morocco is now an administering Power of Western Sahara. On the thesis advanced by Portugal in this case, Spain would therefore remain the "administering Power" of Western Sahara, with the primary responsibility for ensuring the achievement of decolonisation, and with the exclusive right and powers to deal with other States in respect of the territory.[344]

In fact, the attitude of the United Nations, and the international community generally, has been inconsistent with this theory. Resolutions of the United Nations since 1976 have made no mention of any rights, duties or powers of Spain in respect of the territory. According to Portugal, such silence cannot affect the existence of such rights, duties and powers,[345] but if this is correct, the failure of the United Nations to mention them once during a decade and a half is

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1986; 42/78, 4 December 1987; 43/33, 22 November 1988; 44/88, 11 December 1989; 45/21, 20 November 1990; 46/67, 11 December 1991; 47/25, 25 November 1992.

342 Resolution 34/37, 21 November 1979. In 1980 the General Assembly reiterated these sentiments: Resolution 35/19, 11 November 1980.

343 Resolution 3458A (XXX), 10 December 1975.

344 Under the Madrid Agreement in 1975, Spain purported to relinquish its responsibilities and powers. However, Portugal says that "il semble tout au moins fort douteux" that an administering Power could renounce this status unilaterally, and that "le maintien de la qualité de puissance administrante même contre l'avis de l'Etat reconnu à ce titre par les Nations Unies est très important pour la garantie de la réalisation du droit à l'autodetermination par le peuple du territoire en cause" (Reply of Portugal, paras.4.41, 4.44). In any event, General Assembly resolution 3458A (XXX) referred to Spain as the "administering Power" after the tripartite agreement of 14 November 1975 had already been entered into.

345 Reply of Portugal, paras.4.22, 4.24.

extraordinary. In fact, subsequent resolutions of the General Assembly never mentioned Spain at all. The General Assembly has acknowledged the particular role to be played by the Organization of African Unity in finding a solution to the question of Western Sahara.[346] From 1980, the General Assembly requested Morocco and Polisario to enter into direct negotiations with a view to arriving at a definitive settlement of the question of Western Sahara,[347] referring to Morocco and Polisario as the two "parties to the conflict".[348]

Furthermore, even though the United Nations rejected the Moroccan claim that the people of Western Sahara had decided in favour of incorporation with Morocco, even though the United Nations has been critical of Morocco's presence in the territory, and even though a large number of States have recognised the Saharan Republic, this has not prevented certain States from having dealings with Morocco as the State in effective control of the territory, in respect of the natural resources of the territory. For instance, a fisheries agreement between the European Economic Community and Morocco was initialled on 25 February 1988, and was brought into provisional effect from 1 March 1988.[349] Article 1 of the Agreement defines "Morocco's fishing zone" for the purposes of the Agreement as "the waters over which Morocco has sovereignty or jurisdiction". The "Moroccan fishing zone" is intended to include the waters pertaining to Western Sahara.[350] Previously, on 2 August

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346 See Resolutions 31/45, 1 December 1976; 32/22, 23 November 1977; 33/31A and B, 13 December 1978; 34/37, 21 November 1979; 35/19, 11 November 1980; 36/46, 24 November 1981; 39/40, 5 December 1984; 40/50, 2 December 1985; 36/46, 24 November 1981; 38/40, 7 December 1983; 39/40, 5 December 1984; 40/50, 2 December 1985; 41/16, 31 October 1986; 42/78, 4 December 1987; 43/33, 22 November 1988; 44/88, 11 December 1989; 45/21, 20 November 1990; 46/67, 11 December 1991; 47/25, 25 November 1992.

347 See e.g. Resolutions 35/19, 11 November 1980, para 10; 36/46, 24 November 1981; 39/40, 5 December 1984; 40/50, 2 December 1985.

348 Resolutions 36/46, 24 November 1981; 39/40, 5 December 1984; 40/50, 2 December 1985; 41/16, 31 October 1986; 42/78, 4 December 1987; 43/33, 22 November 1988; 44/88, 11 December 1989; 45/21, 20 November 1990. See also Resolution 38/40, 7 December 1983, quoting resolution AHG/Res 104 (XIX), adopted by the Assembly of Heads of State and Government of the Organization of African Unity.

349 A copy of the Agreement is in EC Official Journal, No. L 99, 16 April 1988, p.49. The Council Decision of 29 February 1988 giving it provisional effect is found ibid., p.45.

350 The Annual Register: A Record of World Events 1988, p.243 reports: "King Hassan in August stressed that his country's participation in moves towards a united Maghreb did not conflict with Morocco's continued desire to seek membership of the European Community, with which a fishing agreement was concluded in February following months of negotiations. The agreement did not refer specifically to the waters off Western Sahara, merely to 'those waters under Moroccan sovereignty or jurisdiction'. Nevertheless, Polisario accused Morocco of trying to secure EC recognition of its claims to the disputed waters. Mohamed Seqat, Morocco's Secretary of State for European Affairs, denied this but affirmed that the Moroccan fishing zone included the waters off

1987, the European Communities had agreed in talks with Morocco to an extension of a 1983 fishing agreement between Morocco and Spain, which expired on 31 July 1987. Under the agreement, Spain provided Morocco with guarantees and concessionary loans in return for fishing rights for Spanish fishing boats off the coast of Morocco and Western Sahara.[351] Also, in 1982, Morocco recommenced exploitation of Western Saharan phosphate, which had been interrupted in 1975-1976.[352] Mining and export of Western Saharan phosphate is undertaken by the enterprise Fosbucraa, in which the Moroccan state owned enterprise Office Chérifien des Phosphates (OCP) has a 65% shareholding and the Spanish state owned enterprise Instituto Nacional de Industria (INI) has a 35% shareholding.[353]

213. If it is not inconsistent with international law for the Member States of the European Communities (including Portugal itself) to deal with Morocco in relation to Western Saharan fisheries, or for Spain, via a State owned enterprise, to participate with a Moroccan State enterprise in the mining of Western Saharan phosphate, a fortiori it cannot be inconsistent with international law for Australia to deal with Indonesia in relation to the continental shelf in the Timor Gap area. Others States have a free choice whether or not to deal with Morocco in relation to the exploitation of Western Saharan fisheries or phosphate. However, if Australia is to benefit from its own natural resources in the Timor Gap area, it has no choice but to deal with its neighbouring power in relation to the delimitation of rights in respect of the natural resources of the continental shelf which they both claim. In the case of Western Sahara, such dealings have

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Western Sahara." See also Keesing's Contemporary Archives 1988, p. 35996: "King Hassan achieved a notable diplomatic success when the European Communities (EC) in August 1987 renewed the 1983 fishing agreement ..., recognizing Morocco's sovereignty over Western Sahara's territorial waters ... In November 1987 the Polisario offered to 'legitimize' fishing rights in Sahrawi waters by signing an agreement of its own ... none of the 12 European signatories to the agreement with Morocco took up the SADR's offer."

351 Keesing's Contemporary Archives 1987, p.35480. A further fisheries agreement between the European Economic Community and Morocco, similarly applying to "the waters over which Morocco has sovereignty of jurisdiction", was initialled on 15 May 1992: see EC Official Journal, No. L 407, 31 December 1992, p.1. Previous negotiations between Spain and Morocco in respect of fishing rights in Western Saharan waters are described in T Hodges, The Historical Dictionary of Western Sahara (1982), pp.126-128.

352 Annuaire Français de Droit International 1982, p.1134.

353 T Hodges, The Historical Dictionary of Western Sahara (1982), pp.129; T Hodges, Western Sahara: The Roots of a Desert War (1983), p.224; AED (Africa Economic Digest), 6 May 1991, p.13. Mining Annual Review 1991, p.129, reports that "Capacity at the Bu Craa mines is now rated at around 1.9 M/t/y following the start-up of a desalination unit early in 1990. A second unit should be operational by 1991, taking capacity at the plant to its full 3 M/t/y."

not posed any kind of obstacle to the efforts of the United Nations to find a solution to the conflict, which have culminated in the establishment of the United Nations Mission for the Referendum in Western Sahara,[354] which is now present in Western Sahara to fulfil its mission to implement a settlement plan proposed by the Secretary-General in 1991.

Section III: In the absence of a contrary UN decision, Australia is free to deal with the State in control of a non-self-governing territory

214. Because the right of a given State to administer a particular non-self-governing territory exists independently of United Nations action under Chapter XI, the question of which State others may deal with in relation to the territory must be answered in accordance with general principles of international law concerning rights of States in respect of territory, including the general principles of international law concerning recognition.

215. As indicated in Chapter 2 of Part III of Australia's Counter-Memorial, recognition is generally a discretionary matter for each State, and is in principle an acknowledgement of the reality of a situation. Generally speaking, the competence of an entity on the international plane is limited by the degree of effective control which it in fact exercises over the territory concerned.[355] Recognition is merely an acknowledgement of the reality of the situation, and does not signify approval of the means by which that situation was brought about.[356] A State which disapproves of an effective situation may expressly refuse to recognise it, but as Rousseau observes, "En réalité la non reconnaissance n'est qu'un geste illusoire si elle ne s'accompagne pas de la volonté de rétablir l'état de droit antérieur par des procédés de force".[357]

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354 See Security Council Resolution 690 (1991). Australia contributes both funds and personnel to MINURSO.

355 Counter-Memorial of Australia, especially paras.350-353. See also e.g. H Thierry, J Combacau, S Sur and C Vallée, Droit international public (5th edn 1986), pp.225: "Dans ces conditions, il faut conclure à la liberté légale de la reconnaissance ... la reconnaissance, acte discrétionnaire, et par conséquent totalement aléatoire, ne peut être la condition légale de l'existence d'une situation; elle est donc purement déclarative".

356 Counter-Memorial of Australia, especially paras.353, 357. See also e.g. Ch de Visscher, Les effectivités du droit international public (1967), p.39: "La reconnaissance est un acte politique que l'on a vainement tenté de ramener au concept d'un devoir ... En droit, la reconnaissance d'Etat et celle de gouvernement sont des actes souverainement libres".

357 Ch Rousseau, Droit international public, Vol.III (1977), p.526.

216. In the case of most non-self-governing territories, the former colonial power has remained in effective control of the territory after the Charter came into effect, until self-determination occurred. In such cases, issues of recognition normally have not arisen: the former colonial State which was previously recognised by States generally as having sovereignty over the territory continued to be recognised by other States, and by the United Nations itself, as the State entitled to exercise powers of sovereignty in relation to the territory. In cases where the former colonial State's control of the territory has been forcibly displaced by a third State, it may be less clear whether the new State's administration of the territory should be recognised. Nevertheless, in principle, if the new State is in effective control, recognition is permitted by international law. In the previous section examples were given of cases where such changes of control have been recognised by other States.

217. However, as acknowledged in Australia's Counter-Memorial, a State's discretion in matters of recognition must not be exercised in a way that contravenes any international obligation incumbent upon it.[358] One such obligation under customary international law, expressed in General Assembly Resolution 2625 (XXV),[359] is that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal".[360] The argument was put above[361] that even prior to the Indonesian occupation of East Timor in December 1975, Portugal had lost control over that territory, and other States were no longer obliged to recognise it as having any power to deal in respect of it. If this is so, the issue of the legality of the Indonesian occupation cannot affect the fact that Australia is not obliged to deal solely with Portugal in respect of East Timor. As previously indicated (at para.178), once the Court determines that Australia is not obliged to deal solely with Portugal, the Portuguese claim, insofar as it is based on Australia's failure to deal with Portugal, must fail. The comments here on the issue of the legality of the Indonesian occupation of the territory therefore only arise for consideration if it is determined by the Court that at the time of the initial Indonesian occupation Portugal was still entitled to exercise powers of administration in respect of the territory, and on the assumption that it can determine that question of the

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358 Counter-Memorial of Australia, para.350.

359 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States In Accordance with the Charter of the United Nations".

360 See Reply of Portugal, paras.3.50, 6.29-6.30, 6.37ff (especially para.6.41), 6.55-6.56, 6.64-6.67.

361 Section II of this Chapter, especially paras.206-207.

legality of the Indonesian conduct consistently with the Monetary Gold principle, quod non.

218. The existence of the obligation not to recognise as legal any territorial acquisition resulting from the threat or use of force is admitted in principle. However, it is necessary to clarify its content. There is a distinction between:

(a) recognising the legality of a territorial acquisition resulting from the threat or use of force; and

(b) dealing with the factual consequences of a territorial acquisition resulting from the threat or use of force.

As to the former, Australia has never recognised the legality of the manner in which Indonesia took control of East Timor — indeed, as is apparent from the statements of the Australian government quoted by Portugal,[362] Australia has consistently expressed its disapproval of the manner by which Indonesia incorporated the territory of East Timor. As to the latter, since 1979 Australia has recognised that as a consequence of the events of 1975, Indonesia now exercises effective control over East Timor.

219. The requirement in Resolution 2625 (XXV) that "No territorial acquisition resulting from the threat or use of force shall be recognised as legal" is concerned with (a) and not (b). Australia may be under an obligation not to recognise the legality of the acquisition of the territory of East Timor. But Portugal states that the Court in this case is not asked to determine the legality of Indonesia's conduct[363] and for the reasons given elsewhere in this Rejoinder, the Court is unable to consider this question.[364] However, even if the actual acquisition of the territory of East Timor by Indonesia was illegal, it does not follow that States are under an obligation in perpetuity never to recognise the consequences of that illegal acquisition. The international community may eventually signify its acceptance of a situation, which although brought about by illegal means, is now a fait accompli which cannot be ignored.[365] When this

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362 See Memorial of Portugal, paras.2.20, 2.22, 2.24.

363 See paras.5 (2) and 179-181 above.

364 See Part I, Chapter 1.

365 H Lauterpacht, Recognition in International Law (1947), p.429: "There is no question here of legalizing the illegal act; the question is one of disregarding the effects of the illegality" ... [T]here is no logical objection to the community acquiescing, through collective or individual acts of its members acting in the general interest, in the assertion of a right which did not previously exist. To rule out that possibility altogether would

occurs, the continuing occupation of the territory by the State in question acquires international legitimacy, even though the original acquisition is never recognised as legal.[366] In the words of one writer:

> " ... what, given this assumption [that neither conquest nor a cession imposed by illegal force of themselves confer title], is the legal position where a conqueror having no title by conquest, is nevertheless in full possession of the territorial power and not apparently to be ousted? ... The traditional procedure by which the law is adjusted to fact — by which indeed, the law when occasion requires may seem to embrace illegality — is the procedure of recognition ... [T]he international community may ... eventually signify assent to the new position and thus by recognition create a title. This possibility in no way contradicts the main proposition that force does not of itself create a title, because the international community would from this point of view be exercising a quasi-legislative function."[367]

Or, as another writer observes, a State "ne peut prétendre conserver à tout jamais un territoire qu'il a cessé de gouverner depuis longtemps alors qu'un autre Etat a commencé à y accomplir des actes de souveraineté".[368]

220. Thus, to establish that Australia is in breach of the rule of international law reflected in General Assembly Resolution 2625 (XXV), it would be necessary to demonstrate both that the original occupation of East Timor by Indonesia was illegal, and that this situation had not acquired legitimacy

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mean to postulate for the law a degree of rigidity which may not be compatible with international peace and progress".

366 See Counter-Memorial of Australia, paras.356-359.

367 RY Jennings, The Acquisition of Territory in International Law (1963), pp.61-62. See Counter-Memorial of Australia, para.357. See also H Lauterpacht, Recognition in International Law (1947), p.429 (States "may, by what may be called a quasi-legislative act, give legal force to a situation which in the eyes of the law is a mere nullity"); H Wehberg, "*L'Interdiction du recours à la force*", Recueil des Cours, Vol.78 (1951-I), p.7, at p.108.

368 Ch de Visscher, Les effectivités du droit international public (1967), p. 37. See also J Touscoz, Le principe d'effectivité dans l'ordre international (1964), pp.228-232, (referring, inter alia, to Ch de Visscher, Théories et réalités en droit international public (3rd edn 1960), pp.257, 404, 405 and G Salviolli, "L'Effectivita in diritto internazionale", Rivista trimestriele di diritto publico 1953, p.241, at p.279); Ch Rousseau, Droit International Public, Vol.III (1977), p.526; A Cassese, International Law in a Divided World (1986), pp.26-28, 227-228. W Meng, "Stimson Doctrine" in Encyclopaedia of Public International Law, Vol.4 (1982), p.230, at p.232 says "The use of that principle [of effectiveness] is not excluded by the Stimson doctrine. Non-recognition cannot be effective without subsequent sanctions against the violator. If it remains the sole reaction or if sanctions ultimately fail, States cannot, after a certain lapse of time, be prohibited from recognizing the situation ..."

through international acceptance by the time that the 1989 Treaty with Indonesia was negotiated and entered into, so that all States were under a continuing obligation not to recognise the legality of the present presence of Indonesia in East Timor. This clearly cannot be done without determining the rights and responsibilities of Indonesia.

221. Where the Security Council adopts binding resolutions requiring Member States not to recognise the acquisition, this answers the question what attitude States are required to adopt. However, the Security Council resolutions in 1975 and 1976 relating to the Indonesian occupation of East Timor do not determine that the Indonesian conduct was unlawful at the time nor do they require States not to recognise the legality of the acts of Indonesia in relation to East Timor.[369] However, even if they did, they would not establish that the Indonesian occupation had not acquired legitimacy by the time the Treaty was negotiated and entered into in 1989. The question here is not whether the conduct of Indonesia in December 1975 was illegal (a question which, in any event, Portugal says the Court is not called on to decide), but whether States were under a continuing obligation in 1989 (i.e., 14 years later), and are under a continuing obligation today (i.e., 18 years later) not to recognise the consequences of the situation brought about by the conduct of Indonesia in 1975. The United Nations view on the former issue does not provide an answer to the latter, after so long a period of time.

222. In cases where there is no binding Security Council resolution prescribing specific measures of non-recognition, every State is necessarily left to determine for itself what attitude it will adopt.[370] In such situations, each State must decide for itself, in good faith, whether it considers the situation to be lawful or unlawful, and must act accordingly.[371] States will no doubt be influenced in their decision by the attitude taken by other States, either individually or in forums such as the United Nations General Assembly, but ultimately, it is for each State to determine its own attitude — even a majority of States in the General Assembly voting to adopt a resolution condemning the conduct as illegal could not determine this question in a way binding on other States. Different States may take a different view, and some will recognise the

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369 Counter-Memorial of Australia, Part III, Chapter 1, and Chapter 2 below.

370 Counter-Memorial of Australia, paras.350-359.

371 H Lauterpacht, Recognition in International Law (1947), p.429: "... there may arise situations in which the assumption of legislative powers of this nature, if exercised in good faith and in the interest of general international welfare, is a course preferable to the perpetuation of an anomaly".

legality of a new situation before others. The case of Goa, referred to in the previous section, provides an example of this process. Regardless of whether the original occupation was lawful or not,[372] the incorporation of the territory into India was ultimately recognised by the international community. Different States recognised the annexation at different times. This demonstrates the impossibility of fixing a precise time at which the new situation acquired legitimacy: although States may recognise an acquisition of territory once that situation has acquired legitimacy, it in fact acquires legitimacy through the process of recognition by other States. It cannot be the case that the first State to extend recognition to the new situation is necessarily in breach of international law, solely by virtue of the fact that it has recognised a situation still regarded by all other States as illegal. If this were so, this process could never occur.[373] Furthermore, it is most likely that the first State to recognise the new situation will be a State bordering the territory in question, which simply cannot ignore the new reality indefinitely but is forced to deal with it.

223. In any event, even if it were the case that in theory there is a precise point in time at which such situations acquire legitimacy, the Court is unable in the present case to determine whether or not Australia's negotiation and entry into the Treaty with Indonesia occurred prior to that point in time. To determine this the Court would need to decide whether the original Indonesian occupation of East Timor was illegal under international law, and if so, whether the continuing occupation of East Timor by Indonesia had subsequently ceased to be illegal. Because of the Monetary Gold principle, the Court is unable to do this.[374] This is the insurmountable barrier to the Portuguese argument.

224. Australia has at all times expressed regret at the actions of Indonesia and has maintained its opposition to the manner of Indonesia's incorporation of East Timor.[375] Australia has never recognised the legality of Indonesia's original acquisition of the territory of East Timor (cf General Assembly Resolution 2625 (XXV)). However, in order to exploit the natural resources of its own continental shelf in the Timor Gap area, Australia has no choice but to negotiate

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372 Cf J Dugard, Recognition and the United Nations (1987), 115; J Crawford, The Creation of States in International Law (1979), 112.

373 Portugal contends (Reply of Portugal, para.6.58) that before such a situation could acquire legitimacy, it would be necessary for both Portugal and the General Assembly to accept it. There is no basis for this contention. For instance, various States recognised the incorporation of Goa into India before this situation was recognised by Portugal in 1974.

374 See Counter-Memorial of Australia, paras.224-226, 363.

375 See paras.41 and 218 above.

with the State exercising sovereignty over that territory. It is confronted with the reality that Indonesia is the State in effective control and is the only State with which Australia can enter into an agreement that could be implemented in practice. It is further confronted with the reality that nothing is being done within the Security Council or General Assembly which might change that situation, let alone anything which requires Australia to assume onerous burdens as a "front line State". While not recognising the legality of the acquisition of the territory of East Timor by Indonesia, in circumstances where there is no prospect of a return to the status quo ante, international law does not prohibit Australia from recognising the consequences of Indonesia's actions in 1975. As was pointed out in Australia's Counter-Memorial,[376] the Treaty which is the subject of these proceedings was concluded 14 years after the controversial events had occurred, 13 years after the last consideration of the issue by the Security Council, and 7 years after the last consideration of the issue by the General Assembly. In 1982 the Assembly had done no more than call on the States directly concerned to negotiate with a view to settling the problem — in a resolution which attracted the support of no more than a third of the members of the United Nations. During the debates on those resolutions and in the Fourth Committee, other States had expressed the view that Indonesian control over East Timor was an established fact.[377] There has been no criticism by the international community, or from competent United Nations bodies, of Australia or of any of the other States which have recognised Indonesian sovereignty over East Timor or dealt with Indonesia in relation to East Timor.[378]

225. To the extent that General Assembly resolutions may be indicative of the attitude of other States, resolutions adopted prior to the negotiation of the Treaty are no indication of the attitude of other States as to the legality of the Indonesian administration at the time the Treaty was negotiated. As indicated earlier in this Rejoinder,[379] the reality of Indonesian control over East Timor has been recognised by a significant number of States. Certain States, including some which are geographically close to Indonesia, say that a valid act of self-determination took place in 1976, as a result of which the people of East Timor have chosen integration with East Timor — an attitude that cannot be characterised as amounting to anything other than de jure recognition of

376 At para.358.
377 Counter-Memorial of Australia, Part I, Chapter 2, especially para.175.
378 Counter-Memorial of Australia, paras.368-372, and paras.55-61 above.
379 See paras.44-50 above.

Indonesian sovereignty over East Timor. Other States, such as the United States of America, while not recognising that a valid act of self-determination has taken place, accept the incorporation of East Timor into Indonesia. Other States have entered into treaties with Indonesia which apply to the territory of East Timor.[380]

226. Portugal argues that the conduct of Australia is distinguishable from that of other States who have entered into double taxation treaties with Indonesia because Australia has recognised de jure the incorporation of East Timor into Indonesia, whereas other States, while dealing with Indonesia in respect of the territory of East Timor, have not used the expression "de jure".[381] Portugal contends that these dealings of other States do not constitute a "méconnaissance" of its status as an administering Power, whereas the conclusion by Australia of the 1989 Treaty with Indonesia somehow does. This contention is unfounded. Entering into bilateral treaties regulating without qualification or reservation the relations between States in respect of defined territory must be taken to show that the territory is recognised as subject to the sovereignty of the relevant State party to the treaty.[382] It is immaterial that, in Australia's case, recognition was express, and described as "de jure". In international law, recognition produces the same effect, whether expressed as de jure or de facto, or merely implied. In international practice, some States use the expression "de facto recognition" to denote "acceptance of facts with a dubious legal origin"[383]. However, as a matter of international law, there is no relevant distinction. As Rousseau observes:

> "toute reconnaissance produit des effects juridiques et. ... par définition méme elle ne peut être que de jure. Et si l'on veut dire par là [by the epithet de facto] que la reconnaissance est la constatation d'un fait, on ne fait que répéter un truisme, puisque toute reconnaissance présente invariablement ce caractère"[384].

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380 See Counter-Memorial of Australia, paras.164-166 and Appendix C. See also this Rejoinder, paras.52-54 and 227.

381 Reply of Portugal, paras.6.08-6.14, especially para.6.14.

382 See para.53 above.

383 I Brownlie, Principles of Public International Law (4th edn 1990), p.94.

384 Ch Rousseau, Droit International Public, Vol.III (1977), p.552.

Or, as another writer has pointed out:

> "La reconnaissance est un acte juridique ou elle n'est pas. Parler de reconnaissance de fait c'est employer une expression dénuée de sens."[385]

Use of the expression de jure recognition in relation to a situation certainly does not imply that the recognising State considers that the means by which that situation was originally brought about was legal, nor that it approves of the present situation. Any recognition (whether expressed to be de facto or de jure) is merely an acknowledgement that an effective situation exists and has legal consequences. As Brownlie indicates:

> "If there is a distinction it does not seem to matter legally. Certainly the legal and political elements of caution in the epithet de facto in either context are rarely regarded as significant, and courts both national and international accord the same strength to de facto recognition as evidence of an effective government as they do to de jure recognition. The distinction occurs exclusively in the political context of recognition of governments. It is sometimes said that de jure recognition is irrevocable while de facto recognition can be withdrawn. In the political sense recognition of either kind can always be withdrawn: in the legal sense it cannot be unless a change of circumstances warrants it."[386]

Or as Blix says:

> "Regardless of the reasons for which the rider "de facto" has been attached to an act of recognition, the act connotes

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385 L Delbez, Les Principes Généraux du Droit International Public (1964), p.164 (adding that "on peut regretter les dénominations employées qui sont une source de graves malentendus").

386 I Brownlie, Principles of Public International Law, (4th edn 1990), p.94 (footnotes omitted). He adds (at p.93) that "General propositions about the distinction between de jure and de facto recognition are to be distrusted, since, as it was emphasized earlier, everything depends on the intention of the government concerned and the general context of fact and law". See also J Verhoeven, La reconnaissance internationale dans la pratique contemporaine (1975), p.631: "De l'examen de la pratique un fait paraît néanmoins ressortir, à savoir qu'il faut renoncer à donner de la distinction entre reconnaissance de facto et reconnaissance de jure une explication unique. Sauf à sacrifier la réalité des rapports internationaux à la vérité théorique de systèmes abstraits, il faut admettre les significations multiples qu'a reçues la reconnaissance dite de facto au gré des intentions souveraines".

> the same conclusion as to the international legal capacity or competence of the recognized State or government".[387]

It is not true that international law permits only de facto, and not de jure recognition to be accorded to the consequences of a situation originally brought about by the forcible occupation of territory. The observation that "La reconnaissance n'est qu'une constatation, non un jugement de valeur" applies equally to de jure and de facto recognition.[388] Australian recognition of de jure Indonesian sovereignty over East Timor would only amount to a recognition of the legitimacy of the means by which Indonesia acquired control of the territory of East Timor if this had been Australia's express or implied intention. No such intention has ever been manifested by Australia, which has consistently maintained that its de jure recognition of Indonesian sovereignty over East Timor does not signify approval of the original acquisition of territory.[389]

227. Portugal fails to justify any distinction between Australia's conclusion of the 1989 Treaty with Indonesia and the conclusion by other States of double taxation treaties with Indonesia. It merely asserts that the entry into such double taxation agreements "n'entraîne, de par leur nature, aucun déni du droit du peuple du Timor oriental à disposer de lui même et de souveraineté permanente sur ses richesses et ressources naturelles. Il s'agit tout simplement de limites à l'exercise d'une autorité qui est une autorité de fait".[390] Yet for a State to deal with Indonesia in respect of East Timor, whether in the context of double taxation agreements or in the context of agreements for the exploitation of natural resources, is to deny that Portugal is the sole State with which others may deal in respect of East Timor. If it is illegal to deal with a State other than Portugal in the one context, it must similarly be illegal to deal with a State other than Portugal in the other context.[391] The attitude of other States is clearly that

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387 HM Blix, "Contemporary Aspects of Non-Recognition", Recueil des Cours, Vol.130 (1970-II), p.587, at p.602. Also Nguyen Quoc Dinh, P Daillier and A Pellet, Droit International Public (4th edn 1992), p.534 ("Théoriquement, il ne devrait y avoir que des reconnaissances de l'Etat de jure ... toute reconnaissance est un acte juridique, qui emporte des effets juridiques en matière de capacité d'une entité dans les relations internationales"); DP O'Connell, International Law (2nd edn 1970), Vol.1, p.162 ("international law is indifferent to the form of recognition").

388 Ch Rousseau, Droit International Public, Vol.III (1977), p.526. If there is any legal distinction between de facto and de jure recognition, that distinction exists solely in the sphere of municipal law: HM Blix, "Contemporary Aspects of Non-Recognition", Recueil des Cours, Vol.130 (1970-II), p.587, at p.602; DP O'Connell, International Law (2nd edn 1970), Vol.1, p.162.

389 See para.224 above.

390 Reply of Portugal, para.6.14. Also at paras.5.10-5.11, 6.12.

391 See further paras.52-54 above.

States are not under an obligation to deal solely with Portugal in relation to East Timor, and further, that States are not, as asserted by Portugal,[392] under an obligation of the kind described by this Court in the Namibia Advisory Opinion[393] not to recognise the legality of the acts of Indonesia in relation to East Timor. It is true that the Court held in that case that it would not be inconsistent with such an obligation for States not to recognise the invalidity of "those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory".[394] However, the conclusion and implementation of a double taxation agreement with Indonesia goes beyond the mere recognition of perfunctory acts of administration, and constitutes a positive dealing with Indonesia in international relations in respect of East Timor.[395] Clearly, the conduct of other States is inconsistent with the attitude that there is any present obligation either not to deal with Indonesia in relation to East Timor, or to deal solely with Portugal in respect of that territory.

228. Thus, it was appropriate for Australia to address for itself the question whether it should continue to recognise Portugal as the sole State entitled to deal with other States in respect of East Timor, or whether it was now entitled to recognise the legal effectiveness of the Indonesian administration. Australia decided, in all the circumstances, that the Indonesian occupation of East Timor must now be considered as legally effective.

229. Portugal cites the example of Rhodesia in support of the proposition that the status of administering Power continues to be legally effective notwithstanding a complete loss of control by that State over the territory in question.[396] However, in the case of Rhodesia there were binding Security Council resolutions imposing an obligation of non-recognition[397] — an obligation with which Australia complied and Portugal did not. In the case of Rhodesia, the United Nations was determined that the situation brought about

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392 Reply of Portugal, paras.5.10-5.11.

393 ICJ Reports 1971, pp.54-56.

394 Ibid., p.56. Cf also the observations of the English Court of Appeal in relation to recognition of acts of the illegal government in Rhodesia in Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd [1978] QB 205, 218 (Lord Denning MR), 228 (Roskill LJ).

395 Cf Namibia Advisory Opinion, ICJ Reports 1971, p.55: "...member States are under an obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia".

396 See para.205 above.

397 See Counter-Memorial of Australia, pp.182-184.

by the unilateral declaration of independence would not endure. Where the administering Power loses control of the territory by a use of force, and the Security Council considers that there is some prospect of a return to the status quo ante, it may decide, in order to seek to bring about this result, to impose an obligation of non-recognition which will be binding on Member States. In the case of East Timor, unlike the case of Rhodesia, the Security Council has not imposed sanctions on Indonesia, or specifically called for non-recognition of Indonesia's acts in relation to East Timor. Furthermore, the diminishing majorities voting in favour of the General Assembly resolutions adopted between 1975 and 1982, and the absence of General Assembly resolutions thereafter, indicate that there is at present no prospect of a return to the status quo ante. For the reasons given above, where no such obligation is imposed by the Security Council, other States retain a discretion in determining which State it recognises as exercising sovereignty over a non-self-governing territory in cases where the former administering State no longer exercises any effective control over it. This is without prejudice to the continuing application of Chapter XI which applies to States which are or become responsible for the administration of a non-self-governing territory.

230. Similarly, the Namibia Advisory Opinion, which is referred to several times by Portugal in support of its argument, is entirely distinguishable from this case. The Court in that case was not concerned with a Chapter XI territory, but with a Mandate under the Covenant of the League of Nations. The authority which South Africa exercised over the territory of South West Africa was based solely on the Mandate.[398] The Court held in duly constituted proceedings that the Mandate had been validly terminated by the General Assembly. In Resolution 276 (1970), which the Court held was binding on Member States, the Security Council declared (in paragraph 2) "that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid." In paragraph 5, it called upon all States "to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution". In this case, the Court was asked to give an advisory opinion on the legal consequences of Security Council Resolution 276. The Court decided that because the Security Council had declared in a binding

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[398] ICJ Reports 1950, p.133; quoted in ICJ Reports 1962, p.333 and in ICJ Reports 1971, pp.42 and 50.

resolution that the continued presence of South Africa was unlawful, "Members of the United Nations would be expected to act in consequence of the declaration made on their behalf. The question therefore arises as to the effect of this decision of the Security Council for States Members of the United Nations in accordance with Article 25 of the Charter."[399] The Court expressly acknowledged that the duty of States to refrain from recognising the legality of the acts of South Africa in relation to Namibia arose from the terms of the Security Council resolution, referring to "the duty of non-recognition imposed by paragraphs 2 and 5 of resolution 276 (1970)",[400] and saying that "The precise determination of the acts permitted or allowed ... is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter".[401] Portugal maintains in its Reply[402] that the Court left open the possibility that a duty of non-recognition also existed independently of Resolution 276, under the terms of the Charter and general international law, when it referred to:

> "those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of resolution 276 (1970), because they may imply a recognition that South Africa's presence in Namibia is legal."[403]

However, the Court in this passage expressly acknowledges that the obligation of States is to not act inconsistently "with the declaration of illegality and invalidity made in paragraph 2 of resolution 276(1970)". The Charter and general international law are referred to only in order to define the content of the obligation imposed by that resolution — i.e., to define what amounts to "recognition" for the purposes of the resolution.[404]

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399 ICJ Reports 1971, at p.52 (emphasis added).

400 Ibid., at p.55 (emphasis added).

401 Ibid.

402 Reply of Portugal, para.6.39.

403 ICJ Reports 1971, at p.55.

404 See also Counter-Memorial of Australia, paras.364-365. Portugal in its Reply (at para.6.39) also quotes from the separate opinion of Judge Onyeama in that case, who said that "The declaration of the illegality of the continued presence of South Africa in Namibia did not itself make such presence illegal" and that the resolution was "a statement of the Security Council's assessment of the legal quality of the situation": ICJ Reports 1971, p.147. However, as explained in the preceding paragraphs, even if this were true, in the absence of such a binding assessment by the Security Council in the present case, every State must determine for itself in good faith whether it is under an obligation in international law not to recognise the validity of the acts of Indonesia in

Conclusions

231. In paragraphs 199-207 above, it was demonstrated that Portugal had lost its capacity, in relation to East Timor, to enter into treaties bearing on the essential elements of the rights of peoples, including treaties with respect to maritime delimitation, by November 1975 at the latest, and the subsequent occupation of East Timor by Indonesia in the following month cannot have restored that capacity. As Portugal itself admits, the United Nations does not have the power under Chaper XI of the Charter to confer ex novo on States a right to exercise powers of sovereignty in respect of a particular non-self-governing territory which they do not already have, and at the time of those resolutions, Portugal lacked such power.[405] For these reasons, Australia is not under an obligation to deal solely with Portugal in relation to the continental shelf in the area of the Timor Gap.

232. In any event, the question of which State may be recognised by others as lawfully exercising control over a particular non-self-governing territory is determined under general principles of international law relating to recognition, and not by Chapter XI of the Charter. As has already been demonstrated, international law does not recognise a special juridical status of "administering Power" which continues to be legally effective, erga omnes, even after that State has lost all control over the territory, until such time as the status is terminated by the United Nations. A State's right to administer a particular non-self-governing territory can be lost by force of events. In the case of East Timor, Portugal has lost all control over the territory. Even if the original occupation of the territory by Indonesia was unlawful (a matter which this Court cannot decide in these proceedings), it is possible that the Indonesian administration of the territory has subsequently acquired legitimacy. But however that may be, the Court cannot determine in the present case whether the administration of East Timor by Indonesia was unlawful at the time Australia entered into the Treaty with Indonesia. In the absence of a binding Security Council resolution imposing an obligation of non-recognition, this Court cannot determine that Australia is not entitled to deal with Indonesia in relation to East Timor, and hence, cannot determine that Australia is required to deal solely with Portugal.

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relation to East Timor, and to deal solely with Portugal in relation to that territory: see especially paras.221 and 225 above.

405 See para.198 above.

233. Furthermore, even if the General Assembly did have the power to declare that a State has the juridical status of "administering Power", with the exclusive right to deal with other States in respect of a non-self-governing territory, the General Assembly never purported to confer such a status on Portugal in respect of East Timor. Prior to 1974, General Assembly resolutions on the question of "Territories under Portuguese Administration" were hostile to Portugal, which voted against them.[406] These resolutions never referred to Portugal as the "administering Power" of those Territories. Portugal is referred to in such a resolution as the "administering Power" of the territories under its administration for the first time in 1974, by which time it had already been established that Portugal no longer represented certain of those territories.[407] The mere references to Portugal as the "administering Power" in that resolution cannot be construed as a "determinative designation" that States could deal solely with Portugal in relation to those territories, even if the General Assembly had the power to make such binding determinations. Similarly, mere references to Portugal as "administering Power" of East Timor in resolutions adopted after the Indonesian occupation cannot be construed as a "determinative designation" that States could deal solely with Portugal in relation to East Timor. Those references to Portugal as "administering Power" are at best an acknowledgement that Portugal, while certainly no longer in a position to exercise powers of sovereignty in relation to East Timor, might by virtue of its historical association with the territory continue to have some role in the work of the United Nations relating to that territory. It is unnecessary to decide in the instant case precisely what was, or is, that role. However, it is clear that the General Assembly has regarded Portugal, like Indonesia, as merely one of the "interested parties" in relation to East Timor.[408, 409]

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406 See paras.191-192 above.

407 See paras.190 and 192 above.

408 See especially Resolution 36/50, 24 November 1981, paragraph 3: "... all interested parties, namely Portugal, as the administering Power, and the representatives of the East Timorese people, as well as Indonesia ..." Also Resolution 32/34, 28 November 1977, paragraph 5: "... the Government of Indonesia, as well as the Governments of other States concerned ..."; Resolution 37/30, 23 November 1982, para 1: "Requests the Secretary-General to initiate consultations with all parties directly concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem ..." (emphasis added).

409 In its Reply (at paras.4.58, 4.65), Portugal criticises the "Australian thesis", which it describes as "original", according to which an administering Power of a non-self-governing territory only has such specific and particular powers in relation to the territory as have been conferred on it by the United Nations (referring to Counter-Memorial of Australia, paras.243-254). As is apparent from the preceding analysis, this is not Australia's contention. Australia contends that the right of a State to administer a

234. Portugal's argument that, in this situation, it is a consequence of the right to self-determination that all States must continue to recognise the former colonial State as the "administering Power" with the sole right to deal with other States in relation to the territory, seems inconsistent with the very nature and purpose of the right to self-determination. The former State, having lost all control over the territory, is no longer able to discharge the responsibilities under Article 73(a) to (e) of the Charter. The latter State is, of course, subject to Chapter XI, and is in a position to discharge those responsibilities.[410] The purpose of the right to self-determination is not to protect, far less legally to entrench, the powers and rights of a former colonial power over a former colony. It cannot be in the interests of the people of the territory for a former colonial power which has long since lost all effective control over the territory and has no realistic prospect of ever regaining it to be recognised as the sole State entitled to deal on its behalf.

235. A further consideration to be borne in mind is that Portugal could no longer be held responsible for the acts of the people of East Timor. The International Law Commission's draft articles on State responsibility would seem to require a "territorial governmental entity" or "an entity empowered to exercise elements of the governmental authority" (Article 10).[411] Portugal

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particular non-self-governing territory exists independently of Chapter XI of the Charter (paras.194ff above), and can be lost by force of events, independently of any determination by the United Nations (paras.208ff above). In the present case, Portugal has by force of events lost all effective control over the territory of East Timor. Australia argues that in cases such as the present, continuing references by the United Nations to that State as the "administering Power" are not an indication that the United Nations considers that that State is still the colonial Power with the exclusive right to administer the territory and to represent it internationally pending self-determination, much less that such references themselves constitute a binding determination that the State has this status. Rather, such references are at best an acknowledgement that the State, by virtue of its historical association with the territory, continues to have some role in the work of the United Nations relating to that territory. The nature of this role would be defined by the United Nations in the particular case. The extent of the role of Portugal recognised by the United Nations in relation to East Timor is described in Part I, Chapter 2 of this Rejoinder.

410 The Court may take judicial notice of the fact that at present, Indonesia is in effective control of East Timor. Thus, Indonesia may have obligations under Chapter XI in respect of that Territory. However, it is not for the Court to determine in the instant case what is the precise nature of those obligations or whether Indonesia is fulfilling them. These matters could no doubt be the subject of an Advisory Opinion (cf Western Sahara Advisory Opinion, ICJ Reports 1975, p.12), which Portugal has never advocated that the General Assembly or other competent body should seek.

411 Yearbook of the International Law Commission 1980, Vol.II (Part Two), p.31. See also Namibia Advisory Opinion, ICJ Reports 1971, p.54: "Physical control of a territory and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States".

would not be liable for acts of an insurrectional movement. How can Australia have an obligation to deal with Portugal in respect of East Timor if Portugal cannot be responsible for acts in relation to the territory? If a territorial government for East Timor today authorised a mining company to drill an area of the Joint Development Zone, Australia could not seek to impose responsibility on Portugal in respect of the act. The converse must also be the case: Portugal cannot impose responsibility on Australia for not dealing with Portugal.

236. As was observed previously, once it is established that at the time the 1989 Treaty was entered into, States were under no obligation under general international law to recognise Portugal as the sole State entitled to deal with others in relation to East Timor, the Court should dismiss the Portuguese claim, in so far as it is based on the argument that in failing to deal with Portugal, Australia has acted in breach of the principles of self-determination and permanent sovereignty over natural resources under the Charter, international human rights covenants and general international law.

237. If Australia was under no obligation under general international law to deal exclusively with Portugal in relation to East Timor, the question remains whether Australia was under any such obligation by virtue of Security Council Resolutions 384 (1975) and 389 (1976). This question is considered in the next Chapter.

CHAPTER 2

THERE HAS BEEN NO BREACH BY AUSTRALIA OF SECURITY COUNCIL RESOLUTIONS 384 OR 389 OR OF AN OBLIGATION TO CO-OPERATE IN GOOD FAITH WITH THE UNITED NATIONS

Introduction

238. Australia indicated in its Counter-Memorial why there was no authoritative determination by the United Nations which would prevent Australia from dealing with Indonesia and which would require Australia to deal with Portugal.[412] Australia referred particularly to the Namibia case, in relation to the criteria which determine whether a Security Council resolution is binding on States.[413] Portugal in its Reply continues to assert that Australia has obligations flowing from Security Council resolutions 384 and 389 which it says Australia has breached.[414] Australia in this Chapter shows why that is not the case.

Section I: There has been no breach of Security Council resolutions 384 or 389

A. THERE HAS BEEN NO BREACH OF THE TERMS OF THE RESOLUTIONS

239. Even if the Court were to conclude, contrary to Australia's submission, that the resolutions did amount to binding decisions, there has been no breach of those decisions by Australia.

240. The only action Australia is called upon with other States to take is to respect the territorial integrity of East Timor and the rights of its people to self-determination. As indicated in the next Chapter, Australia has not failed to meet any obligation in this regard. The only other call for action is to

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412 Counter-Memorial of Australia, Part III, Chapter 1, Sections II-IV.
413 See Counter-Memorial of Australia, paras.328-331.
414 Reply of Portugal, paras.5.34-5.61.

co-operate fully with the efforts of the United Nations to achieve a peaceful solution and to facilitate the decolonization of the territory. As the next section shows, Australia has met any obligation it could have in this regard.

241. If the Security Council wished to impose an obligation not to deal with a certain State or to impose a duty to recognise one State and not another as competent in relation to certain actions in relation to the territory, it can do so. There are such examples.[415] The resolutions in question contain no such obligations. And Australia cannot therefore be in breach of them by concluding the 1989 Treaty with Indonesia. Portugal also fails to show that the resolutions, even if binding in 1976, continue to operate in a binding way on States 17 or more years after they were adopted. It is unthinkable that a binding decision would be allowed to go unremarked upon or unenforced by the Security Council for 17 years, in a situation where Indonesia has remained in control of the territory in question.[416]

B. THE RESOLUTIONS WERE NOT INTENDED TO BE BINDING

242. Regardless of which Chapter of the Charter the resolutions may have been adopted under, the question arises whether they are binding on Member States. Australia says they are not. Australia does not consider it necessary to determine definitively whether Article 25 of the Charter only applies to decisions under Chapter VII. But a determination of the provision under which a resolution has been adopted may assist in determining whether it is a decision or merely a recommendation. In this case, whatever provision the relevant resolutions may have been adopted under, they are clearly not "decisions" within the meaning of Article 25.

243. If they were adopted under Article 36 of Chapter VI, then it would follow that they are not binding. Article 36 only envisages the Security Council adopting recommendations. Australia rejects the Portuguese contention that decisions under Chapter VI can be binding.[417] If the resolutions are adopted under Chapter VII that does not automatically determine if they are binding. Article 39 envisages that the Security Council may make recommendations or decide on measures to be taken in accordance with Article 41 or 42. Pursuant to

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415 See Counter-Memorial of Australia, Appendix A.
416 See further paras.95-97, 179, 221 and 225 above.
417 Reply of Portugal, para.5.48.

Article 25 of the Charter, it is only "decisions" of the Security Council which States are under an obligation to carry out. And hence the real issue is whether the resolutions are Article 25 decisions. An examination of the operative language of the two resolutions discloses no decision, other than to remain seized of the situation. Otherwise, each resolution only "calls upon" States to respect the integrity of East Timor and the right of its people to self-determination, or "urges" States to co-operate with the United Nations. These are not the hallmarks of a decision within the meaning of Article 25.

244. The Namibia case indicates that decisions under Article 25 may not be confined to enforcement measures adopted under Chapter VII.[418] But one still needs to find a "decision". Portugal does not appear to contend that the resolutions are decisions taken on the basis of some inherent power of the Security Council. This suggests they must be actions under either Chapter VI or VII. But this does not determine whether they are decisions. As Australia indicated in its Counter-Memorial,[419] the Namibia case pointed to the factors relevant in determining whether a decision had been taken. This, the Court said, depends on the terms of the resolution, the discussion leading to it, the Charter provisions invoked and, "in general, all circumstances that might assist in determining the legal consequences of the resolution".[420] As indicated, the terms used here do not denote a decision. Nor does the discussion at the time of their adoption.[421] The Portuguese reliance on a few isolated statements[422] does not establish the contrary. The debates show a concern that the situation in East Timor was not fully understood and that it would be premature to take action. What was needed was further information. This was reflected in the call for the Secretary-General to report. It was also reflected in the fact that the proximate cause of the Indonesian intervention was recognised in part at least to be a consequence of the breakdown of civil disorder caused by the vacuum left by Portugal. There are no references in the resolutions to the provisions of the Charter under which they are adopted. When regard is had to all the circumstances governing their adoption one can only conclude that they are not binding decisions within Article 25 of the Charter.

245. Yet Portugal relies heavily on the Namibia case to establish that the resolutions are binding under Article 25. But the differences between the two

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418 ICJ Reports 1971, p.6.
419 Counter-Memorial of Australia, para.328.
420 ICJ Reports 1971, p.53.
421 See Counter-Memorial of Australia, paras.79-84, 89-96.
422 Reply of Portugal, paras.5.58-5.59.

cases are notable. The terms of the two resolutions of the Security Council in the case of East Timor did not order Member States to refuse recognition or abstain from any dealings with the effective authorities in the territory, as the Namibia resolutions had done. Nor was there any reference to an illegal situation. And the Security Council did not base its action under resolutions 384 and 389 on an express invocation of Article 25 of the Charter.

246. On the other hand, in the case of Namibia the Security Council not only found a situation of illegality and ordered the abstention from any dealings, but at the same time it invoked expressly Article 25 of the Charter in the preamble to resolution 269, as the Court recalled in its 1971 Advisory Opinion.[423]

247. With respect to the nature of the powers exercised by the Security Council in this case, not only has there been no finding of a danger or threat to international peace and security, but the conduct of the Security Council is eloquent as to the non-existence of such a situation. Despite the lack of compliance with the call made in 1975 and 1976 for the withdrawal of Indonesian forces, no follow-up action has been taken by the Security Council in the subsequent 17 years. The conclusion to draw from this inaction is that the withdrawal of Indonesian forces is no longer insisted upon by the United Nations, so the Security Council resolutions to that effect were, or have become, purely exhortatory. Not only the United Nations, but Portugal itself does not insist any longer on that withdrawal. In a statement before the Committee of 24, in August 1992, a Portuguese representative declared that in the negotiations with Indonesia under the auspices of the Secretary General, Portugal presented on 24 January to the Secretary-General a proposal aimed at entering a dialogue on the merits of the problem "without prior conditions" ("sans conditions préalables").[424] How then can Portugal now insist that so far as concerns the call in the resolutions for action by other States they are binding?

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423 ICJ Reports 1971, p.53.

424 Reply of Portugal, Annex II.21, Vol.II, p.283. See also Annex I.22, Vol.II, p.134.

C. THE RESOLUTIONS WERE NOT ADOPTED UNDER CHAPTER VII OF THE CHARTER

248. Portugal has argued in its Memorial and Reply[425] that the resolutions adopted by the Security Council on East Timor were adopted under Chapter VII of the United Nations Charter, and represent the exercise of its powers under Article 41 of the Charter. Portugal acknowledges that neither resolution refers expressly to the Article under which the Council was acting,[426] but it says that this does not prevent the conclusion that the resolutions have been adopted by virtue of the provisions of Chapter VII. Its insistence on this is, however, not absolute.[427] Portugal relies essentially not on the terminology of the resolutions but on their subject matter to conclude that they were adopted under Chapter VII. Portugal seeks to belittle the actual wording of the resolutions by emphasising the variety of terminology used by the Security Council in past resolutions. But this avoids the key question which is under what provision was the Security Council intending to act.

249. Australia maintains that an examination of the resolutions as a whole discloses a clear intention not to act under Chapter VII of the Charter and certainly not to take a decision under Article 41.

250. Chapter VII is headed "Action with respect to threats to the peace, breaches of the peace and acts of aggression". The resolutions on East Timor contain no reference to, let alone any finding of, any threat or breach of the peace or reference to aggression. The language of the resolutions points to the conclusion that those words of Chapter VII were carefully avoided.

251. If it is intended to act under Chapter VII, this should be apparent from the resolutions themselves. On occasion the Council has referred expressly to the fact that it was acting under Chapter VII: see eg Resolution 660 (1990) on Kuwait; Resolution 724 (1991) on Yugoslavia. In the case of East Timor, there is no reference to any Charter provision. If action under Chapter VII was contemplated one would have expected to find clear indications of this in the wording used, given the significance of Chapter VII in terms of the United Nations role in the maintenance of peace and security. There is no such indication.

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425 See Reply of Portugal, para.5.49.
426 Reply of Portugal, para.5.52.
427 See Reply of Portugal, paras.5.42 and 5.45.

252. By contrast, wording found in Chapter VI is used. Thus, there is reference in both resolutions to the "situation". In resolution 389 reference is made in the eighth preambular paragraph to "the continued situation of tension". The operative paragraphs of both resolutions are primarily concerned with facilitating the decolonization of the territory. This was to be done by withdrawal of forces, co-operation by all States with the United Nations, and involvement of the Secretary-General in contact and consultations with the parties concerned.

253. Under Chapter VI of the Charter the Security Council may be involved in any "situation" (the word referred to in the relevant resolutions) "which might lead to international friction or give rise to a dispute in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security" (Articles 34 and 35). Pursuant to Article 36 the Security Council can recommend "appropriate procedures or methods of adjustment" in the case of a situation of the kind described. And this is what the Security Council in the case of East Timor clearly did. It sought to diffuse the situation by recommending a number of actions to be taken. That Chapter VI action was contemplated is supported by action in other cases. In the case of Western Sahara, for instance, the Council in resolution 377 (1975) specifically invoked Article 34 to request consultations by the Secretary-General with the parties and to report. This is similar to the action called for in the East Timor resolutions, and also involved a decolonisation situation.

254. Portugal argues that the Council has in other situations used the language of "calls upon" in resolutions that were clearly adopted under Chapter VII; and argues that the word "decide" is not an essential element in a Chapter VII resolution. But even if this were so, this proves nothing. With respect to the use of the word "call" it has been said that:

> "Whether the 'call' is an act constituting an obligation of the parties concerned or a simple 'recommendation' depends on the intention of the Security Council and especially on the consequences which it attaches to a failure to comply with the call (or, as Article 40 says: with the provisional measures). The Council may make the call without intending to react against non-compliance with an enforcement action. Then the call is a mere recommendation. But the Council may make the call by a decision within the meaning of Article 25, especially with

> the expressed intention to take enforcement action in case of non-compliance."[428]

Australia considers that one can only determine whether the resolutions in question were adopted under Chapter VII or Chapter VI by considering them as a whole and not simply by looking at isolated words contained in them. And Portugal seems to agree.[429] But if the resolutions are so considered, they are clearly not Chapter VII resolutions.

255. One further matter of particular note that confirms this conclusion is that there is no condemnation in the resolutions of the actions of Indonesia, no finding of aggression, nor any finding that it had acted contrary to the Charter. Portugal says that it is not necessary to refer to an act of aggression for a resolution to be adopted under Chapter VII. But it is extraordinary to suggest that a reference only in a preambular paragraph to "deploring the intervention of the armed forces" of a State without any indication that their use was considered illegal can in any sense amount to a finding of aggression or even a breach of the peace. Yet this appears to be what Portugal suggests. Of course, in the second Security Council resolution there is not even this reference in the preamble. The Portuguese suggestion that an intervention of armed forces is "indéniablement" a breach of the peace or act of aggression[430] cannot be accepted in the absence of evidence that it is so regarded in a particular case. There is no such evidence here.

Section II: There has been no breach of an obligation to co-operate in good faith with the United Nations

256. In its Submission 2 (c), Portugal advances a further obligation which it says Australia has breached, beyond that of failure to comply with Security Council resolutions 384 and 389. This is "the obligation incumbent on Member States to co-operate in good faith with the United Nations". In its Memorial and Reply, Portugal provides little elaboration of this claim. Australia denies any breach of such an obligation.

257. The Security Council resolutions do contemplate "all States and other parties concerned" co-operating with the United Nations to achieve a peaceful

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428 H Kelsen, The Law of the United Nations (1950), p.740.
429 Reply of Portugal, para.5.48.
430 Reply of Portugal, para.5.53.

solution to the existing situation in the territory and to facilitate the decolonization of the territory.[431] For the reasons already outlined, Australia does not consider that these paragraphs impose binding obligations on Australia. But even if they did, it is obvious that Australia has co-operated fully with the United Nations. It has consistently supported the Secretary-General in his efforts to find a solution, and has indicated its willingness to support any authoritative decision of the United Nations in this regard.[432]

258. Accepting that there is some general obligation on the part of Member States to co-operate in good faith with an Organisation of which they are members, there can be no suggestion that Australia has failed to meet such an obligation. In particular, there is no basis, and Portugal itself does not elaborate any basis, on which the various actions of Australia in relation to the 1989 Treaty could infringe any duty of co-operation with the United Nations. As Australia has pointed out, the United Nations has not directed or called upon States not to recognise or deal with Indonesia in relation to East Timor. Nor has Portugal shown in what way the actions of Australia in relation to the Timor Gap in any way hinder or prevent the discharge by the United Nations of any of its powers in relation to the situation of East Timor. There is clearly, in the circumstances, no basis for this particular Portuguese claim.

259. In cases where there has been a lack of co-operation, the United Nations has reflected this in the terms of resolutions passed. For instance, see the terms of various resolutions condemning Portugal passed prior to 1974, as set out in the Appendix to this Rejoinder. Among the resolutions one finds criticism of Portugal's failure to comply with demands of the United Nations. One can find other examples of similar express criticism of States for failure to co-operate. For instance, in relation to Namibia, the Security Council condemned the refusal of South Africa to comply with resolutions of the General Assembly and Security Council and declared that the defiant attitude of South Africa toward's the Council's decisions undermines the authority of the United Nations.[433]

260. There has clearly been no such lack of co-operation by Australia with United Nations resolutions that any response has been made by the United Nations. In the absence of such response, Portugal cannot sustain any complaint against Australia in this regard.

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431 Resolution 384, paragraph 4; Resolution 389, paragraph 5.
432 See Counter-Memorial of Australia, para.70. See also para.263 below.
433 Resolution 278 (1970).

CHAPTER 3

AUSTRALIA HAS NOT ACTED INCONSISTENTLY WITH THE RIGHTS OF THE PEOPLE OF EAST TIMOR TO SELF-DETERMINATION, TERRITORIAL INTEGRITY OR PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

Introduction

261. As already noted, the acts of Australia of which Portugal complains in this case all relate to the fact that Australia has dealt with a State other than Portugal in respect of the exploitation of the natural resources in the Timor Gap area. In the previous two Chapters, it was demonstrated that Australia is not under any obligation to refrain from dealing with any State other than Portugal in respect of East Timor. Consequently, the mere fact that Australia has dealt with a State other than Portugal cannot constitute a denial of the rights of the people of East Timor to self-determination, territorial integrity or permanent sovereignty over their natural resources. In the present Chapter, it will be demonstrated that apart from Australia's failure to deal with Portugal, Australia's acts in relation to East Timor have not otherwise violated those rights of the people of East Timor.

Section I: The right to self-determination

262. Portugal in its written pleadings asserts that Australia is in breach of a duty not to disregarded or fail to respect ("méconnaître") the right of the people of East Timor to self-determination.[434] However, Portugal does not seek to define with precision the content of that right and of the corresponding obligations for third States. Clearly, if Australia were in breach of one of its obligations in respect of the people of East Timor or Portugal, it might be said that Australia had disregarded or failed to respect those rights. However, Portugal has not sought to demonstrate the existence of any specific obligation which Australia has failed to fulfil, other than the duty of "non-méconnaissance" itself, which Portugal asserts exists as an independent duty. Portugal alleges that Australia is in breach of this general duty of "non-

[434] Portuguese submission 2 (a), Memorial of Portugal, p.235, Reply of Portugal, p.273.

méconnaissance", in that Australia has, by recognising Indonesian sovereignty over East Timor:

(a) Denied that East Timor is a non-self-governing territory;[435] and

(b) Failed to facilitate and promote the realisation of that right to self-determination.[436]

263. As to the first of these allegations, it needs to be emphasised from the outset that Australia has never asserted that East Timor does not continue to have the status of a non-self-governing territory. Portugal cannot point to any statement by the Australian Government to this effect. Australia accepts that the criteria for that determination are those set out in General Assembly Resolution 1541 (XV), and that the General Assembly is the United Nations organ responsible for applying those criteria. It can readily be seen that an application of these criteria to East Timor might lead to the conclusion that it is a non-self-governing territory vis-à-vis Indonesia, although it is not suggested that this is a matter for the Court to determine in the present case. As was pointed out in the Australian Counter-Memorial,[437] Australia continues to endorse the efforts of the Secretary-General to negotiate a resolution of the situation. It will respect and recognise the outcome of any agreement approved by the United Nations in respect of the territory, and will abide by any authoritative decision which the United Nations may make with respect to East Timor. Portugal itself quotes a 1985 statement of the then Prime Minister of Australia that Australia "has supported international initiatives to settle the Timor problem, including extensive discussions with the United Nations Secretary General, Indonesia and Portugal" and that "The legal fact that Australia has since 1979 recognized Indonesian sovereignty over East Timor has not previously hindered either our ability or Portuguese ability to seek a settlement of this problem".[438] Portugal also refers to the fact that in 1983, at the conclusion of a visit to Indonesia, the then Australian Minister for Foreign Affairs issued a statement in which he "noted that Indonesia has incorporated East Timor into the Republic of Indonesia but expressed the Government's deep concern that an internationally supervised act of self-determination has not taken place in East Timor".[439]

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435 See footnote 440 below.
436 Reply of Portugal, para.5.02, referring to Memorial of Portugal, para.8.12.
437 Counter-Memorial of Australia, paras.71, 412.
438 Quoted in Memorial of Portugal, para.2.14, and Annex III.27, Vol.V, p.218.
439 Memorial of Portugal, para.2.24, footnote 169.

264. Portugal argues, however, that recognition of the de jure incorporation of East Timor into Indonesia is inherently inconsistent with the status of East Timor as a non-self-governing territory and of the right of its people to self-determination, and is therefore of itself a denial of that status and that right.[440] Contrary to what Portugal asserts, recognition of Indonesian sovereignty over East Timor does not "par nécessité logique absolue" signify that Australia no longer recognises East Timor as a non-self-governing territory or its people as having a right to self-determination. Prior to its withdrawal from the territory, Australia recognised that Portugal exercised sovereignty over East Timor. That was no more inconsistent with East Timor's status as a non-self-governing territory than the present recognition of Indonesian sovereignty. One notices how carefully Portugal avoids saying expressly that it is Portugal that exercises sovereignty over East Timor. Portugal maintains that sovereignty over East Timor inheres in the people of East Timor, and that Portugal exercises mere powers of administration.[441] However, even assuming, as General Assembly Resolution 2625 (XXV)[442] does, that the territory of a non-self-governing territory "has, under the Charter, a status separate and distinct from the territory of the State administering it", organs of the United Nations have, without prejudice to this principle, spoken of the "sovereignty" of administering Powers over non-self-governing territories. The International Court of Justice in the Right of Passage case[443] accepted that Portugal retained sovereignty over its enclaves in India, which were at the time non-self-governing territories.[444] Similarly, in the Western Sahara case, this Court held that the request for an

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440 See e.g. Memorial of Portugal, paras.2.25, 8.11, 8.25 ("... cette reconnaissance équivaut, par elle-même, à dénier ... [la] qualité du territoire timorien comme Territoire non autonome; [la] qualité de peuple attribué à sa population; [l']existence de droits inhérents et opposables à tous des droits que ce peuple détient"); Reply of Portugal paras.1.05, 2.23, 5.09, 6.11 ("L'essentiel pour l'affaire sub judice consiste en ce que reconnaître de jure l'annexion d'un territoire non-autonome par un Etat signifie, par nécessité logique absolue, ne plus reconnaître ce territoire comme un territoire non-autonome"), 6.15.

441 Memorial of Portugal, paras.5.41-5.42; Reply of Portugal, para.4.57.

442 24 October 1970 ("Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations").

443 ICJ Reports 1960, p.6.

444 Ibid., at pp.39, 45-46. Also at pp. 48-49 (Judge Basdevant); 65-66 (Judge Wellington Koo); 99 (Judge Spender); 123-124 (Judge ad hoc Fernandes). Only 3 Judges denied that Portugal retained sovereignty over its enclaves in India (Judge Badawi, at p.51; Judge Kojevnikov, at p.52; Judge Moreno Quintana, at p.95). Of these 3 judges, none asserted that an administering Power could not have sovereignty over a non-self-governing territory. Judge Badawi reached the conlusion that Portugal did not have sovereignty on an interpretation of the original grant; Judge Kojevnikov gave no reasons and Judge Moreno Quintana appeared to base his conclusion on a failure of Portugal to discharge the applicable burden of proof.

advisory opinion, relating to the future status of a non-self-governing territory, did not relate to "existing territorial rights or sovereignty over territory".[445] The General Assembly has itself left open the possibility that an administering Power of a non-self-governing territory can have sovereignty over the territory prior to self determination: for instance, in Resolution 2065 (XX), the General Assembly, while recognising that Resolution 1514 (XV) applied to the Falkland Islands (Malvinas), noted at the same time "the existence of a dispute between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the said Islands" and invited those governments to negotiate "with a view to finding a peaceful solution to the problem".[446]

265. Even if it is the case that an administering Power does not "have" sovereignty over a non-self-governing territory, it clearly may exercise powers of sovereignty over the territory, subject to obligations imposed under the United Nations Charter. Portugal itself describes the people of a non-self-governing territory as "possessing national sovereignty but lacking the exercise thereof",[447] and describes the administering Power as possessing, in relation to the territory, "toutes les compétences propres aux Etats", subject to limits imposed by the law of decolonisation and the United Nations Charter.[448] By definition, to exercise all the powers of a State in relation to a territory is to exercise powers of sovereignty over it.[449] Indeed, Portugal itself admits that the powers which it claims to be entitled to exercise in relation to East Timor were

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445 ICJ Reports 1975, p.28. Portugal itself refers in its Memorial (at para.4.60, footnote 239) to this passage, and to J Crawford, The Creation of States in International Law (1979), p.364, who in fact says that "It is not clear that Chapter XI purports to deprive administering States of sovereignty over colonial territories, or that subsequent practice could have that effect ... The view that Chapter XI does not affect territorial title was also affirmed in the Western Sahara Case". See also ICJ Reports 1975, p.113, per Judge Petrén: "The request for an advisory opinion does not ask the Court to state its view as to the lawfulness of the acquisition by Spain of sovereignty over Western Sahara".

446 Resolution 2065 (XX), 16 December 1965. See also Resolution 3160 (XXVIII), 14 December 1973 ("Mindful that resolution 2065 (XX) indicates that the way to put an end to this colonial situation is the peaceful solution of the conflict of sovereignty between the Governments of Argentina and the United Kingdom").

447 Memorial of Portugal, paras.5.41; Reply of Portugal, para.4.57.

448 Reply of Portugal, para.4.60.

449 See e.g. G Schwarzenberger, International Law (3rd edn 1957) Vol.I, p.184 ("State sovereignty and State jurisdiction are complementary terms ... Furthermore, in principle, State sovereignty and State jurisdiction are co-extensive"); J Crawford, The Creation of States in International Law (1979), p.27 (sovereignty refers "to the totality of powers which States may, under international law, have"); I Brownlie, Principles of Public International Law (4th edn 1990), p.290 ("in general 'sovereignty' characterizes powers and privileges resting on customary law and independent of the particular consent of another state").

not conferred on it ex novo by the United Nations, but exist by virtue of the colonial sovereignty which Portugal had exercised over the territory since the 16th century.[450] That a State responsible for the administration of a non-self-governing territory at least exercises the powers and attributes of sovereignty in respect of that territory was recognised by the General Assembly in Resolution 1883 (XVIII), of 14 October 1963 ("Question of Southern Rhodesia"), in which it invited the Government of the United Kingdom of Great Britain and Northern Ireland "not to transfer to its colony of Southern Rhodesia, as at present governed, any of the powers or attributes of sovereignty".[451] Although recognising that the United Kingdom therefore for the time being exercised "the powers and attributes of sovereignty", this was not considered incompatible with the "the inalienable right of the people of Southern Rhodesia to self-determination and independence", which was reaffirmed by the General Assembly in Resolution 1889 (XVIII) of 6 November 1963 ("Question of Southern Rhodesia").

266. Whether one takes the view that an administering Power "has" sovereignty over a non-self-governing territory, or that it merely "exercises" powers of sovereignty, clearly it is not an illegal denial of the territory's status as non-self-governing to recognise the sovereignty of a State over that territory.[452] Thus, it cannot be argued that because Australia recognises the sovereignty of a State over East Timor, Australia thereby necessarily denies that East Timor is a non-self-governing territory or that its people have a right to self-determination. In essence, Portugal's complaint is not that Australia has recognised the sovereignty of a State over East Timor and dealt with it on that basis, but rather that Australia has recognised and dealt with the wrong State. Portugal is really asserting in this case that it, rather than Indonesia, is entitled to exercise "toutes les compétences propres aux Etats" over the territory of East

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450 See paras.198 above, especially footnote 303. See also Memorial of Portugal, para.3.08, in which Portugal refers to itself as "simple mandataire du peuple" ("agent of the people"), acknowledging that Portugal exercises sovereignty on their behalf. Portugal, of course, did not accept, in 1955 or for nearly 20 years after, that it had any Chapter XI territories. It must accordingly for almost all of its actual administration of colonial territories in Africa and elsewhere have relied on its sovereignty. Its present classification of its legal position and powers is an ex post facto rationalisation.

451 General Assembly Resolution 1747 (XVI), 28 June 1962, had earlier affirmed that the Territory of Rhodesia was "a Non-Self-Governing Territory within the meaning of Chapter XI of the Charter of the United Nations".

452 Thus, the United Kingdom was recognised de jure as sovereign over its colonial territories for many years, whilst at the same time the United Nations classified these territories as non-self-governing, and assumed that the United Kingdom owed a duty to the peoples concerned to respect their right to self-determination.

Timor, and that Australia is in breach of international law by recognising and dealing with one, rather than the other. This Portuguese argument is thus merely another aspect of the argument that was dealt with above in Chapters 1 and 2 of this Part.

267. Portugal emphasises that General Assembly Resolution 2625 (XXV) provides that "The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it" (the "principle of individuality" ("principe d'individualité") or "principle of otherness" ("principe d'altérité")).[453] Portugal contends that for Australia to recognise that East Timor has been "incorporated" into Indonesia is to deny the "otherness" of East Timor.[454] Portugal claims that as well as a denial of the right to self-determination, this also constitutes a denial of the right of the people of East Timor to territorial integrity.[455] However, this argument seeks to read too much into the particular words used by the Australian Government. It has been pointed out that Australia has never stated that it no longer regards East Timor as a non-self-governing territory or that the people of East Timor do not have the right to self-determination. The Australian Government has expressed its concern that an act of self-determination has not taken place, and continues to support the efforts of the United Nations Secretary General to find a solution to the problem in East Timor. In recognising Indonesian sovereignty over the territory, the Australian Government made it clear that it was merely recognising an effective factual situation and was not expressing any approval of the means by which the present situation was brought about. For the reasons given above, recognition of Indonesian sovereignty over East Timor does not involve a denial of its status as a non-self-governing territory. Statements of the Australian Government concerning the "incorporation" of East Timor into Indonesia must be understood in this context. It is an untenable argument that the mere use of the expression "incorporated" is a violation of international law giving rise to State responsibility because of the implications that might potentially be drawn from it. Even assuming that all States are under an obligation in international law not to "deny" the status of a non-self-governing territory, to establish a breach of such an obligation it would be necessary to demonstrate a clear and unequivocal denial. The question is not merely one of the use of words.

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453 E.g., Reply of Portugal, para.4.60-4.61.

454 Memorial of Portugal, paras.5.41, 6.54, 7.01, 8.09-8.11, 8.14; Reply of Portugal, paras.5.07, 5.09.

455 Memorial of Portugal, para.8.09.

268. As to the argument that Australia has failed to "facilitate" and "promote" the realisation of that right to self-determination,[456] Portugal nowhere establishes what minimum standard of active assistance third States are required to provide in relation to the decolonisation of a non-self-governing territory. Unless some such objective minimum standard is established, how can it be said that Australia has failed to discharge an international obligation? Australia has in fact been active in its assistance. As was indicated in Australia's Counter-Memorial, Australia continues to endorse the efforts of the Secretary-General to negotiate a resolution of the situation in East Timor, has sought to promote the humanitarian treatment of the people of East Timor, and has been generous in the aid which it has directed to East Timor, especially through the Red Cross.[457] Are there any other specific duties of States arising from the fact that a territory is non-self-governing? Portugal suggests that Australia might have done more,[458] but on what basis can it assert that what Australia has done was less than the minimum required by international law? While the status of a territory as a non-self-governing territory may give rise to certain obligations for other States, Portugal has not demonstrated the existence of any particular obligation which Australia has failed to fulfil. The primary obligation under Chapter XI falls of course on the State administering the territory, an obligation which Portugal wholly failed to discharge when it was in effective control of East Timor.[459]

269. A further formulation by Portugal is that Australia is under an obligation not to do anything to "impede" the realisation of the right of the people of East Timor to self-determination.[460] However, this argument requires it to be shown that Indonesia is denying the rights of the people of East Timor to self-determination, and that by co-operating with Indonesia, and recognising its sovereignty over East Timor, Australia is "impeding" decolonisation. However, as pointed out earlier, the Court is unable in the present case to determine that Indonesia is denying the people of East Timor their right to self-determination, or to proceed to a determination on that basis. Portugal also suggests that in

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456 Memorial of Portugal, para.8.12; Reply of Portugal, para.5.02.

457 Counter-Memorial of Australia, paras.64-65, 67, 70-71, 412.

458 E.g. Reply of Portugal, paras.3.71-3.73.

459 Portugal merely says that Australia has failed in its duty to promote the exercise of the right to self-determination in East Timor in that it has denied the right of the people of East Timor to self-determination, failed to treat the territory as a non-self-governing territory, and has opposed the competence of Portugal as the administering Power: Memorial of Portugal, para.8.12. This is merely a reiteration of the arguments dealt with previously in this Rejoinder.

460 E.g., Memorial of Portugal, para.8.12.

recognising Indonesian sovereignty over East Timor, Australia impedes the exercise of the right to self-determination because it "prejudges and anticipates the outcome" of the conversations currently taking place under the auspices of the United Nations.[461] Australia does nothing of the sort. Recognition of Indonesian sovereignty is recognition of an effective situation which exists at present. Australia has expressly declared that it will respect and recognise the outcome of any future agreement approved by the United Nations concerning East Timor.[462]

Section II: The right to permanent sovereignty over natural resources

270. Portugal claims that Australia has infringed the right of the people of East Timor to permanent sovereignty over its natural wealth and resources, and is in breach of the obligation not to disregard but to respect that sovereignty.[463] Portugal says that the negotiation, conclusion and implementation of the 1989 Treaty with Indonesia directly contravenes the principle that the natural resources of the people of East Timor cannot be exploited without the agreement of the people of East Timor, freely given.[464]

271. The Portuguese argument merely begs the question, who was entitled to give such agreement on behalf of the people of East Timor at the time the Treaty was entered into? While Portugal claims that "c'est à ceux qui sont les titulaires de ce droit de décider au mieux de leurs intérêts",[465] Portugal does not assert that prior to a valid exercise of self-determination, the consent of the people cannot be freely given, so that no exploitation of the natural resources of a non-self-governing territory is possible. Clearly it is possible to enter into such agreements (subject, of course, to binding Security Council resolutions which would prohibit this). Portugal maintains that it would be legal for Australia to enter into an agreement with Portugal for the exploitation of the natural resources in the Timor Gap area. Portugal even claims that this would be so if at the relevant time Portugal had been in default of its own obligations as administering Power.[466] The question is thus not whether the consent of the

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461 Ibid.
462 Counter-Memorial of Australia, paras.71, 373-375, 412.
463 Portuguese submission 2 (a), Memorial of Portugal, p.235, Reply of Portugal, p.273.
464 Reply of Portugal, para.5.62-5.82, especially para.5.65, 5.77, 5.82.
465 Reply of Portugal, para.5.82.
466 Reply of Portugal, para.5.09.

people of East Timor can be given by a State on their behalf — Portugal asserts that it can — but rather, which State can give this consent. For the reasons given in the previous two Chapters, Australia is not required to deal solely with Portugal in respect of East Timor, and the Court is unable to determine which State can give this consent. However, it may be noted that the precedent of Western Sahara demonstrates that other States have taken the view that it is not inherently inconsistent with the right of a non-self-governing people to permanent sovereignty over natural resources to deal with a State in effective control in respect of these resources, even where this State has displaced the former colonial power.[467] It is for this reason that Australia, in its Counter-Memorial, said that for Portugal to rely on the principle of permanent sovereignty over natural resources is merely to reiterate the issue in another form.[468] Portugal merely asserts that in dealing with a State other than Portugal, Australia has violated the principle, because Australia has not dealt with the "administering Power".[469] This argument has been dealt with in Chapters 1 and 2 above.

272. Furthermore, as Australia pointed out in its Counter-Memorial, in the present case it is not certain that the natural resources in the area of the Joint Development Zone to which the Treaty relates even form part of the natural resources of East Timor. It is conceded by Portugal that the Court may not undertake a maritime delimitation between Australia and East Timor in this case.[470] Therefore, the question whether Australia is seeking to exploit natural resources which belong to the people of East Timor is one which the Court cannot decide. As was said in the Guinea-Bissau—Senegal Arbitration,[471] "The application of the principle of permanent sovereignty over natural resources presupposes that the resources in question are to be found within the territory of

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467 See paras. 211-212 above.

468 Counter-Memorial of Australia, para.377. Portugal itself merely claims that Australia has infringed the right of the people of East Timor to permanent sovereignty over natural resources by disregarding the status of East Timor as a non-self-governing territory and of Portugal as its administering Power, and by excluding any negotiation with Portugal as administering Power with respect to the exploration and exploitation of the continental shelf: see Reply of Portugal, paras.6.18, 6.75; Portuguese submissions 2 (a) and 3, Memorial of Portugal, p.235-236, Reply of Portugal, pp.273-274.

469 Reply of Portugal, paras.5.82, 5.65, 6.18, 6.75.

470 See para.5 (4) above.

471 The text of the award of the Arbitration Tribunal for the Determination of the Maritime Boundary is contained in the Annex to the Application Instituting Proceedings of the Government of Guinea-Bissau in the Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal), before this Court. A translation prepared by the Registry of this Court is reproduced in International Law Reports, Vol. 83 ("83 ILR"), p.1.

the State that invokes that principle ... Any State claiming to have been deprived of part of its ... natural resources must first demonstrate that they belonged to it".[472] It is admittedly true that in that case, M. Bedjaoui, who dissented, referred to "the 'inherent' right which every people has over 'its' maritime domain, even if not yet in fact delimited".[473] However, notwithstanding that such an "inherent" right may exist, it is not possible for an international court or tribunal to find that such a right has been infringed until such time as the maritime domain is in fact delimited. As the Court in this case is able neither to pronounce upon the validity of the Treaty between Australia and Indonesia, nor to undertake itself a delimitation of the maritime boundary between Australia and East Timor, the Court is unable to pronounce upon the question whether the areas in which Australia proposes to undertake exploration for and exploitation of natural resources are areas which are part of the maritime domain of East Timor. Even if they are, for the reasons given above, exploitation of those areas does not require the consent of Portugal.

273. Portugal argues that the Court is not asked to determine the validity or effect of the Treaty between Australia or Indonesia, or to undertake a delimitation of the maritime domain of East Timor. Portugal argues that the mere fact that Portugal asserts rights in the area on behalf of East Timor means that there is a violation of the right of the people of East Timor to permanent sovereignty over natural resources for Australia to undertake exploration for and exploitation of natural resources in the area without negotiating with Portugal.[474] Alternatively, Portugal claims that because the distance between the baselines of Australia and East Timor is less than 400 miles, as a matter of customary international law, neither Australia nor East Timor can lay claim to more than 200 miles.[475] Portugal says that because the Joint Development Zone extends into an area beyond 200 miles from the Australian baselines, it can be determined, even without undertaking a maritime delimitation, that the Zone includes a part of the continental shelf that appertains exclusively to East Timor. Australia rejects this argument, as the next Chapter indicates. In any event, as indicated above, at the time the Treaty was negotiated with Indonesia, Australia was under no obligation to deal with Portugal in relation to East Timor. It also follows from this that Portugal lacked capacity to assert rights in the area on behalf of the people of East Timor. The only issue is that of

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472 Award, p.30; 83 ILR at pp.24-25.
473 Award, p.77; 83 ILR at p.49.
474 Reply of Portugal, paras.5.81, 6.18.
475 Memorial of Portugal, para.7.08-7.10, 8.17; Reply of Portugal, para.6.73.

determining with which State Australia is permitted to negotiate such treaties. This argument is thus no more than a reiteration of the previous arguments. The Court is asked only to determine whether Australia's failure to negotiate with Portugal was contrary to international law, and the answer to this question is clearly in the negative. The Court is not required to determine with whom Australia could deal in respect of the Timor Gap.

CHAPTER 4

AUSTRALIA IS NOT IN BREACH OF ITS OBLIGATION TO NEGOTIATE IN GOOD FAITH IN RESPECT OF THE DELIMITATION OF MARITIME AREAS

274. In its Application and Memorial, Portugal in one of its submissions contends that by excluding any negotiation with Portugal with respect to the exploration and exploitation of the continental shelf in the area of the Timor Gap, Australia "has failed and is failing in its duty to negotiate in order to harmonise the respective rights in the event of a conflict of rights or of claims over maritime areas" (Portuguese submission 3). This same submission is repeated in the Reply. Australia rejects this submission.

275. In its Counter-Memorial, Australia indicated that it considered the 1989 Treaty a measure of legitimate practical action. While the Treaty sought to secure for Australia the enjoyment of long asserted rights over its continental shelf, it was also consistent with any duty to negotiate provisional arrangements in situations where States cannot agree on a final maritime delimitation in an area of dispute. See generally, Part II, Chapter 3 of the Counter-Memorial. Portugal, in its Reply, deals with this response in Part I, Chapter VI, Section 4, parasgraphs 6.68-6.75.

Section I: Australia's sovereign rights

276. Portugal begins by denying that Australia has long asserted sovereign rights over the area of seabed covered by the Timor Gap Treaty.[476] It should be noted that this issue is one which the Court cannot determine.[477] Since another State (Indonesia) claims rights over the whole of the continental shelf in question which does not appertain to Australia, any decision on the extent of Australia's rights is also a decision on the rights of that State. Assuming, however, for the purpose of the present argument that the Court is competent at least to make some assessment of the present situation, some clarification of

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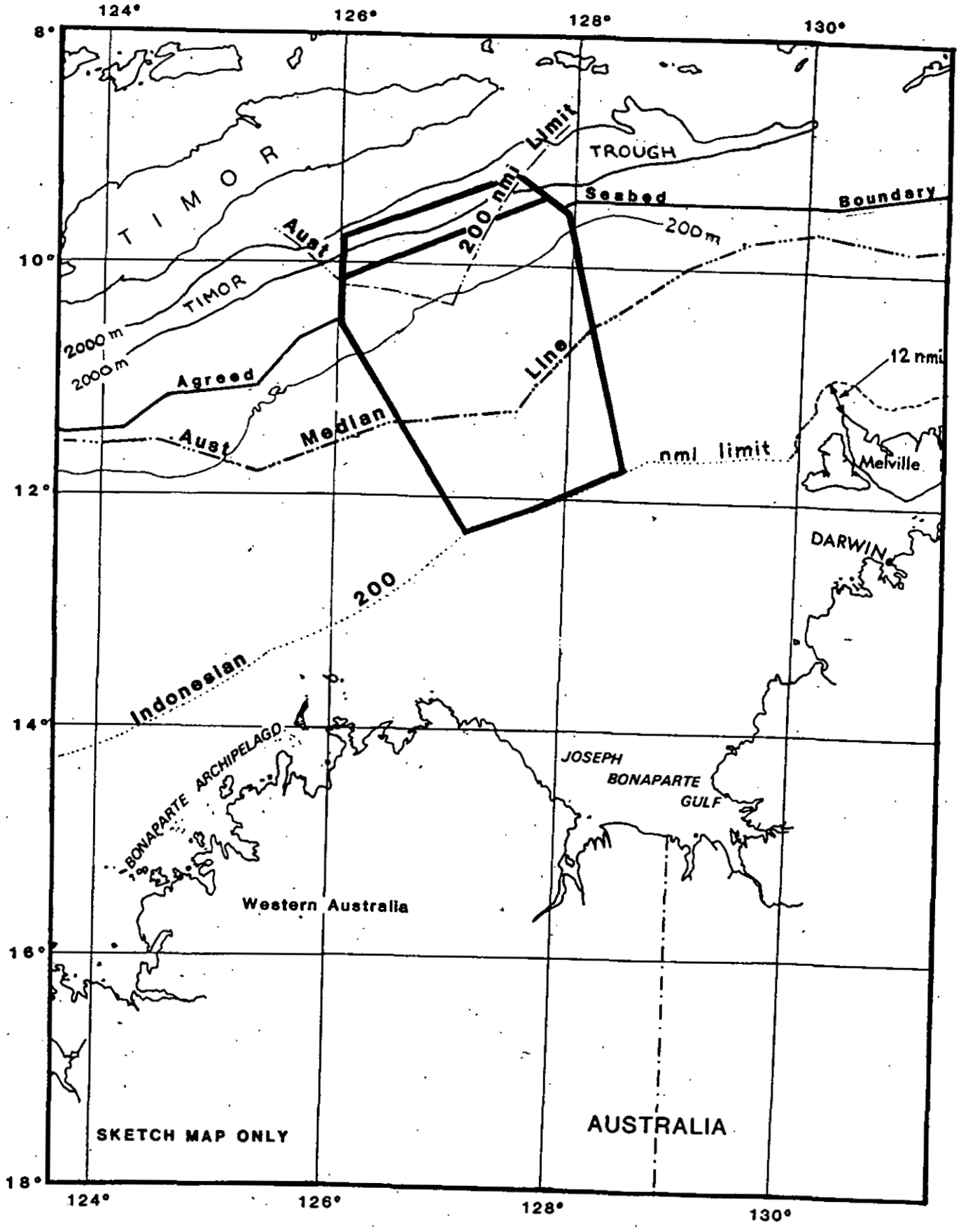
[476] Reply of Portugal, paras.6.68-6.71.

[477] See paras.5 (4), 13, 25 and 27 above.


124°
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Agreed
Aust Median Line
12 nmi
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BONAPARTE ARCHIPELAGO
JOSEPH BONAPARTE GULF
Western Australia
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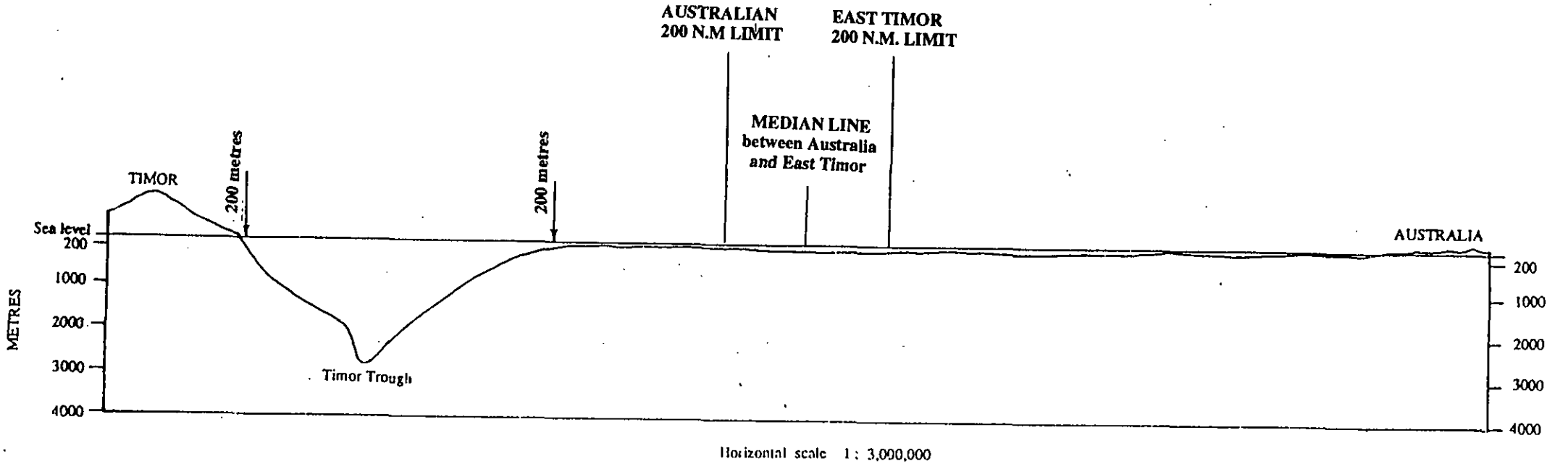
AUSTRALIA



Horizontal scale 1 : 3,000,000

LOCATION DIAGRAM

BATHYMETRIC PROFILE SKETCH

Between Australia and East Timor

Australia's sovereign rights in the area and the effect of the Treaty on them is necessary. This matter is also dealt with in paragraphs 382-388 of the Counter-Memorial.

277. Australia first asserted rights over the continental shelf in a Proclamation of 1953. This declared that Australia had sovereign rights over the continental shelf contiguous to its coasts for the purpose of exploring and exploiting the natural resources of the seabed and subsoil. That proclamation did not define the shelf, but in the Pearl Fisheries Act (No.2) 1953, as Portugal notes,[478] the shelf was defined for the purposes of that Act as the submarine areas to a depth of not more than 100 fathoms. But this definition has not continued to be used in later legislation. It does not indicate the limit of Australia's long asserted sovereign rights in the area. Those rights extend to the foot of the Timor Trough.[479]

278. Australia's claims to the continental shelf developed as international law developed and were asserted taking this into account. Thus, the 1958 Geneva Convention recognised that sovereign rights over the continental shelf extended beyond 200 metres to "where the depth of the superjacent waters admits of the exploitation of the natural resources of the seabed and subsoil" (Art.1). Australian legislation incorporated the 1958 definition. Australia ratified that Convention on 14 May 1963, having signed it on 30 October 1958. The North Sea Continental Shelf cases in 1969 affirmed the notion of natural prolongation and made it clear that the geomorphological structure of a State's continental shelf was of critical importance in determining its limits.[480] This continues to be reflected today in the legal definition of continental shelf contained in the 1982 Law of the Sea Convention (Art.76), to the extent the shelf extends beyond 200 nm. Australia's claims to sovereign rights over the continental shelf have reflected these developments.

279. In 1970 Australia made clear its strongly held position on the limit of its continental shelf in the Timor area. In a statement by the Minister for External Affairs on 30 October 1970 Australia asserted:

> "[T]he rights claimed by Australia in the Timor Sea area are based unmistakably on the morphological structure of the seabed. The essential feature of the seabed beneath the

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478 Reply of Portugal, para.6.70.
479 See sketch map on p.157 and cross-section on p.158.
480 ICJ Reports 1969, p.3.

> Timor Sea is a huge steep cleft or declevity called the Timor Trough, extending in an east-west direction, considerably nearer to the coast of Timor than to the northern coast of Australia. It is more than 550 nautical miles long and on the average 40 miles wide, and the seabed slopes down on opposite sides to a depth of over 10,000 feet. The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, and not one and the same shelf, separating the two opposite coasts. The fall-back median line between the 2 coasts, provided for in the convention in the absence of agreement, would not apply for there is no common area to delimit."[481]

The Australian position on the extent of its sovereign rights reflected in the 1970 statement was set out in the diplomatic notes sent to Portugal in 1973 and 1974.[482] This position was also asserted in the negotiations with Indonesia in 1971 and 1972 which led to the agreements providing for delimitation of the continental shelf in the area, except for that off East Timor.[483] Those agreements reflected, as delimitation agreements often do, a compromise between the positions of both parties. But Australia's legal position as to its rights over the shelf in the absence of delimitation was maintained and has continued to be maintained.

280. Contrary to the assertion by Portugal,[484] the view that the bathymetric axis of the foot of the Timor Trough is the limit of Australia's continental shelf is the position that has consistently been taken by Australia since at least 1970. It is not a recently adopted position as Portugal suggests. Australia has never accepted the median line as the appropriate delimitation line given its view that it has a legal and geomorphological shelf extending to the foot of the Timor Trough. Australia issued petroleum permits beyond the median line between Australia and the then Portuguese East Timor as long ago as 1963 and subsequently, and made other assertions of jurisdiction which reflected this view of the extent of its rights. Details of these assertions of Australian sovereign rights were set out in the diplomatic note to Portugal in 1974.[485]

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481 The text of this and other parts of the statement is set out in Memorial of Portugal, Annex IV-6.

482 Memorial of Portugal, Annexes IV-6 and IV-11.

483 Memorial of Portugal, Annexes III-1 and III-2.

484 Reply of Portugal, para.6.70.

485 Memorial of Portugal, Annex IV-11.

281. Of course, more recently, there has been general legal acceptance by the international community that the legal continental shelf now is defined by use of alternatives — either a distance criterion of 200 nm or by a combination of distance out to 200 nm and geomorphological criteria beyond 200 nm. This is reflected in Article 76 of the Law of the Sea Convention. Where geomorphology allows, a State's sovereign rights can, therefore, extend beyond 200 nm. And in the case of the continental shelf in the Timor Gap, Australia considers that the geomorphology entitles it to assert sovereign rights over its continental shelf to the foot of the Timor Trough. Indonesia, like Portugal, asserts a contrary position based on its view that its continental shelf is defined solely by distance. It, therefore, considers Australia's sovereign rights cannot extend beyond a median line based on overlapping 200 nm zones. Australia has, however, always rejected this view. The 1989 Treaty is without prejudice to the respective views of Australia and Indonesia in this regard. Article 2 (3) of the Treaty provides:

> "3. Nothing contained in this Treaty and no acts or activities taking place while this Treaty is in force shall be interpreted as prejudicing the position of either Contracting State on a permanent continental shelf delimitation in the Zone of Co-operation nor shall anything contained in it be considered as affecting the respective sovereign rights claimed by each Contracting State in the Zone of Co-operation."[486]

The differing views of the two Parties to the 1989 Treaty as to the limits to their continental shelf claims are reflected in the boundaries of the Zone of Co-operation. The northern and southern limits of the Zone represent respectively the maximum claims of Australia and Indonesia, based respectively on geomorphology and distance. The boundaries of Area A of the Zone, in relation to which exploration and exploitation takes place through the Joint Authority, represents the core area of overlapping claims, with its northern and southern limits based again on geomorphology and distance respectively.

282. The attempt by Portugal to portray the Australian claims to the foot of the trough as without any legitimate foundation in international law is rejected. Nor can Portugal legitimately assert[487] that the only basis on which Australia

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[486] The text of the Treaty is contained in the Schedule to the Petroleum (Australia-Indonesia Zone of Co-operation) Act 1990, Application by Portugal, Annex 2. See also Memorial of Portugal, Annex III.9.

[487] Reply of Portugal, para.6.73.

can assert rights in the area is based on a line drawn 200 nm from its coasts. Australia over a lengthy period has asserted and exercised sovereign rights over the area in dispute based on a geomorphological definition of the shelf. And international law continues to recognise this as a relevant definition.

283. As Portugal points out, this case is not, however, one involving a dispute about maritime delimitation and the Court is not asked to draw a delimitation line.[488] The Court must, therefore, assume that Australia's claims are legitimately based. Australia made clear in its Counter-Memorial that it views the 1989 Treaty as a measure of practical action to secure its rights and interests under international law. The Court cannot in the present case determine whether the regime agreed with Indonesia is compatible with the respective maritime rights in international law of Australia and the territory of East Timor. Any attempt to do so or to grant Portugal the remedy it seeks means that Australia would find it practically impossible to exercise its own rights in the area.[489]

Section II: The duty to negotiate

284. Portugal seeks to argue that because there is a "concours de droits ou de prétentions sur des espaces maritimes" Australia has a duty to negotiate over its maritime rights.[490] Australia recognises a duty to negotiate with a view to reaching agreement on the delimitation of the continental shelf with an opposite coastal State. This is a duty that pending final agreement may lead to provisional arrangements of a practical nature.[491] But Australia does not accept that it has a duty to negotiate with Portugal. Portugal argues that Australia's rights under the law of the sea cannot override or fail to have regard to the law relating to non-self-governing territories.[492] But Australia does not seek to argue this. It says that there is no duty to negotiate with Portugal in relation to matters arising from Australia's capacity as a coastal State, given Portugal's own complete inability to exercise the powers of a coastal State, let alone those of an effective administering Power.[493]

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488 Reply of Portugal, paras.6.73, 6.76.
489 Counter-Memorial of Australia, para.410.
490 Reply of Portugal, heading to para.6.74.
491 See also Counter-Memorial of Australia, para.404.
492 Reply of Portugal, para.6.75.
493 Paras.152-154 above.

285. As the above account has demonstrated, Australia has negotiated over its maritime rights in the Timor Gap area. It has concluded a practical arrangement allowing for exploration and exploitation of petroleum resources. It has clearly fulfilled any obligation to negotiate in good faith. The only issue is whether it has incurred international responsibility by having excluded and by continuing to exclude any negotiation with Portugal on this issue.

286. Portugal seeks to show that there is a conflict of rights or of maritime claims in the Timor Gap area between Portugal and Australia.[494] Portugal in its Memorial refers to diplomatic exchanges in 1973 and 1974, and then in February 1991 at the same time as the present proceedings were commenced[495] in order to establish this conflict. The fact that a dispute may have existed in 1974 is not relevant in the present case to whether a dispute continues to exist today. In relation to the 1991 note, Australia responded in a note of its own in April 1991 that it contested the legal interest of Portugal in relation to the maritime spaces appurtenant to East Timor.[496] And it is this issue in relation to which Portugal and Australia are in dispute and to which these present proceedings relate.

287. As Australia has already demonstrated,[497] for Portugal simply to assert that it is the administering Power establishes no basis for Portugal to assert that it is in the position of the relevant coastal State with whom Australia must negotiate over the continental shelf. Yet it is the coastal State to whom the rights over the continental shelf belong. And rights of a State over the continental shelf only exist by virtue of its control of the territory to which the shelf is appurtenant. As the Court said in the North Sea Continental Shelf cases, the most fundamental of all the rules of law relating to the continental shelf is that:

> "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources."[498]

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494 Reply of Portugal, paras.6.72-6.74.
495 Memorial of Portugal, paras.7.04-7.06.
496 Memorial of Portugal, Annex IV.2, Vol.V, p.275.
497 See Part I, Chapter 2 and Part II, Chapter 1 of this Rejoinder.
498 ICJ Reports 1969, p.22 (emphasis added).

In the Aegean Sea case, the Court also recognised that:

> "a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf."[499]

The fact that Portugal exercises no rights as a coastal State in the area and cannot discharge the responsibilities of a coastal State reinforces the conclusion set out in some detail above that there is no duty to negotiate with Portugal in its capacity as administering Power. Nor can Portugal show any basis on which in some way it can represent and assert rights over the continental shelf on behalf of East Timor as if it were a coastal State. It has no effective control of the territory. The United Nations has recognised no competency for Portugal in regard to this matter. On all accounts the submission that Australia has breached a duty to negotiate with Portugal over the continental shelf in the Timor Gap is without foundation, because Portugal is in no position, and has no authority, to act as the relevant coastal State.

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[499] ICJ Reports 1978, p.36.

SUBMISSIONS

288. The Government of Australia submits that, for the reasons set out in its Counter-Memorial and Rejoinder, the Court should adjudge and declare that:

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

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

GAVAN GRIFFITH
Agent of the Government of Australia

HENRY BURMESTER
Co-Agent of the Government of Australia

WARWICK WEEMAES
Co-Agent of the Government of Australia

1 July 1993

APPENDIX

PRINCIPAL RESOLUTIONS OF THE GENERAL ASSEMBLY AND SECURITY COUNCIL TO 1974 DEALING WITH TERRITORIES UNDER PORTUGUESE ADMINISTRATION

§§ (= Portugal absent)
§§§ (=Portugal voted against)

* (=Australia voted for)
** (=Australia abstained)
*** (=Australia voted against)

GENERAL ASSEMBLY RESOLUTIONS

Resolution 1699 (XVI), 19 December 1961 * §§§
"Non-compliance of the Government of Portugal with Chapter XI of the Charter of the United Nations and with General Assembly resolution 1542 (XV)"

Para 1: "Condemns the continuing non-compliance of the Government of Portugal with its obligations under Chapter XI of the Charter of the United Nations and with the terms of General Assembly Resolution 1542 (XV)"

Para 8: "Further requests Member States to deny Portugal any support and assistance which it may use for the suppression of the peoples of its Non-Self-Governing Territories"

Resolution 1742 (XVI), 30 January 1962 * §§
"The situation in Angola"

Preamble: "Noting with deep regret Portugal's refusal to recognize Angola as a Non-Self-Governing Territory and its failure to take measures to implement General Assembly resolution 1514 (XV)"

Para 3: "Deeply deprecates the repressive measures and armed action against the people of Angola and the denial to them of human rights and fundamental freedoms"

Para 8: "Requests all States Members of the United Nations and members of the specialized agencies to deny Portugal any support and assistance which may be used by it for the suppression of the people of Angola"

Resolution 1807 (XVII), 14 December 1962 ** §§§
"Territories under Portuguese administration"

Preamble: "Greatly deploring the continued disregard by the Portuguese Government of the legitimate aspirations for immediate self-determination and independence expressed by the peoples of the Territories under its administration"

Para 2: "Condemns the attitude of Portugal, which is inconsistent with the Charter of the United Nations"

Para 7: "Earnestly requests all States to 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"

Resolution 1819 (XVII), 18 December 1962 *** §§§
"The situation in Angola"

Preamble: "Resolutely condemning the mass extermination of the indigenous population of Angola and other severe repressive measures being used by the Portuguese colonial authorities against the people of Angola"

"Noting that in the Territory of Angola, as in other Portuguese colonies, the indigenous population is denied all fundamental rights and freedoms, that racial discrimination is in fact widely practised and that the economic life of Angola is to a large extent based on forced labour"

Para 3: "Condemns the colonial war being carried on by Portugal against the people of Angola and demands that the Government of Portugal put an end to it immediately"

Para 7: "Requests all Member States to deny Portugal any support or assistance which may be used by it for the suppression of the people of Angola..."

Para 8: "Reminds the Government of Portugal that its continued non-implementation of the resolutions of the General Assembly and of the Security Council is inconsistent is inconsistent with its membership in the United Nations"

Resolution 1913 (XVIII), 3 December 1963 * §§§
"Territories under Portuguese administration"

Preamble:"Noting with deep regret and great concern the continued refusal of the Government of Portugal to take any steps to implement the resolutions of the General Assembly and of the Security Council"

Para 1: "Requests the Security Council to consider immediately the question of the Territories under Portuguese administration and to adopt necessary measures to give effect to its own decisions"

Resolution 2107 (XX), 21 December 1965 *** §§§
"Question of Territories under Portuguese administration"

Preamble:"Noting with deep concern that, in spite of the measures laid down by the Security Council...the Government of Portugal is intensifying the measures of repression and military operations against the African people of these Territories with a view to defeating their legitimate aspirations to self-determination, freedom and independence"

Para 4: "Condemns the colonial policy of Portugal and its persistent refusal to carry out the resolutions of the General Assembly and the Security Council"

Para 7: Urges Member States to take certain measures against Portugal, separately or collectively.

Para 8: Requests all States to take certain steps against Portugal.

Resolution 2184 (XXI), 12 December 1966 *** §§§
"Question of Territories under Portuguese administration"

Para 3: "Condemns, as a crime against humanity, the policy of the Government of Portugal, which violates the economic and political rights of the indigenous population by the settlement of foreign immigrants in the Territories and by the exporting of African workers to South Africa"

Para 4: "Further condemns the activities of the financial interests operating in the Territories under Portuguese domination which exploit the human and material resources of the Territories and impede the progress of their peoples towards freedom and independence"

Para 7: "Recommends to the Security Council that it make it obligatory for all States, directly and through their action in the appropriate international agencies of which they are members, to implement the measures contained in General Assembly resolution 2107 (XX)"

Para 8: Requests all States to take certain steps, and in particular "(d) To take the necessary measures to put an end to such activities as are referred to in paragraph 4 above".

Resolution 2270 (XXII), 17 November 1967 ** §§§
"Question of Territories under Portuguese administration"

Preamble: "Deeply disturbed by the negative attitude of the Government of Portugal and its persistent refusal to implement the relevant United Nations resolutions"

Para 3: "Strongly condemns the persistent refusal of the Government of Portugal to implement the relevant resolutions adopted by the General Assembly, the Security Council and the Special Committee, as well as that Government's actions which are designed to perpetuate its oppressive foreign rule"

Para 4: "Strongly condemns the colonial war being waged by the Government of Portugal against the peaceful peoples of the Territories under its domination, which constitutes a crime against humanity and a grave threat to international peace and security"

Para 6: "Strongly condemns the activities of the financial interests operating in the Territories under Portuguese domination, which exploit the human and material resources of the Territories and impede the progress of their peoples towards freedom and independence"

Para 8: Requests all States to take certain measures against Portugal, and in particular "(d) To put an end to the activities referred to in paragraph 6 above".

Resolution 2395 (XXIII), 29 November 1968 ** §§§
"Question of Territories under Portuguese administration"

Preamble: "Expressing its profound concern over the persistent refusal of the Government of Portugal to implement the relevant United Nations resolutions"

Para 2: "Condemns the persistent refusal of the Government of Portugal to implement resolution 1514 (XV) and all other relevant resolutions of the General Assembly and of the Security Council"

Para 5: "Appeals to all States to grant the peoples of the Territories under Portuguese domination the moral and material assistance necessary for the restoration of their inalienable rights"

Para 11: "Deplores also the activities of the financial interests operating in the Territories under Portuguese domination, which obstruct the struggle of the peoples for self-determination, freedom and independence and which strengthen the military efforts of Portugal"

Resolution 2507 (XXIV), 21 November 1969 ** §§§
"Question of Territories under Portuguese administration"

"Expressing its deep concern over the persistent refusal of the Government of Portugal recognize the inalienable right of the African peoples under its domination to self-determination and independence and to co-operate with the United Nations in seeking solutions that would bring colonialism rapidly to an end"

Para 3: "Condemns the persistent refusal of the Government of Portugal to implement resolution 1514 (XV) and all other relevant resolutions of the General Assembly and of the Security Council"

Para 5: "Condemns the colonial war which is being waged by the Government of Portugal against the peoples of the Territories under its domination"

Para 9: "Deplores the activities of the financial interests which obstruct the struggle of the peoples under Portuguese domination for self-determination, freedom and independence and which strengthen the military efforts of Portugal"

Para 12 "Recommends that the Security Council...should take effective steps in conformity with the relevant provisions of the Charter of the United Nations and in view of the determination of the international community to put an end to colonialism and racial discrimination in Africa"

Resolution 2548 (XXIV), 11 December 1969 Adopted 78:5:16
"Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples"

Preamble: "Deploring the refusal of the colonial Powers, especially Portugal and South Africa, to implement the declaration and other relevant resolutions on the question of decolonization, particularly those relating to the Territories under Portuguese domination, Namibia and Southern Rhodesia"

"Deploring the attitude of certain States which, in defiance of the pertinent resolutions...continue to co-operate with the Governments of Portugal and South Africa and with the illegal racist minority régime in Southern Rhodesia"

Para 6: "Requests all States, as well as the specialised agencies and international institutions, to withhold assistance of any kind from the Governments of Portugal and South Africa and from the illegal racist minority régime in Southern Rhodesia until they renounce their policy of colonial domination and racial discrimination"

Resolution 2554 (XXIV), 12 December 1969 ** §§§
"Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia, Namibia and Territories under Portuguese domination and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa"

Para 3: "Affirms that foreign economic and other interests operating in colonial Territories which are exploiting those Territories constitute a major obstacle to political independence as well as to the enjoyment of the natural resources of these Territories by the indigenous inhabitants"

Para 6: "Deplores the attitude of the colonial Powers and States concerned which have not taken any action to implement the relevant provisions of General Assembly resolutions"

Para 7: "Requests the administering Powers and States concerned whose companies and nationals are engaged in such activities to take immediate measures to put an end to all practices which exploit the Territories and peoples under colonial rule..."

Para 8: "Requests all States to take effective measures to cease forthwith the supply of funds or other forms of economic and technical assistance to colonial Powers which use such assistance to repress the national liberation movements"

See also

Resolution 2703 (XXV), 14 December 1970
Resolution 2873(XXVI), 20 December 1971
Resolution 2979 (XXVII), 14 December 1972
Resolution 3117 (XXVIII), 12 December 1973

Resolution 2558 (XXIV), 12 December 1969 ** §§§
"Information from Non-Self-Governing Territories transmitted under Article 73 e of the Charter of the United Nations"

Para 3: "Condemns the Government of Portugal for its continued refusal to transmit information under Article 73 e of the Charter with regard to the colonial Territories under its domination, despite the numerous resolutions adopted by the General Assembly concerning those Territories"

Para 7: "Reiterates its request that the administering Powers concerned transmit such information as early as possible and at the latest within a maximum period of six months following the expiration of the administrative year in the Non-Self-Governing Territories concerned"

See also

Resolution 2422 (XXIII), 18 December 1968
Resolution 2701 (XXV), 14 December 1970
Resolution 2870 (XXVI), 20 December 1971
Resolution 2978 (XXVII), 14 December 1972
Resolution 3110 (XXVIII), 12 December 1973

Resolution 2704 (XXV), 14 December 1970 ** §§§
"Implementation of the Declaration on the Granting of Independence to *Colonial Countries and Peoples by the specialized agencies and the* international institutions associated with the United Nations"

Para 3: "Urges the specialized agencies and the organizations concerned which have not yet done so to take the steps required for the full implementation of those provisions of the relevant resolutions relating to assistance to the national liberation movements and to the discontinuance of all collaboration with

the Governments of Portugal and South Africa, as well as with the illegal racist minority régime in Southern Rhodesia"

Resolution 2707 (XXV), 14 December 1970 ** §§§
"Question of Territories under Portuguese administration"

Preamble: "Gravely concerned at the defiant attitude of the Government of Portugal towards the international community and the persistent refusal of that Government to recognize the inalienable right of the peoples of the Territories under its domination to self-determination and independence and to implement the relevant resolutions of the United Nations"

Para 2: "Strongly condems the persistent refusal of the Government of Portugal to implement resolution 1514 (XV) and all other relevant resolutions of the General Assembly and the Security Council, and the colonial war being waged by that Government against the peoples of Angola, Mozambique and Guinea (Bissau)..."

Para 8: "Calls upon all States to take all effective measures to put an end to all practices which exploit the Territories under Portuguese domination and the peoples therein and to discourage their nationals and companies from entering into any activities or arrangements which strengthen Portugal's domination over, and impede the implementation of the Declaration with respect to, those Territories"

Para 13: "Recommends that the Security Council should continue to give special attention to the problems of Portuguese colonialism in Africa..."

Resolution 2708 (XXV), 14 December 1970 *** §§§
"Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples"

Preamble: "Deploring the continued refusal of the colonial Powers, especially Portugal and South Africa, to implement the Declaration and other relevant resolutions on the question of decolonization, particularly those relating to the Territories under Portuguese domination, Namibia and Southern Rhodesia"

"Strongly deploring the attitude of those States which, in defiance of the relevant resolutions...continue to co-operate with the Governments of Portugal and South Africa and with the illegal racist minority régime in Southern Rhodesia"

Para 6: "Urges all States and specialized agencies and other organizations within the United Nations system to provide, in consultation, as appropriate, with the Organization of African Unity, moral and material assistance to national liberation movements in the colonial Territories"

Para 7: "Requests all States, as well as the specialized agencies and international institutions, to withhold assistance of any kind from the Governments of Portugal and South Africa and from the illegal racist minority régime in Southern Rhodesia until they renounce their policy of colonial domination and racial discrimination"

Resolution 2795 (XXVI), 10 December 1971 * §§§
"Question of Territories under Portuguese administration"

Preamble: "Deploring the persistent refusal of the Government of Portugal to recognize the inalienable right of the peoples in the Territories under its domination to self-determination and independence in accordance with the Declaration on the Granting of Independence to Colonial Countries and Peoples"

Para 2: "Strongly condems the persistent refusal of the Government of Portugal to implement resolution 1514 (XV) and all other relevant resolutions of the General Assembly and the Security Council"

Para 3: "Condemns the colonial war being waged by the Government of Portugal against the peoples of Angola, Mozambique and Guinea (Bissau)..."

Para 10: "Calls upon all States to take all immediate measures to put an end to all activities that help to exploit the Territories under Portuguese domination and the peoples therein and to discourage their nationals and bodies corporate under their jurisdiction from entering into any transactions or arrangements that strengthen Portugal's domination over, and impede the implementation of the Declaration with respect to, those Territories"

Para 13: "Requests all States and the specialized agencies and other organizations within the United Nations system, in consultation with the Organization of African Unity, to render to the peoples of the Territories under Portuguese domination, in particular the population in the liberated areas of those Territories, all the

moral and material assistance necessary to continue their struggle for the restoration of their inalienable right to self-determination and independence"

Resolution 2918 (XXVII), 14 November 1972 * §§§
"Question of Territories under Portuguese administration"

Preamble: "Condemning the persistent refusal of the Government of Portugal to comply with the relevant provisions of the aforementioned resolutions of the United Nations"

Para 2: "Affirms that the national liberation movements of Angola, Guinea (Bissau) and Cape Verde and Mozambique are the authentic representatives of the true aspirations of the peoples of those Territories and recommends that, pending the accession of those Territories to independence, all Governments, the specialized agencies and other organizations within the United Nations system and the United Nations bodies concerned should, when dealing with matters pertaining to the Territories, ensure the representation of those Territories by the liberation movements concerned in an appropriate capacity and in consultation with the Organization of African Unity"

Para 4: "Appeals to all Governments, the specialized agencies and other organizations within the United Nations system and non-governmental organizations to render to the peoples of Angola, Guinea (Bissau) and Cape Verde and Mozambique, in particular the populations in the liberated areas of those Territories, all the moral and material assistance necessary to continue their struggle for the achievement of their inalienable right to self-determination and independence"

Para 6: "Calls upon all States to take forthwith all possible measures to put an end to any activities that help to exploit the Territories under Portuguese domination and the peoples therein and to discourage their nationals and bodies corporate under their jurisdiction from entering into any transactions or arrangements that contribute to Portugal's domination over those Territories and impede the implementation of the Declaration with respect to them"

Resolution 2980 (XXVII), 14 December 1972 * §§§
"Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the specialized agencies and the international institutions associated with the United Nations"

Para 6: Urges once again the specialized agencies and other organizations within the United Nations system, in accordance with the relevant resolutions of the General Assembly and the Security Council, to take all necessary measures to withhold and financial, economic, technical and other assistance from the Governments of Portugal and South Africa and the illegal régime in Southern Rhodesia, and to discontinue all collaboration with them until they renounce their policies of racial discrimination and colonial oppression"

Resolution 3061 (XXVIII), 2 November 1973 ** §§§
"Illegal occupation by Portuguese military forces of certain sectors of the Republic of Guinea-Bissau and acts of aggression committed by them against the people of the Republic"

Preamble: "Recognizing the inalienable right of all peoples to self-determination and independence in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples"

Para 1: "Welcomes the recent accession to independence of the people of Guinea-Bissau, thereby creating the sovereign State of the Republic of Guinea-Bissau"

Para 2: "Strongly condemns the policies of the Government of Portugal in perpetuating its illegal occupation of certain sectors of the Republic of Guinea-Bissau and the repeated acts of aggression committed by its armed forces against the people of Guinea-Bissau and Cape Verde"

Para 3: "Demands that the Government of Portugal desist forthwith from further violation of the sovereignty and territorial integrity of the Republic of Guinea-Bissau and from all acts of aggression against the people of Guinea-Bissau and Cape Verde by immediately withdrawing its armed forces from those territories"

Resolution 3113 (XXVIII), 12 December 1973 * §§§
"Question of Territories under Portuguese administration"

Para 2: "Reffirms that the national liberation movements of Angola and Mozambique are the authentic representatives of the true aspirations of the peoples of those Territories and recommends that, pending the accession of those Territories to independence, all Governments, the specialized agencies and other organizations within the United Nations system and the United Nations bodies concerned should, when dealing with matters pertaining to the Territories, ensure the representation of those Territories by the liberation movements concerned in an appropriate capacity and in consultation with the Organization of African Unity"

Para 3: "Condemns in the strongest possible terms the persistent refusal of the Government of Portugal to comply with the provisions of the relevant resolutions of the United Nations..."

Para 4: "Demands that the Government of Portugal should cease forthwith its colonial wars and all acts of repression against the peoples of Angola and Mozambique"

Para 6: "Appeals to all Governments, the specialized agencies and other organizations within the United Nations system and non-governmental organizations to render to the peoples of Angola, Mozambique, and other territories under Portuguese domination, in particular the populations in the liberated areas of those Territories, all the moral, material and economic assistance necessary to continue their struggle for the achievement of their inalienable right to freedom and independence"

Para 9: "Calls upon all States to take forthwith all possible measures:
(a) To put an end to any activities that help to exploit the Territories under Portuguese domination and the peoples therein;
(b) To discourage their nationals and the bodies corporate under their jurisdiction from entering into any transactions or arrangements that contribute to Portugal's domination over those Territories;
(c) To exclude Portugal from taking part on behalf of Angola and Mozambique in any bilateral or multilateral treaties or agreements relating particularly to external trade in the products of those Territories"

Resolution 3163 (XXVIII), 14 December 1973 * §§§
("Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples")

Para 8: "Requests all States, directly and through their action in the specialized agencies and other organizations within the United Nations system, to withhold or continue to withhold assistance of any kind from the Governments of Portugal and South Africa and from the illegal racist minority régime in Southern Rhodesia until they renounce their policy of colonial domination and racial discrimination"

Resolution 3181 (XXVIII), 17 December 1973
("Credentials of representatives to the twenty-eighth session of the General Assembly")

"The General Assembly

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Approves the credentials of the representatives of Portugal, on the clear understanding that they represent Portugal as it exists within its frontiers in Europe and that they do not represent the Portuguese-dominated Territories of Angola and Mozambique nor could they represent Guinea-Bissau, which is an independent State"

Resolution 3294 (XXIX), 13 December 1974 (Adopted without vote)
"Question of Territories under Portuguese domination"

Preamble: "Welcoming the declaration of the Government of Portugal accepting to fulfil its obligation under the relevant provisions of the Charter of the United Nations and recognizing the right of the peoples to self-determination and independence..."

Para 6: "Reaffirms its total support of, and constant solidarity with, the peoples of the Territories under Portuguese domination in their legitimate struggle to achieve without further delay freedom and independence under the leadership of their national liberation movements ... which are the authentic representatives of the peoples concerned"

Para 10: "Appeals to all Governments and the specialized agencies and other institutions associated with the United Nations to render to the peoples of the Territories concerned all moral and material assistance towards the achievement of their national independence and the reconstruction of their countries"

SECURITY COUNCIL RESOLUTIONS

Resolution 180 (1963) of 31 July 1963

Para 2: "Affirms that the policies of Portugal...are contrary to the principles of the Charter and the relevant resolutions of the General Assembly and of the Security Council"

Para 3: "Deprecates the attitude of the Portuguese Government, its repeated violations of the principles of the Charter and its continued refusal to implement the resolutions of the General Assembly and of the Security Council"

Para 6: "Requests 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..."

Resolution 183 (1963) of 11 December 1963

Preamble: Recalls resolution 180 (1963).

Para 2: "Calls upon all States to comply with paragraph 6 of resolution 180 (1963)"

Resolution 218 (1965) of 23 November 1965

Para 2: "Deplores the failure of the Government of Portugal to comply with previous resolutions of the Security Council and the General Assembly and to recognize the right of the peoples under its administration to self-determination and independence"

Para 6: Requests all States to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the people of the Territories under its administration..."

Resolution 312 (1972) of 4 February 1972

Para 2: "Condemns the persistent refusal of the Government of Portugal to implement General Assembly resolution 1514 (XV) and all other relevant resolutions of the Security Council"

Para 6: "Calls upon all States to refrain forthwith from offering the Portuguese Government any assistance which would enable it to continue its repression of the peoples of the Territory under its administration..."

Resolution 322 (1972) of 22 November 1972

Preamble: Recalls General Assembly resolution 2918 (XXVII) of 14 November 1972 on the question of Territories under Portuguese administration

Para 2: "Calls upon the Government of Portugal to cease forthwith its military operations and all acts of repression against the peoples of Angola, Guinea (Bissau) and Cape Verde, and Mozambique"

Para 3: "Calls upon the Government of Portugal, in accordance with the relevant provisions of the Charter of the United Nations and General Assembly resolution 1514 (XV), to enter into negotiations with the parties conccerned, with a view to achieving a solution to the armed confrontation that exists in the Territories of Angola, Guinea (Bissau) and Cape Verde, and Mozambique and permitting the peoples of those Territories to exercise their right to self-determination and independence"

ANNEXES

ANNEX 1

A1

Texts of statements in the Australian Parliament by the Australian government on the Dili killings - 6 November to 11 December 1991

Question without notice

Indonesia

(From *Hansard* of 6 November)

Senator Bourne — Has the Minister for Foreign Affairs and Trade seen recent media reports of Indonesian troops raiding the Motael Roman Catholic Church in Dili, East Timor, at 2.30 am on Monday, 28 October this year, shooting two youths dead and arresting between 20 and 40 others, because of local opposition to Indonesian rule of East Timor? What has been the Australian Government's response to a request from Amnesty International for an official investigation into the incident, including the deaths of the two youths and response of detention? Does the Australian Government intends to raise the matter of human rights in Indonesia and East Timor with the chief of Indonesia's armed forces, General Try Sutrisno, during his current visit to Australia?

Senator Evans — I am familiar with the media reports concerning the incident in Dili on 28 October. I instructed the Australian Embassy to investigate that matter as a matter of urgency both with the Indonesian authorities and with independent non-government sources, to the extent that we could get access to them.

The information we have obtained from these various sources is inconclusive. The official military account is that the deaths occurred in the context of a fight between Timorese groups outside the church — which may have had something to do with a fight between supporters and opponents of integration — and that two people died in the incident in question. A number of eyewitness accounts suggest that shots were fired. There certainly was a military presence at some stage of the proceedings, but there do not appear to be any eyewitness accounts suggesting that the deaths occurred directly as a result of the shots being fired.

The Indonesian authorities have conceded that shots were fired but say that that was in the context of breaking up a brawl or a subsequent reaction to the situation rather than the cause of the deaths in question. We are continuing to make inquiries about this to see whether a more conclusive, final account can he given in which everyone can have confidence. It does seem that the situation is a little more complex than some of the initial reports sourced in Amnesty and elsewhere. There is absolutely no reason to believe at this stage that the deaths were as a result of direct military or official action.

Of course, if it is revealed that human rights abuses did take place in this context I will instruct our Ambassador to make representations to the Indonesian Government, as we have done on numerous previous occasions. We emphasised out support for international observance of human rights, both generally in Indonesia and very specifically in the context of East Timor.

I will not be able to meet General Try Sutrisno during this visit to make those points. The discussions he is having are about more specific military matters in a general bilateral and regional context. I am just not sure what points are being made, but I will take that up with Senator Ray and see what might be possible in that respect.

Question without notice

East Timor

(From *Hansard* of 13 November)

Dr Hewson - My question is directed to the Prime Minister. Can he inform the House of the accuracy of media reports concerning the deaths of up to 60 people in the East Timor capital of Dili? When did the Government first become aware of the incident? What steps has the Government taken to establish the facts in this matter, and has it responded in any way? Did the Government make any inquiries into the shooting of two independence activists in Dili two weeks ago? Does the Government believe that there are any links between those two deaths and the most recent incident?

Mr Hawke — I thank the Leader of the Opposition for his question. I know that not only on his part but on the part of all honourable members of this House there will be a very deep concern about the tragedy which unfolded yesterday. We are, of course, as a government, very deeply disturbed by the reports of this tragedy in Dili yesterday. We deplore the loss of innocent life. While many details remain unclear, it is now evident that an appalling tragedy has occurred in which many people have been killed. The Indonesian Ambassador has been called to the Department of Foreign Affairs and Trade this morning and the Australian Ambassador in Jakarta has been instructed to call on the authorities there.

Through these channels we are asking the Indonesian Government for urgent information about what exactly happened in Dili yesterday. We have urged the Indonesian Government to conduct a thorough investigation and publish a full and factual account of what happened and why. We have said that we expect that those responsible for breaches of human rights should be appropriately dealt with.

Honourable members — Hear, hear!

Mr Hawke — I have also asked Senator Evans to discuss the matter with Indonesia's Foreign Minister, Mr Alatas, in Seoul where they are both attending the APEC ministerial meeting. An officer of the Australian Embassy in Jakarta is on his way to Dili. His inquiries will include investigating reports that an Australian aid worker was present at the event and may have been injured. May I interpolate in the answer I have prepared on this matter to say in respect of the specific part of the Leader of the Opposition's question which related to the possible connection with earlier events that we will see that the officer there conducting those inquiries looks at that issue as well.

The Indonesian Ambassador said in his discussions at DFAT this morning that the Indonesian Government is viewing yesterday's events seriously and would undertake a thorough investigation, and that it regrets the deaths which have occurred. Ambassador Siagian gave our officials an account of the incident based on what he said were preliminary reports. He said that violence had erupted following an attack by demonstrators on an Indonesian army officer. We are not, of course, in a position to assess the accuracy of conflicting reports of the incident. We do welcome the Indonesian Government's acknowledgment of the seriousness of the situation and its decision to undertake an investigation.

May I say, as the honourable member for the Northern Territory said in his press release today, that the Australian and Indonesian Governments have both worked hard — as I think all honourable members acknowledge — on the basis of goodwill on both sides to build a responsible and beneficial relationship between our two countries. That relationship is one to which not only my Government attaches great importance; I think that is an importance shared in the minds of all honourable members. East Timor, we must say, has always been an area of concern in that relationship. We have recognised Indonesia's sovereignty over East Timor, but we have constantly expressed our concern about human rights abuses there. We have consistently done that. We encourage the Indonesian Government to deal with this tragedy openly and in accordance with the international standards of respect for human rights to which both countries subscribe.

I think in that answer to the questions of the Leader of the Opposition I have gone to every point except one. I think he asked when were we first aware. Some information became available in the latter part of yesterday, I understand through AAP reports. I think now I have answered all the particulars of the question put by the Leader of the Opposition.

I would hope that I speak, and I know I do speak, for all members of this House again in deploring what has happened and urging the Government of Indonesia, as I have said in answer to the Leader of the Opposition, to give us urgent information about exactly what has happened and how it happened, and to conduct a thorough investigation and publish a full and factual account of what happened and why. I repeat that it would be our expectation that out of those processes those responsible for breaches of human rights should be appropriately dealt with. Finally, I say to the Leader of the Opposition that, of course, I would undertake to keep him informed of any further information that we have on this matter.

Question without notice

East Timor

(From *Hansard* of 14 November)

Mr Gibson — I address my question to the Prime Minister. What response has the Government received to representations to the Indonesian Government about the tragedy in East Timor? What further information has come to light about these events?

Mr Hawke — I thank the honourable member for Moreton for his question. I am sure that all members of the House would be interested to know the developments of which we are aware, and I certainly want to share those with the honourable member and with the House.

Since I spoke to the House yesterday on this issue our Government has discussed at very high levels with the Indonesian Government the appalling events in Dili yesterday. Yesterday afternoon our Ambassador in Jakarta, Mr Phillip Flood, met General Moerdani, who is Acting Foreign Minister as well as Minister for Defence and Security, and Senator Evans had long talks in Seoul with Mr Alatas, the Foreign Minister for Indonesia. In both these discussions, Australia expressed the points that I outlined to this House yesterday: we are deeply disturbed by the tragedy in Dili and deplore the loss of innocent life; we want an urgent account of what happened there; we want a full inquiry into the circumstances and that those found responsible be appropriately dealt with.

In their responses, General Moerdani and Mr Alatas expressed deep concern and regret at what had occurred and understanding of the strong reaction that we in Australia have felt and have expressed about those events in Dili. In his long discussion with Senator Evans, Mr Alatas agreed on the need for a full and internationally credible inquiry and recognised the potential of the incident to undermine Indonesia's efforts to improve the situation in East Timor. The Commander of Indonesia's armed forces, General Sutrisno, has publicly expressed his regret at the deaths and he has promised a thorough investigation.

The Government welcomes these indications that Indonesia is responding positively to the concerns that we and other members of the international community have expressed about the events of Tuesday. I must say that I am disappointed that they were not more fully reflected in the statement released last night by the Indonesian Embassy. We will, of course, continue to press our concerns and we will take a close interest in the manner in which the inquiry into the shootings is conducted, as well as in the conclusions and the action which follows.

Turning to the second part of the question, General Sutrisno is reported to have told journalists in Jakarta yesterday that at the most 50 people died in the incident. I want to stress that, whatever the final number of casualties, it is obvious that an appalling tragedy has occurred. It does not depend on what the final number is; an appalling tragedy has occurred.

Both General Moerdani and Mr Alatas have given us accounts of what occurred based on preliminary information which is available to them. In addition, I am pleased to say that our Embassy official arrived in Dili yesterday afternoon and he will stay in Dili for several days so that he can speak to as many people as possible about the incident. It still is not possible to speak with any certainty about many of the details of the incident.

The Indonesian authorities are continuing with their inquiries and are awaiting the return of a number of key personnel from Dili. The Indonesian authorities have said that the incident was provoked by an attack on an Indonesian military officer. Other witnesses claim that there was no provocation. We are continuing to investigate these and other aspects of the incident, including with non-government sources. It would be unwise to comment further until we have more detail.

Nonetheless, I hope it will be recognised that whatever provocation may have occurred — we do not say that any did; but it is important to say that whatever provocation may have occurred, if any — the response by the Indonesian military has been tragically excessive. I believe, in saying that, I would be reflecting the views not only of all members of this House but of the people of this country. I conclude by saying this: after all these years it is clear that the problems of East Timor are not going to be solved by military force.

Question without notice

Military aid and exports to Indonesia

(From *Hansard* of 26 November)

Senator Coulter — My question is directed to the Minister for Foreign Affairs and Trade. In the light of the Dili massacre and other gross violations of human rights of East Timorese by Indonesia since 1975, will the Government immediately cease all military aid and exports to Indonesia and the training of Indonesian military personnel

Senator Evans — The events in Dili, appalling and abhorrent as they unquestionably were, were in our judgment, on all the available evidence so far, not a matter of deliberate or calculated government policy but rather represented some aberrant behaviour by a section of the military. I say "on all available evidence"; should there emerge contrary evidence, of course that judgment would need to be revised. But, as such, the situation is quite distinct from that, for example, which occurred in Tiananmen Square in China in 1989 which did reflect very deliberately a calculated act of government policy. As such, our concern has been to ensure that the event in question, in all its horror, is fully and properly investigated and that appropriate follow-up action is taken. Again, there is no basis for any assumption at this stage that investigation will not be conducted on a proper basis and that appropriate follow-up action will not be taken. There is no basis for any such assumption.

For that reason, the Government has resisted taking action of any kind which would represent a significant downgrading in the bilateral relationship, whether it takes the form of minimising or deleting the very small amount of defence cooperation activity which occurs at a sum of just over $2m, or any form of trade sanction whether it relates to defence exports or anything else, or any form of cancellation of visits, or any form of reduction of aid, which is quite substantial. All those forms of bilateral response designed to express a formal protest are in our judgment quite inappropriate in the particular context that I have described. What is appropriate is some more constructive form of Government action of the kind that we will be debating later today. I do not want to spend time spelling that out. But it will involve diplomatic action, through a visit in the next few weeks to Indonesia by me, and other related activity. That is the appropriate response. There is simply no basis for proceeding down the particular path that Senator Coulter has described, however much — I repeat — we all regard the awful incident which occurred in Timor on 12 November as thoroughly abhorrent.

Senator Coulter — Mr President, I wish to ask a supplementary question. Does the Minister's answer to my question mean that he agrees with Mr Brian Loton that the events in East Timor are "peripheral" to the more important considerations of Australia's relationships with Indonesia?

Senator Evans — No, it does not mean for a moment that I regard the events in East Timor as peripheral. However, it does mean that I think that those events should be looked at in the perspective that I have described. In the absence of any evidence at this stage either that they were directed as

a matter of specific government policy or that they will be covered up and not followed through in an appropriate fashion, it is quite inappropriate for action of the kind that Senator Coulter seems to have in mind to take place. Of course, human rights issues are not peripheral to our relationship with Indonesia or anybody else.

Of course, in particular, the human rights situation in East Timor is not peripheral. It has been a central focus of our involvement with Indonesia for very many years. We have made the judgment, over many years, that the realities of international life and the nature of the international willingness to go down the path of recognising rights to self-determination and so on are so limited and the realities are such that the human rights of the Timorese people are better pursued through active encouragement and general international pressure upon Indonesia to do that. That is the course that we have followed so far. It has been a productive course over the last few years. Tragically, however, that particular course came to a very unhappy and unsavoury halt with the events on 12 November. It is going to be a matter of judgment as to whether that course is capable of being recreated or whether some other course may need to be followed in the future. However, it is premature to make any such judgment at this stage.

Question without notice

Indonesia: human rights

(From *Hansard* of 27 November)

Mr Mack — I address my question to the Prime Minister. In view of the Government's commitment to human rights and the new world order, has the Government instructed our Ambassador to the United Nations to raise the matter of the Dili massacre in the United Nations; or does the Government intend to continue Australia's 16-year-old policy of hypocrisy and appeasement?

Mr Hawke — I do not accept the latter part of the question as an appropriate description of the policy of this Government on this matter. I believe that the honourable gentleman would appreciate that I should set out, therefore, what is the approach of the Government. I am more than happy to do that for him.

The essence of the approach that we intend to adopt in the wake of what is undoubtedly a tragedy is to use the close and effective working relationships that we have built up with Jakarta in recent years to urge the Indonesian Government to respond positively to this tragedy which has occurred. When I talk about a positive reaction from the Indonesian Government, we believe that that positive response requires, without any question, an objective and thorough inquiry, and it certainly requires appropriate punishment for those found responsible. We believe also that it requires a new momentum initiated by the Government of Indonesia in achieving a resolution of the conflict in East Timor.

I do not avoid the fact in any way, may I say to the honourable gentleman, that there is a continuing conflict in East Timor. The Indonesian Government, in our view — which, as I have said, I try to put constructively — has to seek a resolution of that continuing conflict and understand that the military solution is no solution. It will not solve the continuing running sore and tragedy of East Timor in military terms. It must understand that. I have said that the Indonesian Government must make renewed efforts not to meet just in some formal tokenistic way but to sit down and talk with the people of East Timor, including the people from the resistance.

We have made it absolutely clear that without such a positive response, and in particular if the inquiry turns out to be a whitewash, we will then in those circumstances, I say to the honourable gentleman, have to consider steps to review our policies toward Indonesia. Having made the demand for that inquiry — and I think the demand that I made reflected the view of every member in this House and would reflect the views of the overwhelming majority of the Australia people — we think it appropriate to see what happens there, but we will not simply await the findings of the inquiry. The Government is actively exploring ways, I can assure the honourable member, in which we in Australia can urge, help and facilitate the sort of positive response that I have described.

The honourable gentleman will be aware that Senator Evans will travel to Indonesia next month specifically to discuss these issues with the Indonesian Government. I welcome the fact that the Indonesian Government has agreed to such a visit. We will meanwhile — and this goes even more directly to part, of the honourable gentleman's question — be exploring what role can be played by the various organs of the United Nations and we will support the International Committee of the Red Cross in its vital work in East Timor.

Finally, we will seek the agreement of the Indonesian Government to establish an Australian consulate in Dili. In the meantime, the Australia Ambassador in Jakarta, who I believe has been doing an outstanding job for us in Jakarta on

this issue, has been instructed to make early and regular visits to East Timor himself.

May I conclude my answer to the honourable gentleman by saying that the terrible tragedy of the Santa Cruz massacre does pose, we believe, a crucial test for Indonesia to respond in a humane, open and positive manner to the appalling outrage of the massacre itself and to the circumstances in East Timor from which that massacre sprung. We believe — and I hope that the honourable gentleman shares this view — that only by doing so will Indonesia strengthen the trends of economic and social and political development of its nation, in which it rightly takes pride.

So I hope, in that answer, that I have indicated to the honourable gentleman that we are not simply content with expressing outrage which, as I say, reflected the view of all honourable members, but in specific, concrete ways we are trying to direct the efforts of this nation — and we will be talking with others — to try to see what we can do to meet the critical situation, and that is the situation of the people of East Timor, because the truth is, as I have said before and as I repeat in conclusion, it is clear that the Indonesian authorities and the Government have not won the hearts and minds of the people of East Timor, and they have to do that. If we can help constructively in that way we will do so.

Question without notice

East Timor

(From *Hansard* of 27 November)

Senator Lees — My question is directed to the Minister for Foreign Affairs and Trade Has the Minister seen today's front page article of the Adelaide *Advertiser* entitled "Whitlam urged Timor takeover: ex-Minister"? These accusations were made by a former Minister, John Wheeldon, the then Minister for Social Security and a Minister for Repatriation and Compensation in the Whitlam Government. In case the Minister has not read it, I will quote from the first column:

> The Whitlam government secretly urged Indonesia to take over East Timor just before the invasion in December, 1975. He told the *Advertiser:*
>
> I don't have any doubt whatsoever that in the last month of the Whitlam government in 1975, Australia was actively involved in urging the Indonesians to take over East Timor.
>
> . .

Specifically, I ask: is the present Government's policy still to encourage the Indonesian occupation of East Timor?

Senator Evans — I have not seen the specific article attributing those views to John Wheeldon. I have heard John Wheeldon express a number of views over the years, some of which I have agree with; many more of which I have had some considerable difficulty in accepting at their immediate face value. I am not sure that I would necessarily accept at its immediate face value Mr Wheeldon's assessment of the course of events back in 1975. I know that is an allegation that has been constantly made and repeated over the years about Mr Whitlam's attitudes on that issue. I believe it is the case that Mr Whitlam does not accept the accuracy of those sorts of assertions that are constantly made and I would accordingly not premise any answer on an acceptance of the accuracy of what the honourable senator says. So that leads me to reject as just inappropriate any suggestion of still applying an attitude which I am not prepared to concede existed even then.

Our attitude more generally to the annexation which occurred in 1975 has been made very clear. It has been vigorously resisted and opposition to that was expressed at the time by Australia internationally and by both sides of politics. We still to this day regard it as a wrongful annexation and totally improper behaviour. We have drawn the distinction, however, between the circumstances of the annexation and the subsequent course of events which made it, in effect, a fait accompli which was incapable of reversal. That is what led the then Liberal-Country Party Opposition to take the view it did about de jure recognition in 1979. That is what, among other things, led this Government in 1985 to confirm that particular view.

Question without notice

East Timor

(From *Hansard* of 28 November)

Senator Bourne — Has the Minister for Foreign Affairs and Trade seen reports that Indonesian soldiers executed up to 80 people on 15 November, three days after the Santa Cruz cemetery massacre; that troops shot dead 10 people on 17 November and a further seven people, including a one-year-old boy, on 18 November? Has the Minister also seen reported comments that a witness to the 15 November shootings will give evidence only to a United Nations investigative delegation if his safety can be guaranteed? Does the Minister believe that these allegations will also be investigated by the committee set up by the

Indonesian Government? If so, as this is an Indonesian Government committee of inquiry, will witnesses give evidence?

Senator Evans — I am aware of the various response containing allegations of further killings. It remains the case that we have no evidence from any source to support or substantiate those reports. Officers from our Embassy in Jakarta have been sent to East Timor to investigate further the allegations in question. To date, they too have obtained no evidence in support.

As to the question of investigations of these response by the national investigation commission, I hope that these response will be investigated by that body and that all relevant witnesses will be given a chance to give evidence to it. Our Ambassador in Jakarta has made it clear to the Indonesian authorities that we believe that these allegations of further killings should be properly and fully investigated.

The Prime Minister, our Ambassador in Jakarta and I have already called on the Indonesian Government in various ways to conduct a full and credible inquiry that will lead to a publicly accessible report and, of course, the punishment of any wrongdoers. We see the establishment of that national commission as being a positive first step in that direction. In this regard, I am encouraged by the reported remarks of the head of the commission Judge Djaelani, that the commission is hoping to view foreign videos of the 12 November killings, will look into foreign and local press response will seek to question eyewitnesses and will go anywhere in Indonesia, if necessary, to gather information. We will have to wait and see whether those undertakings, commitments and processes are satisfactory.

Question without notice

Indonesia

(From *Hansard* of 10 December)

Senator Hill — My question is directed to the Minister representing the Prime Minister. I refer to the comments made by former Prime Minister Whitlam about the Hawke Government's foreign policy that Prime Minister Hawke is "a media and poll driven politician" whose "performances for domestic consumption have made it impossible for him to visit China, Malaysia and Fiji" and that, despite his speed on the phone to President Bush, he is unable to directly contact the President of a neighbouring country. I ask: would Australia have had more influence in relation to Indonesia if Mr Hawke had taken time off from his grandstanding on such issues as I have mentioned — and South Africa — to visit Indonesia at least once in the last eight years?

Senator Evans — It is a matter of fact that Gough Whitlam himself established a very good relationship with the Indonesian Government and had a strong personal relationship with President Suharto. That was of general benefit to Australia and to Gough Whitlam's credit. However, it has also to be acknowledged that there are limits to the extent to which that kind of personal relationship can produce results.

Mr Whitlam, after all, has told us constantly that his own attitude towards the East Timorese question was one of very strong support for an act of self-determination and very strong resistance — a very strong opposition — to any use of force by Indonesia in East Timor. Manifestly, all the personal relationships in the world that might have existed between Mr Whitlam and President Suharto did not stop the annexation of East Timor by Indonesia occurring without any act of self-determination and with the use of force. I think that is a healthy corrective to any suggestion that personal relationships by themselves can achieve miracles when other dynamics are at work.

Prime Minister Hawke himself has shown very strong, very close, very substantial and a very continuing personal interest in the development

of the bilateral relationship. His very first overseas visit as Prime Minister included a visit to Indonesia. There have been many instances since when he has tried to find holes in his program to take forward that personal relationship and, of course, he does have another visit planned there for early next year.

We have made a very substantial and vigorous series of attempts to build a broad-ranging relationship between the two countries in a variety of ways that I have often spelt out on the record before. The nature and character of that relationship is indicated by the fact, I guess, that notwithstanding the tension which presently exists over the East Timorese question, the Indonesian Government has been very willing and receptive to receive me visiting there next week — as I will be doing — when there will be ample opportunity to canvass these issues in detail.

Meanwhile, the Indonesian Government can be in no doubt at all about where Mr Hawke and the Australian Government generally stand on this issue as a result of a number of quite specific and quite substantial contributions that have been made to the debate on this subject and also, of course, the personal communication that the Prime Minister has had with the Indonesian Ambassador to Australia, Sabam Siagian.

Question without notice

Indonesia

(From *Hansard* of 10 December)

Senator Loosley — My question is directed to the Minister for Foreign Affairs and made and also relates to Australian relations with Indonesia. Has the Minister seen the article in the *Bulletin* of 10 December entitled "Uranium Sales to Indonesia Proposed"? Is it he case that the Australian Government has taken steps to facilitate the sale of Australian uranium to Indonesia? Is the article based on correct assumptions?

Senator Evans — I have seen the article to which Senator Loosley refers. The information which the *Bulletin's* investigation purports to reveal has been on the public record for some time, not least as a result of answers which I gave to questions in the Senate in June of this year. There have been discussions since late 1990 between Australian and Indonesian officials on a nuclear science and technology cooperation agreement. The objective of such an agreement would be to enhance existing and mutually beneficial scientific and technological cooperation in the peaceful nuclear field, including such areas as nuclear safety, nuclear medicine and radiation protection.

Indonesia is a party to the Nuclear Non-Proliferation Treaty and, pursuant to its NPT obligations, has a full scope safeguards agreement with the International Atomic Energy Agency covering its existing and future nuclear activities. The agreement in question would not, if it were to be negotiated to fruition — as I have said before and as, indeed, the article itself notes, despite the misleading title — provide for commercial transfers of Australian uranium to Indonesia.

The possibility of future commercial transfers is foreshadowed in the draft agreement, but if such sales were proposed a bilateral safeguards agreement which meets all Australia's safeguards policy requirements would need to be in place, and there have been no negotiations with Indonesia on any such agreement. In any event, Indonesia would not be operating a nuclear power plant before the early years of the next century at the earliest, and I am not aware of any current Indonesian plans for the importation of uranium for power generation in that context. Discussions on the nuclear cooperation agreement are continuing and an agreement has not yet been finalised.

As I have also said before, the Government will give consideration to the steps it might take to review aspects of the bilateral relationship and bilateral contacts in the light of the outcome of the Indonesian inquiry into the killings in East Timor, but, as I have also said, it would be quite inappropriate for us to assume at this stage that that inquiry will no be a credible one. It is in that context that this proposed agreement could be looked at, like everything else, but at this stage there is no reason whatsoever to assume that it will be.

Finally, the article makes a series of allegations about the environmental and other risks of Indonesia's nuclear power program, in respect of which I think the following comments need to be made. Indonesia, which is facing diminishing oil reserves, has made decisions about the energy mix it needs to meet its future requirements on the basis of careful study. Australia respects Indonesia's sovereign right to make such decisions, just as we have the sovereign right to make similar decisions I do not see such risks, as alleged, from the tightly regulated nuclear power program using the latest Western technology which Indonesia is planning, as anything like as severe or as substantial as those which were indentified in the article, although there is of course no room for complacency about nuclear developments anywhere.

Finally, Australia, together with Indonesia and others, is working through the International Atomic Energy Agency to achieve the highest safety and non-proliferation standards for peaceful nuclear activities wherever those activities take place.

Question without notice

Indonesia

(From *Hansard* of 11 December)

Senator Vallentine — My question is addressed to the Minister for Foreign Affairs and Trade and it concerns East Timor. Does the Minister believe it is appropriate for him, or anyone else in his place, to sign an agreement this week with Indonesia which will allow oil and gas exploration in the Timor Sea, coming as it does only a month after the massacre in Dili and the subsequent efforts of the Indonesian military to cover up what happened there? Given the growing concern in the United States Congress and in Europe about Indonesia's appalling record in East Timor since 1975 and the plea by the East Timorese delegation which met with the Minister on 3 December for Australia to support East Timor's right to self-determination, does the Government now accept not only that it is inappropriate to pursue the division of spoils under the Timor Sea with Indonesia but also that Australia should now move to use the good offices of the United Nations in the future of East Timor as Australia has supported and promoted recent United Nations initiatives in Yugoslavia and Cambodia?

Senator Evans — The agreement being signed this week is very much pursuant to the treaty which already exists between Indonesia and Australia on the Timor Gap question. It would be a very serious matter indeed were Australia not to proceed with its obligations under that existing treaty arrangement which was freely entered into between two sovereign countries and is pursuant to what was obviously a de jure recognition by us — announced as such in 1979 and repeated by this Government in 1985 — so far as Indonesia's sovereignty over the border area in question is concerned.

In the circumstances of the present East Timor situation, it is the case — as I have made clear on numerous previous occasions — that the Government does not believe, on any evidence presently available to us, that what happened there, deplorable as it was, was something that could be construed as an act of state: a calculated or deliberate act of the Government as such. As such, it has to be regarded as quite distinct from the actions of government which were involved in the Tiananmen Square exercise in China or in the context of the administration of the apartheid regime in South Africa.

So long as we continue to make that judgment about the nature of the Dili massacre — that it was not an act of state but the product of aberrant behaviour by a subgroup within the country — it would be utterly inappropriate for us to take any steps which would bring the bilateral relationship into disrepair. It would certainly be quite inappropriate for us to even contemplate taking a step so grave as to, in effect, tear up a solemn international treaty entered into between two countries. That is not a step the Government is prepared to take.

We have said that in the event that the investigation presently under way should prove to be manifestly unsatisfactory — and, of course, we all hope very much that that will not be the case — then we will be prepared to review the whole nature of our relationship with Indonesia and the bilateral contacts that are associated with the East Timor question. I have said that before, the Prime Minister has said it, and that remains the case.

In the meantime, we are actively pursuing a number of issues with the Indonesians and I will, of course, be pursuing these very directly and in very great detail next week during my visit there. One of those issues is the role of the United Nations. We do believe it would be very appropriate indeed were the Secretary-General, in the exercise of his good offices, to send an envoy or a representative — perhaps one of the special rapporteurs on particular subject matters who do exist in the UN system — to enter into discussions with the Indonesian authorities on the conduct of the inquiry and perhaps participate in some supportive way in that inquiry to give added confidence in it to witnesses and, of course, to the international community, and to assist in the process of discussing means of effective reconciliation between the East Timor people and the Indonesian Government. There is genuinely, we believe, a role for the United Nations in that respect. We hope very much that the Indonesian Government will see it that way. That is one of the issues that I will be actively pursuing in Jakarta next week

Senator Vallentine — Mr President, I ask a supplementary question. I put it to Senator Evans that the existing Timor Gap treaty should be put on hold pending the present inquiry and the hoped for United Nations inquiry. I further ask whether Senator Evans really expects ordinary citizens of East Timor to come before that Indonesian Government inquiry when they are threatened yet again by Sutrisno, the commander of the armed forces, who has said that after the inquiry is over they will, and I quote:

> . . . wipe out and uproot the disturbance movement which has tainted the government's dignity.

In Senator Evans's estimation, is this Indonesian Government inquiry worth anything at all? Is it not completely lacking in credibility when citizens of East Timor are scared for their lives if they dare to speak out to that inquiry?

Senator Evans — It is not a matter of doing anything as simple as putting the treaty arrangements on ice. There is a plan of operational activity; there is a course of action that has been identified as appropriate and indeed required under that particular treaty. The time for taking that further step has arrived, and it would, as I say, be a very serious act indeed and in effect amount, as I understand it, to a breach possibly of our treaty obligations were we not to proceed with those arrangements this week.

As to the particular remarks attributed to General Sutrisno this week, they are obviously regrettable, if accurate. I certainly am seeking an opportunity, and I believe I will have the opportunity, to meet with General Sutrisno when I visit Indonesia next week. I will certainly be making very clear to him and to other members of the Government just how regrettable and how manifestly unacceptable we regard the sentiments attributed to him as being, and how unhappy those sentiments are from the point of view of Indonesia's national interests and international reputation.

I hope that, in an atmosphere of slightly more restrained discussion than it is possible to conduct at this distance in this currently rather troubled environment, it will be possible to make some of those points effectively in a way that will have some effect. I can only try.

Resolution of Australian Senate, 27 November 1991 on Dili killings

Matter of urgency

East Timor

(From *Hansard* of 26 November)

The following motion as moved by Senator Evans was passed by the Senate.

The Senate

(a) expresses its deepest sympathy to the people of East Timor for the appalling tragedy they experienced with the Dili massacre of 12 November 1991;

(b) condemns in the strongest terms the resort by the Indonesian military to force which on every account was wholly excessive;

(c) regards as deeply repugnant the reported comments of the Indonesian Commander-in-Chief on the day following the massacre that the "disruptors . . . had to be shot";

(d) notes the Indonesian Government's decision to establish a National Commission of Investigation to investigate all aspects of the massacre, and calls upon it to take every necessary step to ensure to the satisfaction of both the East Timorese and international communities:

(i) that the inquiry is "free, accurate, just and thorough", as promised;

(ii) that it is conducted fairly and impartially, with all witnesses guaranteed protection against intimidation or retaliation; and

(iii) that appropriate action is taken against those found to be responsible for unlawful or excessive acts;

(e) further calls upon the Indonesian Government:

(i) to provide immediate access by humanitarian and aid groups, especially the International Committee of the Red Cross, to those wounded or detained as a result of the events of 12 November and other recent incidents in East Timor, without any prejudice to those so visited;

(ii) to respond promptly to requests for information in relation to detained or missing persons about whom concern has been expressed following the events of 12 November and other recent incidents;

(iii) to release all political prisoners detained because of their opposition to the integration of East Timor with Indonesia; and

(iv) to guarantee that individuals who express peaceful opposition to the integration of East Timor with Indonesia are free from intimidation, harassment or detention;

(f) requests the Government to instruct the Australian Ambassador to Indonesia to make an early visit, and subsequently regular visits, to East Timor to report fully on all aspects of the present situation and the progress of the National Commission of Investigation;

(g) requests the Australian Government, having regard to the full range of its policies toward and bilateral contacts with Indonesia, to give consideration to the steps which it might take to review these policies and contacts in the event that the Indonesian investigation and follow-up action is unsatisfactory, for example the suspension of military training programs;

(h) notes the importance of any Australian Government response to the 12 November massacre not only reflecting the deep concern of the wider Australian community but also being consistent with Australia's own national interests and above all with the interests and welfare of the East Timorese people;

(j) calls, accordingly, upon the Government to explore all possible constructive avenues for:

(i) guaranteeing the effectiveness of the investigation process and its follow-up;

(ii) achieving a peaceful resolution of the ongoing conflict, including by requesting the Indonesian Government, in the Prime Minister's words, to "sit down with the people of East Timor including the resistance forces and try and work out a program of achieving peaceable relations"; and

(iii) meeting the longer-term needs and aspirations of the East Timorese people; and

(k) in particular in these respects, the Senate requests that:

(i) the Foreign Minister make an early visit to Indonesia to discuss all aspects of the East Timor situation, including the events of 12 November and options for effective longer-term reconciliation;

(ii) active steps be taken to explore the role which might now be played, with wide international support, by the United Nations and its Secretary General;

(iii) strong support be given to the role of the International Commission of the Red Cross in protecting and promoting human rights in East Timor, through continued representations to the Indonesian authorities and if possible targeted financial assistance; and

(iv) approval be sought for the establishment of a resident Australian Consulate in Dili.

Response by the Australian Minister for Foreign Affairs to the outcome of the trial of Xanana Gusmao, 24 May 1993

Xanana Gusmao

Senator GILES—My question is directed to the Minister for Foreign Affairs. What is the Government's response to the verdict in the trial of Fretilin leader Xanana Gusmao? Was the trial conducted fairly and was Xanana given adequate opportunities to mount a defence?

Senator GARETH EVANS—Xanana Gusmao was found guilty last Friday, 21 May, under article 106 of the Indonesian criminal code, of sedition and rebellion and, under the emergency law, of possession of firearms. He has been sentenced to life imprisonment. He was not charged under the anti-subversion law, which carried the death penalty and, although the firearms offence did carry that penalty, it was not sought by the prosecution. The length of the life sentence has not been specified, but it should not be assumed that it means for term of one's natural life. In other cases in Indonesia life imprisonment has meant around 15 to 20 years, although with crimes against the State there have been cases—it must be acknowledged—in which this has been exceeded.

Given Xanana's self-acknowledged role as the leader of the armed resistance in East Timor and the uncontested nature of the key elements of the evidence, it has to be said that that verdict was not surprising. In fact, when compared with the charges laid and the sentences handed down in trials of other so-called rebels in Indonesia, Xanana's sentence is in fact less severe. His defence lawyer, Sudjono, has now said that Xanana is not appealing the sentence but will be seeking presidential clemency.

I have already made clear on a number of occasions, and I do so again, my hope and the Australian Government's hope that the Indonesian authorities will see the handling of Xanana's case as an occasion for achieving longer term reconciliation in East Timor, including through such strategies as a major reduction in the military presence, a major economic development strategy, further recognition of East Timor's distinctive cultural identity and possibly some greater degree of autonomy. It would obviously be of great help in achieving that reconciliation if Xanana's sentence were to be substantially reduced by presidential clemency and we will be making that point in our further discussions with the Indonesian Government.

As to the conduct of the trial, while in terms of the standards that we and others would ideally like to see applied, there were a number of specific problems with the overall fairness of the trial. However, they should not be overstated. None of them was unique to the management of this case nor

were they, in our judgment, so severe or so deep in nature as to have fundamentally impaired the process that is provided for under the Indonesian Criminal Procedures Code. Overall, court proceedings were open to diplomatic observers, to local and foreign media and to domestic and international human rights organisations, including Asia Watch, the ICJ and a UN observer. That was a welcome development.

However, it was regrettable that certain individual observers, including Australia's Rodney Lewis, were prevented from attending, effectively at all, and that no observers at all were admitted to the trial sessions on 12 and 17 May. It is also a matter for concern that Xanana was barred by court authorities from reading out in full his own prepared defence statement. The criminal code of Indonesia does provide for the accused to exercise the right of a full and final say and defence lawyer Sujono argued strongly that he should be allowed to read the full statement.

On the question of legal representation, it is not clear again that Xanana was given the lawyer of his choice, but it does seem at the same time generally accepted that defence lawyer Sudjono did make diligent and comprehensive efforts in mounting the defence case. He met Xanana five times before the trial began and had no difficulty of access to him during the trial.

Finally, on the question of his treatment during detention and trial, we have no information to suggest that he was ill-treated, and we have been closely following the case through our mission in Jakarta from the start, including through contact with a number of independent non-government organisations. I remain confident of the assurances given to me at the highest levels of the Indonesian Government that Xanana would not be ill-treated in detention. I have, however, instructed our embassy in Jakarta to raise with the Indonesian authorities the need for continuing regular access by the International Committee of the Red Cross to Xanana and to other detainees.

HUMAN RIGHTS IN EAST TIMOR

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS

OF THE

COMMITTEE ON INTERNATIONAL RELATIONS HOUSE OF REPRESENTATIVES

NINETY-FIFTH CONGRESS

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STATEMENT OF GEORGE H. ALDRICH, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

Mr. ALDRICH. Mr. Chairman, I am appearing before you this morning in response to the chairman's request for our testimony on the legal aspects of the East Timor problem.

Indonesia's military intervention in East Timor in December 1975, and the subsequent incorporation of East Timor into Indonesia in July 1976, raised a number of difficult legal questions. These questions have related to permissible uses of force under the U.N. Charter and uses of U.S.-furnished equipment under applicable U.S. law and agreements between the United States and Indonesia, as well as the right of the people of East Timor to self-determination.

In an ideal situation, the process of decolonization of East Timor would have proceeded in an orderly fashion with Portugal preparing for an early transfer of power pursuant to a plebiscite or other act of self-determination by the people of East Timor conducted in an atmosphere of free political activity. Unfortunately, the situation did not develop that way, and Portugal, preoccupied with political upheaval at home and in its African colonies, abandoned in fact its administration of the territory in August 1975 and left the struggle to the warring local factions.

From that period until at least November 1975, Indonesia recognized Portugal as retaining legal authority and responsibility for the future of East Timor. It also held discussions with some of the Timorese parties. In late November 1975, Fretelin, a faction which had gained control of the former Portuguese arsenal and, consequently, military primacy over much of the territory of East Timor, declared itself the government of an independent "Democratic Republic of East Timor." This declaration was not accepted by members of the other factions in East Timor and vigorous fighting continued. Indonesia then intervened militarily.

The immediate legal question posed to the United States by Indonesia's intervention in East Timor was whether any use by Indonesia in East Timor of U.S.-furnished military equipment placed Indonesia in substantial violation of its agreements with the United States governing the use of such equipment. These agreements had been entered into in implementation of the provisions of the Foreign Assistance Act and Foreign Military Sales Act governing the purposes for which such equipment could be furnished by grant or by sale to Indonesia. Essentially, the applicable agreements limited use of U.S.-furnished equipment to internal security and legitimate self-defense, and the statutes precluded furnishing of new items of assistance while any substantial violation continued.

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[1] The article is too long to be included in the record. See New York University Journal of International Law and Politics, vol. 8, winter 1976 article entitled "The Right of Self-Determination in Very Small Places."

This matter was considered within the Department of State in light of all prevailing circumstances, including the difficulty of determining the relevant facts as to the extent and nature of use of any U.S. equipment and the urgent consideration being given to the question in the United Nations. We had in mind specifically U.N. Security Council Resolution 384 of December 22, 1975, which called upon all states to respect the right of the people of East Timor to self-determination and requested the U.N. Secretary General to send to East Timor a special representative to make an on-the-spot assessment and to establish contact with all interested parties in order to insure implementation of the resolution. It was decided that it would be appropriate in these circumstances to defer further sales under the foreign military sales program and grants under the military assistance program with respect to Indonesia and to defer foreign military sales financing for Indonesia pending further clarification and developments. In view of this action, it was not necessary for us to make any determination whether there had been any "substantial violation" within the meaning of the law.

This situation continued until the end of June 1976, a period of approximately 6 months. At that time, for a variety of reasons, we decided to resume our military assistance and sales programs to Indonesia. The legal basis for ending the suspension included congressional authorization of military assistance for Indonesia—for fiscal years 1976 and 1977—and the defeat of a proposed amendment urging a cutoff of such assistance on account of Indonesian actions in Timor.

During the period from December 1975, until June 1976, it was the policy of the United States to favor a resolution of the problem of East Timor by the Timorese and other concerned parties themselves. We supported Security Council Resolution 384 as well as U.N. General Assembly Resolution 3485 of December 12, 1975, also calling for respect for the right of self-determination of the people of East Timor. We remained hopeful that the report of the special representative of the Secretary General would offer a promising course but, due to a number of factors, it was inconclusive and again called on the parties to work out a solution. We abstained on Security Council Resolution 389 of April 22, 1976, largely because the Security Council did not accept an amendment which would have acknowledged steps taken by Indonesia to begin withdrawal of its forces from East Timor, but at the same time the U.S. Representative reaffirmed "our support of the right of the people of East Timor * * * for * * * self-determination."

On July 17, 1976, Indonesia formally incorporated East Timor as its 27th province. This followed unanimous approval by the People's Council of East Timor on May 31, 1976, of a petition asking Indonesia to accept integration of East Timor into Indonesia. According to information we have received from Indonesian authorities, the People's Council consisted of 28 members, the majority of whom were said to have been tribal chiefs and other traditional leaders selected through meetings of local leaders, with the representatives from Dili, the capital city said to have been chosen by direct elections. We actually know very little about the selection process for these delegates, although the process itself took place at a time of military occupation by Indonesia during which considerable fighting was still going on.

The U.S. Government did not question the incorporation of East Timor into Indonesia at the time. This did not represent a legal judgment or endorsement of what took place. It was, simply, the judgment of those responsible for our policy in the area that the integration was an accomplished fact, that the realities of the situation would not be changed by our opposition to what had occurred, and that such a policy would not serve our best interests in light of the importance of our relations with Indonesia. It was for these reasons that the United States voted against U.N. General Assembly Resolution 31/53 of December 1, 1976, which rejected the incorporation of East Timor into Indonesia and recommended that the Security Council take immediate steps to implement its earlier resolutions to secure exercise by the people of East Timor of their rights of self-determination.

I think it is important to state that I do not view U.S. policy in the case of East Timor as setting a legal precedent for future cases. The fact is that decisions whether or not to treat an entity as part of another entity are most often taken as political decisions on the basis of all the circumstances of the particular case in what is perceived as the national interest. An important factor to be considered, obviously is our commitment under articles 55 and 56 of the U.N. Charter to promote respect for human rights, including the right of self-determination. However, the question remains what we are required to do if this right is not observed as we might wish in a situation in which we believe that efforts by us to change the situation would be futile, probably would not be of any help to the people concerned, and would be injurious to other national interests of the United States. We do not believe that we are required in such circumstances to refrain from acting on the basis of the prevailing factual situation.

In the case of East Timor, the policy judgment has been made by this administration, as stated by Deputy Assistant Secretary Oakley last March, that our interests would not be served by seeking to reopen the question of Indonesian annexation of East Timor. Instead, we have directed our efforts to urging Indonesia to institute a humane administration in East Timor and to accept an impartial inspection of its administration by the International Committee of the Red Cross. It is believed that these measures represent the most effective way we can promote the human rights of the inhabitants of East Timor in the present circumstances.

Thank you, Mr. Chairman.

Mr. FRASER. Thank you, Mr. Aldrich.

Mr. Meeker.

ANNEX 5

1982 US statement on recognition of East Timor

RECENT DEVELOPMENTS IN EAST TIMOR

HEARING

BEFORE THE

SUBCOMMITTEE ON ASIAN AND PACIFIC AFFAIRS

OF THE

COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

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STATEMENT OF HON. JOHN H. HOLDRIDGE, ASSISTANT SECRETARY OF STATE FOR EAST ASIAN AND PACIFIC AFFAIRS

Mr. HOLDRIDGE. Thank you very much, Mr. Chairman.

It is a pleasure to be before you and the other members of the committee. I am pleased to have this opportunity to discuss with you the situation in East Timor. This is the fifth time the State Department has testified before the House of Representatives on this specific subject since March 1977.

The most recent such occasion was in June 1980, before the Subcommittee on International Operations.

In addition, I commented on the situation in East Timor as part of a joint hearing on human rights in East Asia, held in November 1981 by your subcommittee and the Human Rights and International Organizations Subcommittee.

It is important as we examine this complex situation in East Timor that we give due note both to the progress that has been achieved in meeting the humanitarian needs of the Timorese people as well as to the problems that remain.

U.S. POLICY REGARDING EAST TIMOR

We don't want to disguise the fact there are problems and that these need to be addressed on a continuing basis. U.S. policy with regard to East Timor has been consistent through three administrations. We accept the incorporation of East Timor into Indonesia, without recognizing that a valid act of self-determination has taken place there.

We simply say it is impossible and impractical to turn back the clock. Our efforts now are concentrated on doing what we can to improve the welfare of the Timorese people. Particularly, we have found that progress can be achieved only by working closely with the Indonesian Government and with the international organizations active in East Timor.

In addition to our concern regarding East Timor, there are a number of other important elements in our relationship with Indonesia.

I wouldn't want to submerge these in our concerns about the situation in East Timor. We value highly our cooperative relationship with Indonesia and expect it to continue.

In fact, we are looking forward to the visit of President Suharto of Indonesia next month.

Let me proceed by outlining our view of current conditions in East Timor.

THE CURRENT FOOD AND HEALTH SITUATION

Any consideration of the current food and health situation in East Timor must begin by acknowledging the major relief effort undertaken jointly by the Indonesian Government, international

agencies and the United States and other donors from mid-1979 to early 1981.

By April 1981, the involved international agencies concluded that the emergency situation had been overcome and that the long-term needs of the Timorese people could best be met by shifting emphasis from relief to development.

In the last year, there have been reports that the food situation was again deteriorating and East Timor was facing the threat of famine.

Since the economy and agricultural base of East Timor are extremely fragile, the United States has been quick to look into any reports of food shortages.

Based on our monitoring, it is our view that East Timor is not now facing a famine situation, nor the threat of famine in the near future.

However, in some isolated areas, particularly in the southeast portion of the island, there are food shortages. These areas demand and are apparently receiving immediate attention.

Serious health problems remain in East Timor. Malaria is a particularly acute problem, affecting large numbers of the population.

The Indonesian Government and the international agencies have ongoing programs to address both food and health problems, and we are supportive of those.

THE MILITARY SITUATION

With regard to the military situation, Fretilin, the Timorese guerrilla group does not seriously threaten overall Indonesian authority.

Fretilin does, however, retain the capability to conduct occasional, limited operations. Its operations continue to result in some Indonesian and Fretilin casualties.

There are unconfirmed reports of a recent upsurge in Fretilin activity, perhaps designed for propaganda impact in advance of the upcoming UNGA session. This is a characteristic we have noted in past years.

It is noteworthy that the people of East Timor turned out in large numbers in May of this year to participate for the first time in Indonesian national elections.

The elections in the province were carried out without disruption, in a completely peaceful atmosphere.

We remain concerned about reports of abuses in connection with military operations. One of the more extreme charges made is that Indonesian forces have engaged in a systematic effort to kill innocent Timorese. We have found no evidence to support such a charge.

There are also recurring charges of disappearances and mistreatment of Timorese. While any abuse of human rights is deplorable, the number of allegations of physical mistreatment and disappearance has declined since the period of fiercest fighting between Indonesia and Fretilin forces in 1976–78.

Nevertheless, we are continuing to follow allegations of military abuses of this sort.

DETAINEES

Another positive development is that there is more information available to the international community on the numbers and conditions of detainees in East Timor as a result of the increased international access permitted by the Government of Indonesia to the principal places of detention: Comarca Prison in Dili and Atauro Island off the coast of East Timor.

An ICRC team visited East Timor in February to begin a program of prison visitation and visited both sites.

Most persons suspected by the Indonesian Government of supporting, or sympathizing with Fretilin are detained on Atauro Island.

The ICRC team, on its February trip, spent 4 days on Atauro and reported 3,737 persons had been temporarily relocated to the island. Most of these people had been sent to Atauro during military sweep operations in 1981.

We have no reliable information on the precise, current population on Atauro, but have no reason to believe it has dramatically changed in recent months.

A recent Embassy visitor indicated conditions on Atauro have improved considerably since the ICRC began its prison visitation program in February.

DEALING WITH REMAINING PROBLEMS

Let me now report on what is being done to address the humanitarian and economic development problems that remain in East Timor.

By far the most active and important role is being undertaken by the Government of Indonesia itself, which has significantly expanded its development activities in East Timor each year since 1976.

This Indonesian effort is even more striking when viewed in the context of that country's overall development needs. Although faced in each of its 26 far-flung Provinces with enormous socioeconomic problems, the GOI has given top development priority to East Timor. This year it will spend more per capita on development in East Timor than in any other Province.

It also must be noted that the Government's development effort must, by necessity, be concentrated at this stage on fundamental infrastructure projects, since there were almost no basic facilities at the time of the Portuguese withdrawal.

I might add I have gone into this question of what the Indonesian Government is doing in greater detail in my prepared statement.

ROLE OF INTERNATIONAL ORGANIZATIONS

Supplementing the Indonesian Government efforts, the international organizations have made a major contribution to improving the welfare of the Timorese people. Going about their tasks in a nonpolitical, nonpolemical way, they have succeeded where a confrontational approach would surely have failed.

The International Committee of the Red Cross [ICRC] has five ongoing activities in East Timor. First, it is continuing to provide

technical assistance to the Indonesian Red Cross in support of food and health programs in East Timor.

Second, ICRC is serving as the intermediary for family reunification of persons with immediate relatives in Portugal and elsewhere.

Third, it has administered a tracing program to assist Timorese, both in Timor and abroad, to locate missing or displaced relatives.

Fourth, as already noted, in February 1982, the ICRC began a program of prison visitations.

Finally, food and medical supplies provided through ICRC since March to detainees on Atauro have had a significant positive effect on the conditions of detention. This program is continuing.

Catholic Relief Services [CRS], which had the largest program in East Timor during the international relief effort, has turned its attention to agricultural development.

It is administering a 5 year, $5 million river basin development plan.

A third international agency, the United Nations International Childrens' Emergency Fund [UNICEF], has recently begun work in East Timor.

UNICEF will work with the Indonesian Red Cross in providing primary health care services to the women and children in seven villages where health conditions are poorest.

All three of the agencies listed above have expatriate staff in Djakarta who travel frequently to East Timor and enjoy good access throughout the province.

In addition to the international agency programs, the U.S. Agency for International Development [USAID] is working directly with the Indonesian Government in implementing a malaria control program under a $3.6 million agreement signed in mid-1980 to cover the entire island of Timor, both East and West.

When the project is complete, an estimated 45 percent of the population of East Timor will be protected against malaria.

ACCESS TO EAST TIMOR

Another area of U.S. concern is access to East Timor. While international access to East Timor remains limited, there has been major improvement in recent months.

In addition to a continuation of the improved access to East Timor enjoyed by U.S. mission and international agency personnel, there has been an increase in the number of journalists and diplomatic personnel allowed to visit the island. Among these have been a U.S. academic group, including Stanley Roth of Chairman Solarz' staff in November 1981; former Australian Prime Minister Gough Whitlam in February of this year, journalists from the Philadelphia Inquirer; Asian Wall Street Journal; and Reuters News Agency in May June; members of the Djakarta diplomatic community in early August; and an American Jesuit official in late August 1982.

Indeed, one of the reasons for the recent flurry of press articles on East Timor is precisely because the Indonesian Government has been increasingly willing to let outsiders into the Province to take a look at the situation firsthand.

Increased access to East Timor is one of the best examples of how quiet efforts are most effective in addressing Indonesian human rights concerns.

Our Embassy in Jakarta also has followed closely the matter of family reunions and repatriation of Portugese citizens from East Timor, the majority of whom have been proceeding for residence either in Portugal or Australia.

Progress is being made, but details have not generally been made public.

In conclusion, the record shows progress in many areas.

The Indonesian Government has demonstrated a willingness to come to grips with some of the most disturbing problems, as evidenced by increased international access, the beginning of the prison visitation program, and the entry of UNICEF into the province.

We will continue to follow events in East Timor closely, taking every appropriate opportunity to continue our quiet dialog with Indonesians who are capable of influencing developments in the province and fostering the kind of humanitarian progress which is our common goal.

I want to say, Mr. Chairman, in conclusion, that we are not going to minimize the fact that problems continue to exist in East Timor. I am simply saying that we are doing our best through our own efforts, to see that what we can do to improve this situation.

Thank you very much.

[Mr. Holdridge's prepared statement follows:]

ANNEX 6

New Zealand statement on East Timor, 1978

United Nations Vote on East Timor

New Zealand abstained on the United Nations resolution about East Timor because it feels that the situation there is irreversible.

The Minister of Foreign Affairs said this today in answer to questions from the press.

A draft resolution on East Timor was approved on Tuesday by the Fourth Committee of the United Nations General Assembly by a vote of 55 to 29 with 42 abstentions. Among the other countries abstaining from the vote were *Britain, Canada, Fiji, and Western Samoa.*

"New Zealand does not question the central point of the resolution — that the people of East Timor have the right to decide their own future", said the Minister. "Our reservations relate to the reference in the draft resolution to the 'legitimacy' of the struggle of the people of East Timor.

"The information we have received from our Ambassador in Jakarta, and from other sources, has convinced the Government that the situation in East Timor is irreversible. We could not in good conscience support a resolution that would clearly encourage those people to continue their struggle when we believe that they cannot succeed." *(Press statement from the Minister of Foreign Affairs, Rt. Hon. B. E. Talboys, 7 Dec. 1978.)*

ANNEX 7

Text of resolution adopted by Commission on Human Rights, 1993

Economic and Social Council

Distr.
LIMITED

E/CN.4/1993/L.81/Rev.1
10 March 1993

Original: ENGLISH

No action vote 15-22(A)-12
VOTE 22(A)-15-12

COMMISSION ON HUMAN RIGHTS
Forty-ninth session
Agenda item 12

QUESTION OF THE VIOLATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN ANY PART OF THE WORLD, WITH PARTICULAR REFERENCE TO COLONIAL AND OTHER DEPENDENT COUNTRIES AND TERRITORIES

Angola, Belgium*, Brazil, Costa Rica, Denmark*, Finland, France, Germany, Greece*, Iceland*, Ireland*, Italy*, Liechtenstein*, Luxembourg*, Mozambique*, Netherlands, Norway*, Portugal, Spain*, Sweden*, Switzerland*, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution

1993/... Situation in East Timor

The Commission on Human Rights,

Guided by the Universal Declaration of Human Rights, the International Covenants on Human Rights and the universally accepted rules of international law,

Bearing in mind the statement on the situation of human rights in East Timor agreed by consensus by the Commission on Human Rights at its forty-eighth session (see E/CN.4/1992/84, para. 457) following the violent incident of 12 November 1991 in Dili,

* In accordance with rule 69, paragraph 3, of the rules of procedure of the functional commissions of the Economic and Social Council.

Recalling resolution 1992/20 of 27 August 1992 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

Gravely concerned at continuing allegations of serious human rights violations and noting with concern in this context the reports of the Special Rapporteur on the question of torture (E/CN.4/1993/26), of the Special Rapporteur on extrajudicial, summary or arbitrary executions (E/CN.4/1993/46) and of the Working Group on Enforced or Involuntary Disappearances (E/CN.4/1993/25),

Bearing in mind the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment approved by the General Assembly in its resolution 43/173 of 9 December 1988 and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, endorsed by the General Assembly in its resolution 44/162 of 15 December 1989,

Taking note of the information that the Government of Indonesia has provided the Commission on actions it has taken during the past year,

Welcoming the recent access to East Timor to human rights organizations as well as to some other relevant international observers, but remaining disappointed that such access is still frequently denied,

Having examined the report of the Secretary-General on the situation in East Timor (E/CN.4/1993/49),

1. Expresses its deep concern at the reports of continuing human rights violations in East Timor;

2. Recalls that the Commission has commended the decision of the Government of Indonesia to set up an inquiry commission but regrets that the Indonesian investigation into the actions of the members of its security personnel on 12 November 1991, from which resulted loss of life, injuries and disappearances, failed to clearly identify all those responsible for these actions;

3. Expresses its concern at the lack of information about the number of people killed on 12 November 1991 and at the persons still unaccounted for and urges the Government of Indonesia to account fully for those still missing since 12 November 1991;

4. Regrets the disparity in the severity of sentences imposed on those civilians not indicted for violent activities - who should have been released without delay - on the one hand, and to the military involved in the violent incident, on the other;

5. Calls upon the Government of Indonesia to honour fully its commitments undertaken in the statement on the situation of human rights in East Timor, agreed by consensus by the Commission on Human Rights at its forty-eighth session;

6. Also calls upon the Government of Indonesia to ensure that all the East Timorese in custody, including main public figures, be treated humanely and with their rights fully respected, that all trials be fair, just, public and recognize the right to proper legal representation, in accordance with international humanitarian law, and that those not involved in violent activities be released without delay;

7. Welcomes the greater access recently granted by the Indonesian authorities to human rights and humanitarian organizations, and calls upon the Indonesian authorities to expand this access further;

8. Encourages once again the Indonesian authorities to take the necessary steps to implement the recommendations presented by the Special Rapporteur on the question of torture in his report (E/CN.4/1992/17/Add.1) following his visit to Indonesia and East Timor and to keep the Special Rapporteur informed of the progress made towards their implementation;

9. Urges the Government of Indonesia to invite the Special Rapporteur on the question of torture, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances to visit East Timor and to facilitate the discharge of their mandates;

10. Welcomes the agreement given by the Government of Indonesia to the proposal of the Secretary-General for a new visit to Indonesia and East Timor by his Personal Envoy in the coming months, and invites the Secretary-General to consider transmitting the full reports of Mr. Wako's previous and next visit to the Commission on Human Rights;

11. Also welcomes the resumption of talks on the question of East Timor and encourages the Secretary-General to continue his good offices for achieving a just, comprehensive and internationally acceptable settlement of the question of East Timor;

12. Decides to consider the situation in East Timor at its fiftieth session on the basis of the reports of the Special Rapporteurs and Working Groups and that of the Secretary-General, which would include an analytical compilation of all information received from, inter alia, Governments, intergovernmental and non-governmental organizations.

ANNEX 8

Extract from Australia's first report to the Human Rights Committee, pursuant to Article 40 of the ICCPR

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Report By

AUSTRALIA

TO THE HUMAN RIGHTS COMMITTEE

Pursuant to Article 40(1)(a)

November 1981

ARTICLE 1

61. Australia is fully committed to the principles enunciated in this Article. Domestically, the people of Australia have exercised their right of determination by uniting as one people in a Federal Commonwealth under the Crown of the United Kingdom of Great Britain and (Northern) Ireland (see Part I, paragraphs 3-9 and the reference in Australia's instrument of ratification to Articles 2 and 50). In constitutional terms, the principal landmarks are the institution of responsible government for the six States pursuant to the Imperial Australian Colonies Government Act 1850 (the colonies adopted new Constitutions between 1855 and 1889) and the later federation of the six colonies in a Federal Commonwealth. The Commonwealth of Australia came into being on 1 January 1901 under the authority of the Imperial Commonwealth of Australia Constitution Act 1900. Under the Constitution, which is embodied in the Imperial Act, the Governor-General of Australia, as the representative of the Crown, is able to exercise all the powers of the Crown in Australia. In institutional terms, Australia self-government involved, as indicated in Part I, freely elected Parliaments, responsible executive government, an independent judiciary and the rule of law.

62. At the international level, Australia has traditionally been a strong supporter of the right to self-determination. In relation to Australia's dependent territories, see Part 1, paragraphs 9-16, which contain a note of the discharging of Australia's obligations in relation to its Territories. The note refers to Australia's former Territory of Papua and trust Territory of New Guinea; to Australia's conformity to its obligations under Article 73(e) of the United Nations Charter in relation to the Territory of Cocos (Keeling) Islands; and to its role recently in furthering the goal of complete internal self-government in relation to the Northern Territory and Norfolk Island.

(a) every person, whether private citizen or government official, is equally subject to the law; and

(b) the government must operate through and within the law - in particular, government officials must have legal authority for their actions and are subject to effective legal sanction if they contravene the law.

The reliance on the rule of law means that the rights of individuals are guaranteed by ordinary legal remedies without the need for formal constitutional guarantees.

8. Federal States are required by Article 50 of the Covenant (in conjunction with Article 2) to ensure that its provisions extend equally to all parts of that State. Australia is a federal system in which each jurisdiction has legislative, executive and judicial powers and responsibilities which can be, and are, exercised in different ways. This will be dealt with at points throughout this report, and especially in the section dealing with the reference in Australia's instrument of ratification to Articles 2 and 50. Suffice it to say at this stage that Australia will comply with the Covenant in accordance with the undertaking given at ratification. A federal State offers protections to the rights of individuals which may not be available in a unitary State. For example, if a right is not fully recognised in one jurisdiction, the others exert an influence on it; and the existence of the separate jurisdictions enables more detailed attention to be given to the problems of individuals within those jurisdictions.

9. It is appropriate to conclude this section of the report with a more detailed reference to the various Territories associated with the Commonwealth. Under section 122 of the Constitution, the Commonwealth Parliament has plenary power to make laws for any Australian Territories, and the Commonwealth is accordingly responsible for those Territories. Their laws have been reviewed as part of the Commonwealth-State exercise associated with ratification of the Covenant and reference is made to their laws in Part II as appropriate. The Territories include the Northern Territory, already referred

to, and the Australian Capital Territory, both located on mainland Australia. There are also four inhabited Territories external to the mainland - the Australian Antarctic Territory, Norfolk Island, Christmas Island and the Cocos (Keeling) Islands. The law in each of these Territories is largely law derived from a jurisdiction other than the Commonwealth. Commonwealth law does not apply to these Territories unless expressly stated to do so. Australia discharged the obligations it incurred as Administering Authority for the former Trust Territory of New Guinea and of the former Territory of Papua when the nation of Papua New Guinea became independent on 16 September 1975.

10. Under the Northern Territory (Self-Government) Act and associated legislation, the Northern Territory has been established with separate political, representative and administrative institutions, with its own powers to levy taxation and with its own system of courts. Accordingly, the Northern territory is, for the purposes of the Covenant, to be treated as a separate entity, akin to a State (see paragraph 3).

11. The Australian Capital Territory, in which is located the national capital Canberra, and the seat of government, is a non-self-governing mainland Territory. Its law is in part that applying generally throughout Australia (Commonwealth law); in part is contained in special Commonwealth laws applying to the Territory, e.g. the Seat of Government (Administration) Act 1910; in part is derived from New South Wales law (from whose territory the Territory was excised) prior to 1911; and in part is contained in Ordinances 'made' by the Governor-General, who, in effect, legislates for the Territory under section 12 of the Seat of Government (Administration) Act. The bulk of the law in this Territory is, in fact, contained in Ordinances.

12. Australia accepted the Australian Antarctic Territory as territory under the authority of the Commonwealth on 24 August 1936. By virtue of the Australian Antartic Territory

Act 1954, the laws of the Australian Capital Territory generally apply and the Supreme Court of the Australian Capital Territory has jurisdiction in that Territory. Commonwealth laws do not apply unless expressed to extend there. Australia is also a party to the 13 power Antarctic Treaty of 1959, concluded to ensure the use of the Antarctic for peaceful purposes.

13. The Norfolk Island Act 1979 equips Norfolk Island with responsible legislative and executive government to enable it to run its own affairs to the greatest practicable extent. The Act established a framework for Norfolk Island to achieve, over a period of time, internal self-government as a Territory under the authority of the Commonwealth. The law in force in Norfolk Island consists of laws and statutes in force in England on 25 July 1828; certain laws enacted by the Governor of Norfolk Island before the Island became a Territory of the Commonwealth; Commonwealth Acts applicable to Norfolk Island and enactments of the Territory. Since August 1979, the Legislative Assembly of Norfolk Island has exercised power, with the assent of the Administrator or the Governor-General, as the case may be, to make laws, called "Acts", for Norfolk Island. The courts of the Territory function in accordance with British and Australian court procedures.

14. The government of the Territory of Christmas Island is provided for by the the Christmas Island Act 1958 which is the basis of the Territory's administrative, legislative and judicial system. Under the Act, the laws in force in the Colony of Christmas Island immediately before the date of transfer of sovereignty to Australia were continued in force in the Territory, subject to their alteration, amendment or repeal by Ordinances made under the provisions of the Act. These laws comprise the laws of the Colony of Singapore specified in the Christmas Island Order in Council 1957 (Imperial Statutory Instrument 1957, No. 2166) together with certain Regulations made by the Administrator of the Colony of Christmas Island during the period 1 January to 30 September 1958 under powers conferred by section 9 of that Order in Council. Under the Act,

the power to make Ordinances for the peace, order and good government of the Territory is vested in the Governor-General of the Commonwealth of Australia. All Ordinances so made must be tabled in the Commonwealth Parliament and are subject to disallowance in part or whole by either House of Parliament. Generally, Commonwealth legislation does not extend to the Territory unless expressed to do so. The courts of the Territory function in accordance with British and Australian court procedures.

15. The Territory of Cocos (Keeling) Islands is a non-self-governing territory to which Chapter XI of the United Nations Charter applies. As required under Article 73(3) of the Charter, Australia has regularly submitted reports on the administration of the Territory to the United Nations Secretary-General for consideration by the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Committee of Twenty-Four). A mission of the Committee of 24 visited Cocos in July 1980 and expressed general satisfaction on the situation in the Territory in its subsequent report to the Committee and, through it, to the United Nations General Assembly.

16. The basis of the Territory's administrative, legislative and judicial system is the Cocos (Keeling) Islands Act 1955. The laws of the Colony of Singapore in force in the Islands immediately before transfer of sovereignty to Australia on 23 November 1955, were continued in force by the Act. Those laws included some 300 Ordinances. In addition to conferring on him the general power to make Ordinances for the peace, order and good government of the Territory, the Act also gave power to the Governor-General to amend or repeal any of the laws continued in force by the Act. The Singapore Ordinances Application Ordinance 1979, made by the Governor-General on 20 December 1979, had the effect of repealing all Singapore Ordinances in force in the Territory and applying the provisions of 95 selected Singapore Ordinances only (as specified in the Schedules to the Ordinance) to be laws of the

Territory as on and from 27 December 1979. Ordinances are required to be tabled in the Commonwealth Parliament and are subject to disallowance in part or whole by the Parliament. Generally, Commonwealth legislation does not apply to the Territory unless expressed to do so. Currently, some 100 Commonwealth Acts specify that they apply, in whole or in part, to the Territory. The courts in the Territory function in accordance with British and Australian court procedures (although the institutions, customs and usages of the Malay residents are given general protection under section 18 of the Cocos (Keeling) Islands Act).

ANNEX 9

Extract from response by Australia to questions on its first report to the Human Rights Committee, pursuant to Article 40 of the ICCPR

CCPR

Distr.
GENERAL

CCPR/C/SR.407
2 November 1982

ENGLISH
Original: FRENCH

HUMAN RIGHTS COMMITTEE

Seventeenth session

SUMMARY RECORD OF THE 407th MEETING

held at the Palais des Nations, Geneva,
on Thursday, 28 October 1982, at 10.30 a.m.

Chairman: Mr. MAVROMMATIS

CONTENTS

GE.82-17745

32. Turning to the questions which had been put in connection with specific articles of the Covenant, he noted that Australia's domestic position on matters relating to article 1 had given rise to little discussion. A question had, however, been asked concerning the regime in Australia's uninhabited territories. In that connection he said that, clearly, no area of Australian territory was outside the legislative, administrative and judicial regime in force.

33. Replying to questions concerning Australia's position on current international situations involving questions of self-determination, and in particular that of Namibia and the Palestinian people, he said that Australia was actively committed to the achievement of the right of peoples to self-determination. As an active member of the Committee of 24, Australia had played an important role in the United Nations decolonization activities, with particular emphasis on the South Pacific. As a member of the United Nations Commission on Human Rights, it had supported a number of resolutions reaffirming the right of peoples to self-determination, for example in Afghanistan and Kampuchea. As a member of the United Nations Council for Namibia, Australia had worked consistently towards securing for the Namibian people the full exercise of their right to self-determinatio which was at present denied them.] Australia recognized the Council for Namibia as the legal administering authority of the territory until its people were brought to independence. It fully supported the efforts of the Contact Group aimed at the speedy implementation of Security Council resolution 435. More generally, Australia's long-standing opposition to apartheid was well known. Australia had condemned human rights violations in southern Africa in a variety of United Nations forums and was committed to the eradication of the abhorrent system of apartheid.

Australia was committed to a comprehensive peaceful settlement in the Middle East supported both Israel's right to exist within secure borders and the right of the Palestinians to a homeland. A few days earlier, the Australian Minister for Foreign Affairs, in an address to the United Nations General Assembly, had called on Israel to recognize the legitimate rights of the Palestinians, pointing out that Israel, pre-eminently among nations, should understand the significance of a national homeland for a dispersed people. The Australian Government had long recognized that a political settlement of the Palestinian issue was central to peace and stability in the Middle East. It was nevertheless for the parties to the conflict to decide on the means whereby a comprehensive settlement might be achieved. As to the massacre of Palestinian civilians in refugee camps in West Beirut, the Australian Government had expressed its outrage and had condemned those responsible.

35. The Australian Government hoped that under Mr. Gemayel's leadership the processes of reconciliation in Lebanon would be encouraged and that the Lebanese Government would be able to reassert its sovereignty throughout its territory. His government believed that all foreign forces should be withdrawn from Lebanon and welcomed current efforts towards that end. At another level, Australia maintained its willingness to assist in the reconstruction of Lebanon. It had already contributed $A 2,338 million in emergency relief assistance to the victims of the conflict and had committed $A 10 million in reconstruction aid, at least half to be channelled through UNICEF.

[Extract from the]

REPORT

OF THE

HUMAN RIGHTS COMMITTEE

[containing comments on the Australian report]

GENERAL ASSEMBLY

OFFICIAL RECORDS THIRTY EIGHTH [illegible]

SUPPLEMENT No. 40 (A/38/40)

UNITED NATIONS

New York, 1983

139. As regards article 1 of the Co nant, mention was made of a statement in the report to the effect that the people of Australia had exercised t eir right to self-determination by uniting as one people in a Federal Commonwealth and information was requested on the manner in which the Aboriginals "who were already present when the first European settlers arrived in 1788" had participated in that exercise. Noting, according to the report, that Australia had traditionally been a strong supporter of the right to self-determination, it was asked whether that included recognition of the right to self-determination of the Palestinian people and the peoples of southern Africa and whether Australia had taken legislative and administrative action to prevent Australian corporations, companies and banks from assisting the apartheid régime in South Africa. In this connection, it was asked whether the Government's policy of self-management for the Australian Territories was considered a first stage on the road to self-determination.

140. In relation to article 2 of the Covenant, it was pointed out that, in countries such as Australia, in which the Covenant was not embodied in internal legislation, which did not have a comparable bill of rights and in which the legal system was based on the concept of the rule of law, where "the rights of individuals are guaranteed by ordinary legal remedies without the need for formal constitutional guarantees", as mentioned in the report, it was more difficult to prove that the Covenant was effectively implemented and that particular importance should, therefore, be attached to the commitment undertaken in this article not only to "respect" but also to "ensure" the rights recognized in the Covenant. Noting also that the rules derived from decisions of courts formed part of the law of the land, members asked how the Covenant was made accessible to judges, what arrangements had been made to ensure that judges would act in accordance with the obligations which Australia had assumed under international law and whether Australia was considering the incorporation of the provisions of the Covenant in domestic law or, failing that, the adoption of a Federal Bill of Rights or a Bill of Rights for each of the constituent states.

141. Noting the existence in Australia of many bodies and authorities competent to deal with human rights and referring to the various writs mentioned in the report, members wondered whether a common law system, such as that of Australia, provided any genuine or effective remedies to ensure the enjoyment of all the rights enunciated in the Covenant and suggested that an unwritten presumption of freedom was not sufficient. More information was needed, particularly on whether the Australian Human Rights Commission was competent to receive complaints from individuals whose rights had allegedly been violated and, if so, how many complaints it had received and what the nature of its arbitration function was; what recommendations had been made by that Commission with a view to the amendment

160. In connection with article 1 of the Covenant, the representative stated that his country supported the right of the Palestinians to a homeland; that it had worked consistently towards securing for the Namibian People the full exercise of their right to self-determination and that it had condemned human rights violations in southern Africa and was committed to the eradication of apartheid.

ANNEX 10

Extract from Australia's second report to the Human Rights Committee, pursuant to Article 40 of the ICCPR

AUSTRALIA'S SECOND REPORT

UNDER ARTICLE 40 OF THE

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

February 1987

14. Jervis Bay: The Jervis Bay Territory was excised from New South Wales in 1915. The intention, never realized in fact, was to provide Canberra, an inland city, with a seaport. The Jervis Bay Territory is deemed to form part of the Australian Capital Territory (by virtue of the Jervis Bay Territory Acceptance Act 1915), so that the laws in force in the Australian Capital Territory apply also to the Jervis Bay Territory.

15. Australian Antarctic Territory: Australia accepted the Australian Antarctic Territory as a Territory under its authority on 24 August 1936. Australia is also a party to the Antarctic Treaty of 1959, concluded to ensure the use of the Antarctic for peaceful purposes.

16. By virtue of the Australian Antarctic Territory Act 1954, the laws of the Australian Capital Territory generally apply and the Supreme Court of the Australian Capital Territory has jurisdiction in the Australian Antarctic Territory. Commonwealth laws (other than Australian Capital Territory laws) do not apply unless expressed to extend to the Territory. The Governor-General may also make Ordinances for the Territory which are to be tabled in the Australian Parliament and may be subject to disallowance by the Parliament.

17. Norfolk Island: The Norfolk Island Act 1979 equips the small Territory of Norfolk Island with responsible legislative and executive government to enable it to run its own affairs to the greatest practicable extent. The Act established a framework for Norfolk Island to achieve, over a period of time, internal self-government as a Territory under the authority of the Australian Government.

18. The law in force in Norfolk Island consists of laws and statutes in force in England on 25 July 1828; certain laws enacted by the Governor of Norfolk Island before the Island became an Australian Territory; federal Acts applicable to Norfolk Island and enactments of the Territory. Since August 1979, the Legislative Assembly of Norfolk Island has exercised power, with the assent of the Administrator or the Governor-General, as the case may be, to make laws (called "Acts") for Norfolk Island. The courts of the Territory function in accordance with Australian court procedures.

19. Christmas Island: The Territory of Christmas Island has a population of approximately 3,000. The government of the Territory of Christmas Island is provided for by the Christmas Island Act 1958 which is the basis of the Territory's administrative, legislative and judicial system. Under the Act, certain of the laws in force in the Colony of Christmas Island immediately before the date of transfer of sovereignty to Australia were continued in force in the Territory, subject to their alteration, amendment or repeal by Ordinances made under the provisions of that Act. These laws comprise the laws of the Colony of Singapore specified in the Christmas Island Order in Council 1957 (Imperial Statutory Instrument 1957, No. 2166). Under the Christmas Island Act, the power to make Ordinances for the peace, order and good government of the Territory is vested in the Australian Governor-General. All Ordinances so made must be tabled in the Australian Parliament and are subject to disallowance in part or in whole by either House of Parliament. Generally, federal legislation does not extend to the Territory unless expressed to do so. The Christmas Island Administration (Miscellaneous Amendments) Act 1984 provided for the extension of a number of significant Commonwealth laws to the Territory including the Commonwealth Electoral Act, Health legislation and the Social Security Act. The courts of the Territory function in accordance with Australian court procedures.

20. Cocos (Keeling) Islands: The Territory of Cocos (Keeling) Islands has a population of approximately 1,800. The Territory was a non-self-governing territory to which Chapter XI of the United Nations Charter applied. The Australian Government has continued to implement policies which promote the political, social, economic and educational advancement of the Cocos Malay people on the Cocos (Keeling) Islands. These policies culminated in an Act of Self-Determination held on 6 April 1984, observed by a United Nations Visiting Mission. Three options were placed before the Cocos Malay people - independence, free association, and integration as provided for in Resolution 1541(XV) adopted by the United Nations General Assembly in 1960. The Cocos Malay community decided to integrate with Australia.

21. Following the Act of Self Determination the federal Parliament passed the Cocos (Keeling) Islands Self-Determination (Consequential Amendments) Act 1984 which extended a number of Commonwealth laws to the Territory. The extension of those laws had the effect, amongst other things, of giving the Cocos people full voting rights in federal elections and access to federal social security pensions and benefits. The Territory's administrative, legislative and judicial system remained unchanged.

22. The basis of the Territory's administrative, legislative and judicial system is the Cocos (Keeling) Islands Act 1955. The laws of the Colony of Singapore in force in the Islands, immediately before transfer of sovereignty to Australia on 23 November 1955, were continued in force by the Act. Those laws included some 300 Ordinances. In addition to conferring on the Governor-General the power to make Ordinances for the peace, order and good government of the Territory, the Act also gave to the Governor-General the power to amend or repeal any of the laws continued in force by the Act. The Singapore Ordinances Application Ordinance 1979,

made by the Governor-General on 20 December 1979, had the effect of repealing all Singapore Ordinances in force in the Territory and applying the provisions of 95 selected Singapore Ordinances only (as specified in the Schedules to the Ordinance) to be laws of the Territory as on and from 27 December 1979. New Ordinances are required to be tabled in the Australian Parliament and are subject to disallowance in part or whole by the Parliament. Commonwealth laws only apply in the Territory where expressly stated to do so, or by necessary implication. The courts in the Territory function in accordance with Australian court procedures (although the institutions, customs and usages of the Malay residents are given general protection under section 18 of the Cocos (Keeling) Islands Act).

23. Uninhabited Territories: The law in the Territory of Ashmore and Cartier Islands is currently the law that was in force in the Northern Territory immediately prior to 1 July 1978. However, the Ashmore and Cartier Islands Acceptance Amendment Act 1985 will have the effect, when brought into operation, of bringing into force in the Territory of Ashmore and Cartier Islands the laws of the Northern Territory as amended from time to time. At the same time it is proposed to exclude the application of a large number of the Northern Territory laws that would otherwise apply in the Territory of Ashmore and Cartier Islands but which are inappropriate to that Territory, leaving a body of regularly updated and relevant law.

24. The laws in force in the Territory of Heard Island and McDonald Islands are the laws in force from time to time in the Australian Capital Territory so far as applicable and Acts of the Commonwealth Parliament expressed to extend to the Territory. The Coral Sea Islands Act 1969 and the Heard Island and McDonald Islands Act 1953 also provide that the Governor-General may make Ordinances for the peace, order and good government of those Territories. These Ordinances must be tabled in the federal Parliament and are subject to disallowance by that Parliament.

ARTICLE 1

104. For Australia, the principal landmarks in achieving self-government were the institution of responsible government for the six States pursuant to the Imperial Australian Colonies Government Act 1850 (the colonies adopted new Constitutions between 1855 and 1889) and the later federation of the six States in the federal Commonwealth. The Commonwealth of Australia came into being on 1 January 1901 under the authority of the Imperial Commonwealth of Australia Constitution Act 1900. Under the Constitution, which is embodied in the Imperial Act, the Governor-General of Australia, as the representative of the Crown, is able to exercise all the powers of the Crown in Australia. In institutional terms, Australia self-government involved, as indicated in Part I, freely elected Parliaments, responsible executive government, an independent judiciary and the rule of law.

105. Australian Territories: Australia's former Territory of Papua and Trust Territory of New Guinea which had been jointly administered as the Territory of Papua New Guinea became independent of Australia in 1973. Australia completed its obligations under Article 73(e) of the United Nations Charter in relation to the Territory of Cocos (Keeling) Islands in 1984. The measure of self-government existing in the Northern Territory and Norfolk Island has already been referred to in Part I of this Report.

106. At the international level, Australia has traditionally been a strong supporter of the right to self-determination. This is evidenced by the action taken by the Australian Government in respect of the Cocos Malay people on the Cocos (Keeling) Islands, which culminated in the Act of Self-Determination held on 6 April 1984 (see paragraph 20).

The United Nations Visiting Mission which observed the voting process was led by Ambassador Coroma of Sierra Leone, with its other members from Fiji, Venezuela and Yugoslavia. The Mission was of the unanimous view that the people of Cocos had exercised their right to self determination in accordance with the United Nation's Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples.

ANNEX 11

Extract from response by Australia to questions on second report to the Human Rights Committee, pursuant to Article 40 of the ICCPR

LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE SECOND PERIODIC REPORT OF AUSTRALIA (CCPR/C/42/Add.2)

I. Constitutional and legal framework within which the Covenant is implemented (article 2(2) and (3))

(a) What is meant by the phrase (para.53 of the report) that "prior to or without legislative implementation, some of the requirements of the Covenant may be implemented at an administrative level"? Are the rights guaranteed under the Covenant all available as a matter of State and federal law notwithstanding the absence of legislation incorporating the Covenant or of a Bill of Rights?

(b) What information is available on the effectiveness of the Ombudsman's powers either to provide a remedy or to lead to changes in the law ?

(c) What is the relationship between the Federal Court and the High Court? In what circumstances are appeals permitted from decisions of non-judicial persons and authorities and are these required to be directed only to the Federal Court ?

(d) Please elaborate on the status of the new Human Rights and Equal Opportunity Commission and its capacity to monitor compliance with the Covenant. Can it receive complaints from individuals?

(e) What efforts are being made to make the entire population aware of the rights guaranteed under the Covenant?

II. Self-determination (article 1)

What is Australia's position with regard to self-determination in general and specifically with regard to the struggle for self-determination of the South-African, Namibian and Palestinian people?

III. Non-discrimination and equality of the sexes (articles 2(1), 3 and 26)

(a) What are the implications of the constitutional inability of the Federal Government to enact national legislation on all aspects of non-discrimination against women (see para.135 of the report)? Please indicate the areas in which discrimination against women, if any, still exists in law and practice.

(b) Is it envisaged that the federal Affirmative Action (Equal Employment Opportunity for Women) Act 1986 will be extended to aboriginal peoples ?

(c) Treatment of aliens: In what respects are the rights of aliens restricted as compared with those of citizens?

SECTION II - SELF-DETERMINATION

Mr Robertson - the focus of the international community since the second world war has been placed on the decolonisation aspect of self determination. Australia has, since the foundation of the United Nations, been an active supporter of the decolonisation of the Organisation. The realisation of these objectives has transformed Africa and has had a crucial impact on our own region, firstly in Asia and more recently in the Pacific where, during the 1960's and 1970's we were pleased to welcome a number of states into the community of nations. We have placed on record our support for decolonisation in numerous statements to various United Nations organs over the years and through our voting positions on important self determination questions.

For many years we were a member of the Committee of 24 which played a key role in ensuring the exercise of self determination, particularly in regard to non-self governing territories.

Australia was the administering power for Papua New Guinea, Nauru and the Cocos Islands. In close cooperation with the Committee of 24, each of these territories was able to exercise the right to self determination. In the most recent case, the Cocos Islanders chose the option of integration with Australia in an act of self determination under the supervision of the Committee of 24 in 1984. Our second report provides information on this important event.

The denial of self determination to the people of Namibia, a particularly frustrating and serious case, because it is compounded by the imposition of the repugnant apartheid system. Australia has vigorously supported full implementation of Security Council Resolution 435 relating to self determination and independence for Namibia. As a member of the Council of Namibia, we have consistently supported the U.N.'s efforts to achieve these objectives.

The Human Rights Committee has raised the question of self determination in South Africa. Australia's unequivocal rejection of the apparent apartheid system is on record in many United Nations' forums and has found expression in a series of specific measures aimed at bringing pressure to bear on the South African authorities to dismantle apartheid. During Australia's term as a member of the U.N. Security Council, we voted for a Resolution proposing mandatory economic sanctions on South Africa in 1986. Other measures taken by Australia include respect for various restrictions on contacts with South Africa, including the important field of sport and assistance for black South Africans through education and other training. We should also add that we have made bilateral representations to the

South African authorities on a number of individual human rights cases and issues over the years as a reflection of our concern about the impact of apartheid on respect for individual, civil and political rights.

With regard to events in the Middle East, Australia believes that a resolution of the conflict in the occupied territories demands that the right of the Palestinians to self determination be recognised, including their right to choose independence if they so desire. It is apparent that the root cause of the disturbances in the occupies territories and the frustration experienced by the Palestinians is a result of their inability to determine their own future. As the Australian Foreign Minister said on 14 January, "without the reasonable prospect of the right to self determination being fulfilled, many Palestinians in the occupied territories will increasingly see violence as the only way open to them". As the Head of Australia's Observer Delegation to the recent session of the Commission on Human Rights, I had occasion to deliver a statement on this issue which sets out the Government's position in more detail. Copies of this statement are available to members of the Committee.

We have followed with interest the international focus on continuing application of self determination to all citizens. It is significant that self determination is the first Article of both International Covenants. This right is not extinguished or discharged by a single act of self determination on independence after a colonial era. We interpret self determination as the matrix of civil, political and other rights which are required to ensure meaningful participation of citizens in relevant decision making processes which enable individuals to have a say in their future. The process of self determination involves a number of aspects including participation in free, fair and regular elections, the ability to seek public office and to enjoy freedom of speech and association. Full respect for self determination therefore requires that all members of society can participate in political processes. In Australia, for example, major efforts have been made to increase the participation of women in these processes and in other relevant decision-making. Similarly, with regard to disadvantaged groups such as Aboriginals, the same imperative should be met. We shall say more about the processes of consultation with Aboriginal groups later in our presentation.

Self-determination (article 1 of the Covenant) (section II of the list of issues)

14. The CHAIRMAN read out section II of the list of issues concerning the second periodic report of Australia, namely: Australia's position with regard to self-determination in general and to the struggle for self-determination of the South African, Namibian and Palestinian peoples in particular.

15. Mr. ROBERTSON (Australia) said that, since the founding of the United Nations, his Government had actively advocated and voted for decolonization and for the right of Non-Self-Governing Territories to self-determination. Decolonization had transformed the political face of Africa and had had a crucial impact on his own region, first in Asia and more recently in the Pacific, where a number of new nations had come into being in the 1960s and 1970s. Australia had been the administering Power for Papua New Guinea, Nauru and the Cocos (Keeling) Islands, and each of those Territories, in close co-operation with the Special Committee on decolonization of which Australia was a member, had been able to exercise the right to self-determination. Most recently, in 1984, the Cocos (Keeling) Islanders had opted for integration with Australia in an act of self-determination under United Nations supervision.

16. The denial of self-determination to the people of Namibia was a particularly serious and frustrating case because it was compounded by the imposition of the repugnant apartheid system. Australia had vigorously supported full implementation of Security Council resolution 435 (1978) on Namibian independence, and as a member of the Council for Namibia had consistently supported United Nations efforts to achieve that objective.

17. Regarding self-determination in South Africa, Australia unequivocally rejected apartheid and had taken a number of specific steps to bring pressure to bear on the South African authorities to dismantle that system. In the Security Council, for instance, Australia had voted for a resolution imposing mandatory economic sanctions against South Africa in 1986; and it had made bilateral representations to the South African authorities on a number of individual human rights cases and issues over the years. The Government had also imposed various restrictions on contacts with South Africa, including in the important field of sports, and was providing education and training for black South Africans.

18. With regard to the Middle East, Australia believed that a resolution of the conflict in the territories occupied by Israel demanded that the right of the Palestinians to self-determination, including their right to choose independence if they so desired, should be recognized. The root cause of the disturbances in the occupied territories was clearly the Palestinians' inability to decide their own future, and they would increasingly see violence as the only way open to them. Copies of a statement to the Commission on Human Rights, detailing his Government's position on the question, were available.

19. It was significant that the right of self-determination was set forth in the first article of both human rights Covenants. That right was not exercised fully by a single act of self-determination on gaining independence after a colonial era. Australia interpreted self-determination as the matrix of civil, political and other rights required for the meaningful participation of citizens in the kind of decision-making that enabled them to have a say in their future. Self-determination included participation in free, fair and regular elections and the ability to occupy public office and enjoy freedom of speech and association. In Australia, major efforts had been made to increase the participation of women and disadvantaged groups such as Aboriginals in political life and decision-making.

ANNEX 12

Working paper prepared by the Secretariat

General Assembly

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17 July 1992

ORIGINAL: ENGLISH

SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES

EAST TIMOR

Working paper prepared by the Secretariat

CONTENTS

EAST TIMOR

I. GENERAL

1. The Territory of East Timor comprises the eastern part of the island of Timor, which is located at the tip of the chain of islands forming the Republic of Indonesia; the enclave of Oecusse Ambeno; the island of Atauro, off the northern coast of Timor; and the island of Jaco, off its extreme eastern tip. It lies between latitudes 8'17'S and 10'22'S and longitudes 123'25'E and 127'19'E.

2. According to the 1980 census, the total population of the Territory was 555,350; in 1991, it was estimated at 752,000. 1/

II. CONSIDERATION BY THE UNITED NATIONS 2/

A. The General Assembly and other United Nations bodies

3. Between 1961 and 1982, the General Assembly annually reviewed the question of East Timor and adopted resolutions on the basis of the reports submitted by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. 3/

4. Since April 1977, the Government of Portugal, in its capacity as administering Power of East Timor, has annually informed the Secretary-General that owing to conditions prevailing in the Territory, namely the presence of armed forces of the Republic of Indonesia, it has been de facto prevented from transmitting any information concerning East Timor under Article 73 e of the Charter of the United Nations. 4/

5. At its thirty-seventh session, by its resolution 37/30 of 23 November 1982, the General Assembly requested the Secretary-General to initiate consultations with all parties directly concerned, with a view to exploring avenues for achieving a comprehensive settlement of the problem, and to report to the Assembly at its thirty-eighth session. The Assembly requested the Special Committee to keep the situation in the Territory under active consideration and to render all assistance to the Secretary-General to facilitate implementation of the resolution.

6. Since 1983, the Secretary-General has kept the General Assembly apprised of developments related to the exercise of his good offices. 5/ In his latest progress report, submitted to the General Assembly at its forty-sixth session (A/46/456), the Secretary-General stated that he had continued consultations with the Governments of Indonesia and Portugal, in the course of which both sides had reiterated their determination to seek a comprehensive and internationally acceptable solution to the question of East Timor through continuing dialogue and negotiation.

7. At each session since the thirty-eighth, the General Assembly has deferred consideration of the question. 6/

8. During the general debate at the forty-sixth session, the representatives of Angola, Cape Verde, Guinea-Bissau, Mozambique, Portugal, Sao Tome and Principe and Vanuatu referred to the question of East Timor in their statements (A/46/PV.5, 7, 14, 21, 23, 24). The representative of the Netherlands, on behalf of the 12 members of the European Community, also referred to East Timor in a memorandum which was circulated as an integral part of his speech (A/46/PV.6). In response to the statement made by Portugal, Indonesia made a statement in exercise of the right of reply (A/46/PV.7). In the general debate in the Fourth Committee, the representative of the Netherlands, on behalf of the 12 members of the European Community, also referred to East Timor (A/C.4/46/SR.8); and the representatives of Cape Verde and Sao Tome and Principe made further references to the Territory (A/C.4/46/SR.11 and 13). Indonesia made a statement in exercise of the right of reply in response to the statement made by the Netherlands (A/C.4/46/SR.9).

9. In the debate in the Third Committee on human rights questions, the representatives of Australia, Austria, Brazil, Canada, Cape Verde, Finland, France, the Holy See, as well as the representative of the Netherlands, on behalf of the 12 States members of the European Community, and the representatives of New Zealand, Portugal and Vanuatu made further references to the Territory (A/C.3/46/SR.44 and 47-53). Representatives of Indonesia, Portugal and Vanuatu made statements in exercise of the right of reply (A/C.3/46/SR.44 and 53).

10. Under the mandate entrusted to it and renewed annually by the General Assembly, the Special Committee has continued to review the question and has heard statements by Member States and petitioners concerning the situation in the Territory. 7/

11. At its 1991 session, the Special Committee considered the question of East Timor at its 1383rd to 1385th meetings, on 7 and 8 August. During those meetings, the Committee heard the representatives of Indonesia (A/AC.109/PV.1383 and 1385), Cape Verde (also on behalf of Angola, Guinea-Bissau, Mozambique and Sao Tome and Principe) and Portugal (A/AC.109/PV.1385); as well as 16 petitioners (A/AC.109/PV.1383, 1384 and 1385).

12. At its 1385th meeting, on 8 August, the Special Committee decided to continue consideration of the item at its 1992 session, subject to any directives that the General Assembly might give at its forty-sixth session (A/AC.109/PV.1385).

13. Since the adoption of its resolution 1983/8 of 16 February 1983 relating to East Timor, 8/ the Commission on Human Rights has not considered the question. At the 41st meeting of the forty-first session, on 5 March 1985, the Chairman announced that the Commission had taken action in private

session, under Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970, with regard, inter alia, to East Timor, and that the situation relating thereto was no longer under consideration by the Commission. 9/

14. On 1 September 1988, the Subcommission on Prevention of Discrimination and Protection of Minorities, by 10 votes to 9, with 5 abstentions, decided not to take any action on a draft resolution on East Timor. 10/

15. In both 1989 and 1990, the Subcommission on Prevention of Discrimination and Protection of Minorities adopted by secret ballot resolutions entitled "Situation in East Timor" (1989/7 and 1990/15), whereby it recommended to the Commission on Human Rights that it consider the situation pertaining to human rights and fundamental freedoms in East Timor at its forty-sixth and forty-seventh sessions, respectively. 11/

16. At the 26th meeting of the forty-third session of the Subcommission, on 23 August 1991, the Chairman announced that, as in previous sessions, some experts had taken the initiative of preparing a draft resolution on the subject. Having learned of that initiative, he had requested that certain recent developments in the process of consultations initiated by the Secretary-General be taken into account and had consulted the members concerned in an attempt to find a solution by consensus. The recent developments included an agreement in principle between the parties to send a Portuguese parliamentary mission to visit East Timor (see para. 36 below) and the announcement made by the observer for Indonesia in the Subcommission that the Special Rapporteur on Torture of the Commission on Human Rights would be invited to visit East Timor. To promote the spirit of openness and to facilitate the work of the Special Rapporteur on Torture, it had been agreed not to submit the draft resolution on East Timor. 12/

17. On 8 January 1992, under item 10 (a) of the provisional agenda of its forty-eighth session, the Commission on Human Rights released the report of the Special Rapporteur on Torture, Mr. P. Kooijmans, on his visit to Indonesia and East Timor at the invitation of the Government of Indonesia. 13/ In his report, the Special Rapporteur noted that he had visited the Territory from 11 to 13 November, and thus was present at the time of the shootings in Dili (see sect. V). That incident however, did not fall directly within his mandate. In East Timor, he had held meetings with, among others, the "Governor", the Military Commander, the Attorney, the President of the District Court and Bishop Belo of the Roman Catholic Church and had interviewed several former detainees.

18. The Special Rapporteur said he had been told by the "Governor" that the number of incidents between the local population and the armed forces was decreasing, although sometimes the police intervened with brutality. Of the detainees he had met, some had confirmed that they had been tortured, but others had no complaints of ill-treatment. Military authorities admitted that there had been cases of torture or other serious human rights violation, but they assured him that everything was being done to prevent their recurrence. According to statistical data he had received, some 215 members of the armed

forces had been punished or disciplined for failing to carry out their functions, 115 for criminal acts.

19. At the 54th meeting of the forty-eighth session of the Commission on Human Rights on 4 March 1992, 14/ the Chairman read out a statement, agreed to by consensus, in which the Commission noted with serious concern the human rights situation in East Timor and deeply deplored the violent incident which had occurred in Dili on 12 November 1991 (see sect. V). The Commission, among other things, welcomed the setting up of a national commission of inquiry by the Indonesian Government and the prompt response which its advance report had elicited from the highest authorities. It expressed the hope that further investigation would clarify the discrepancies on the number of people killed and missing. The Commission said that it was encouraged by Indonesia's disciplinary measures and military court proceedings against some members of the armed forces and urged the Government to bring to trial and punish all those found responsible. It called upon Indonesia to ensure that all civilians arrested were treated humanely, that those brought to trial received proper legal representation and fair trial and that those not involved in violent activities were released without delay. The Commission welcomed the appointment of Mr. S. Amos Wako as Personal Envoy of the Secretary-General to obtain clarification of the events and the willingness of the Indonesian authorities to cooperate with him. The Commission encouraged the Secretary-General to continue his good offices for achieving an internationally acceptable settlement of the question. 15/

B. Communications related to the question

20. In letters dated respectively 1 and 6 August 1991 addressed to the Acting Chairman of the Special Committee (A/AC.109/1081 and Add.1), the Permanent Representative of Indonesia reiterated the position of his Government on the question of East Timor and requested that the letters be circulated as documents of the Special Committee.

21. In a letter dated 6 April 1992 to the Secretary-General, the Permanent Representative of Cape Verde transmitted the text of a joint declaration on East Timor issued by the Heads of State of Angola, Guinea-Bissau, Mozambique, Sao Tome and Principe and Cape Verde on the occasion of their Tenth Summit, held in Sao Tome and Principe on 10 March 1992 and requested that the letter and its annex be circulated as an official document of the General Assembly (A/47/151).

22. In a letter dated 21 April 1992 to the Secretary-General, the Permanent Representative of Portugal, in the capacity of President of the European Community, transmitted the text of a statement of the European Community and its member States on East Timor issued on 13 February, and requested that the letter and its annex be circulated as an official document of the General Assembly (A/47/169).

23. In a note verbale dated 20 May 1992 to the Secretariat, the Permanent

Mission of Sao Tome and Principe transmitted the text of a letter from Mr. Kay Rala Xanana Gusmao, member of the National Command of the Maubere Resistance (CNMR) and Commander of the Liberation Armed Forces of East Timor (FALINTIL), and requested that the letter and its annex be circulated as an official document of the General Assembly (A/47/219).

III. POLITICAL DEVELOPMENTS

24. Indonesian Law 7/76 of 17 July 1976 states that East Timor is a province or a "first-level region" of Indonesia. The law provides for the establishment of a "Regional Government" consisting of a "Regional Secretariat" and a "Regional House of Representatives" and for East Timor to be represented in the National House of Representatives and in the People's Consultative Assembly of Indonesia.

25. By its resolution 32/34 of 28 November 1977, the General Assembly rejected Indonesia's claim that East Timor had been integrated into Indonesia, inasmuch as the people of the Territory had not been able to exercise freely their right to self-determination and independence.

26. The most recent general elections to the "Regional House of Representatives" and the National House of Representatives were held on 9 June 1992. According to the Indonesia Times of 15 June 1992, 369,046 voters were registered with the East Timor Elections Committee, and 305,401 of these voted for the Functional Group (GOLKAR), 58,449 for the Indonesian Democratic Party and 5,196 for the United Development Party.

27. The "Governor" of East Timor is Mr. Mario Carrascalão, who is serving a second term which expires in September 1992. According to press reports, 15 candidates are planning to run for election as his successor. 16/ These include Brigadier General Rudolf Samuel Warouw of Indonesia, who was dismissed as military commander of East Timor in December 1991, reportedly because he and his direct superior, as military leaders, were held responsible by President Suharto for the events in Dili on 12 November. The Jakarta Post of 17 March 1992 reported that the Chairman of the Timorese Regional Assembly had charged that the Indonesian Government was attempting to dictate who the next governor should be.

28. Press reports over the past few years have estimated the Indonesian military presence in the Territory to be about 10,000 troops. 17/

29. On 12 June 1992, an article in The Guardian (London) said that after the Dili incident a security crackdown had been imposed and that the military had been granted special powers. The current Indonesian military commander in East Timor, Brigadier General Theo Syfei, was reported as indicating that four of the six battalions, comprising 3,840 men, might be removed by September. According to the report, as the September target date coincides with the retirement of "Governor" Carrascalao, this suggests plans for a "fresh start" in Indonesia's administration of the Territory. However, the report queries

whether prevailing circumstances will actually permit a wide-ranging change, especially as "there is little evidence of success in winning over the East Timorese". It was reported in the same newspaper on 14 July 1992 that, according to the Indonesian newspaper Kompas, three East Timorese "rebels" had been killed in a clash with Indonesian troops who had stepped up operations in the Territory.

30. In 1990, the Frente Revolucionária de Timor Leste Independente (FRETILIN) maintained that there were 5,000 armed guerrillas. 18/ At the beginning of April 1992, 19/ Indonesian sources reported that according to Brigadier General Syafei there were nine FRETILIN groups with a total of 296 members living in forested areas. Their firepower consisted of about 128 weapons of various kinds, or 2 per cent of their arsenal in 1975/76. General Syafei said that FRETILIN had changed its strategy to focus on political work in urban areas instead of military activities.

31. In 1992, it was reported in the Portuguese press that Mr. Xanana Gusmao, leader of FRETILIN, had told an interviewer that FRETILIN forces had weakened and would accept "without hesitation" the result of a "popular verdict" on the future of East Timor, no matter what the result might be. 20/

32. As previously reported, in 1989 Indonesia and Australia signed a comprehensive agreement for a zone of cooperation for exploration and exploitation of offshore oil resources in the Timor Gap (see A/45/57-S/21022; A/45/60-S/21028; A/46/93-S/22249; A/46/97-S/22285).

33. On 22 February 1991, the Government of Portugal filed in the Registry of the International Court of Justice an application instituting proceedings against Australia in a dispute concerning "certain activities with respect to East Timor". 21/

34. By an Order of 3 May 1991 (I.C.J. Reports 1991, p. 9), the President of the International Court of Justice, after a meeting with the Agents of the two Parties at which agreement on time-limits was reached, fixed 18 November 1991 as the time-limit for the filing of the Portuguese Memorial and 1 June 1992 as the time-limit for the Australian Counter-Memorial. 22/

35. On 16 December 1991, the Portuguese Ambassador to Australia handed a note verbale to the Ministry of Foreign Affairs for Australia strongly protesting against 11 production-sharing contracts which had been approved for petroleum exploration in "Area A" defined by the "Timor-Gap Cooperation Treaty" (A/47/65-S/23339, annex).

36. In mid-1991, Portugal and Indonesia reached agreement regarding the visit of a Portuguese parliamentary delegation to East Timor. The visit was formally approved by President Suharto of Indonesia on 25 August 1991. 23/ Informed that Indonesia opposed the inclusion of Ms. Jill Jolliffe in the list of international journalists to accompany the delegation, Portugal announced on 26 October that it was suspending the visit. A press release issued by the Permanent Mission of Portugal on 31 October 1991 said that Indonesia's

opposition was not in conformity with what had been agreed upon by the parties and that it culminated a series of actions incompatible with the terms of reference already approved for the visit. Indonesia contended that its opposition was based on the fact that Ms. Jolliffe had established herself as an anti-Indonesia crusader and that her ability to be an independent and objective reporter was therefore compromised. 24/

37. In February 1992, a group of about 150 people, including peace activists, students and journalists from 10 countries, set sail from Darwin, Australia, to East Timor aboard a chartered ferryboat, the Lusitânia Expresso, on what they described as a peace voyage. Indonesia said it had not received any request from either the operator of the vessel or its passengers for authorization to sail into Indonesian waters and would enforce applicable national and international laws if the group persisted in its voyage. 25/ On 10 March, the spokesman of the Secretary-General said that the Secretary-General had been informed of the mission by its organizers and had expressed the hope that no violent incident would occur and that good judgement and maximum restraint would be displayed by all concerned. According to a report in the Far Eastern Economic Review of 26 March 1992, the ship was "repelled by navy frigates at the edge of the Indonesian waters early on the morning of 11 March. The Indonesian navy had said it was prepared to use force ... but, in the event, a verbal warning proved a sufficient deterrent". Indonesia has stated that the Lusitânia Expresso entered its territorial sea at 0555 ICT on 11 March and continued its voyage after being ordered to leave. After repeated warnings, at 0607 ICT, the Lusitânia Expresso turned around and proceeded to leave (A/47/152, annex). In a statement issued on 24 March, Portugal said that whilst the ship was three miles outside the territorial waters of East Timor, Indonesian vessels ordered the Lusitânia Expresso not to enter, stop or anchor within its territorial waters. The Portuguese statement also said: "Moreover, these actions prevented the Lusitânia Expresso from entering the territorial waters of East Timor, a Non-Self-Governing Territory under Portuguese administration, in accordance with the relevant United Nations resolutions, and over which the Republic of Indonesia exercises no legitimate jurisdiction whatsoever" (A/47/134-S/23757, annex).

38. In a letter dated 24 March 1992 to the Secretary-General, the Permanent Representative of Portugal transmitted the text of a statement of his Government on the incident and requested that the letter and its annex be circulated as an official document of the General Assembly and of the Security Council (A/47/134-S/23757).

39. In a letter dated 8 April 1992 to the Secretary-General, the Permanent Representative of Indonesia transmitted the text of a statement issued by the Government of Indonesia the same day in response to the letter from Portugal and requested that the letter and its annex be circulated as an official document of the General Assembly (A/47/152).

40. On 23 April 1992, it was reported that Indonesia had rejected requests by United States Senators David Boren and Claiborne Pell to visit East Timor. 26/

IV HUMAN RIGHTS SITUATION

41. Regarding the comprehensive settlement of the question of East Timor, on which the Secretary-General reports annually to the General Assembly, the Secretary-General has been in contact with the parties concerned with a view to reactivating a dialogue that could lead to such a settlement. In this regard, the Governments of Indonesia and Portugal have presented their proposals and views on a dialogue to the Secretary-General, who continues his efforts to obtain an agreement on the modalities and format of such talks.

42. Below is a summary of observations relating to the human rights situation in East Timor contained in Country Reports on Human Rights Practices for 1991, Indonesia, published in February 1992 by the United States Department of State: 27/

> "In East Timor, where a shift from security operations to civic action projects by the armed forces had brought a gradual reduction in human rights abuses, the situation deteriorated sharply beginning in October.
>
> "During the period under review, people were detained for days or weeks and subsequently released without charges.
>
> "Although the Indonesian Government does not provide data on the number of persons serving subversion sentences, informed estimates suggest a total of more than 500 including those convicted of subversion in connection with separatist activities in East Timor.
>
> "The Government occasionally censors publications and continues the practices of telephoning editors to suppress stories and of censoring foreign periodicals. An article about East Timorese workers in Java that was to appear in the prominent news weekly Tempo, for example, was censored in early September 1991 at the insistence of military officers who came to the magazine's offices.
>
> "The Catholic Church operates widely in East Timor, but the activities of some of its clergy are carefully monitored by security forces concerned with their political sympathies.
>
> "Curfews were sometimes in force in connection with military operations in parts of East Timor.
>
> "Under a 1985 agreement, the International Committee of the Red Cross (ICRC) is authorized by the Government to visit persons held for security reasons in East Timor. None the less, ICRC experienced significant delays in gaining access to those wounded or imprisoned in the 12 November incident.
>
> "Family visits back to East Timor by East Timorese now living in Australia continued."

43. Amnesty International reported that at least 30 people had been killed in East Timor by Indonesian security forces in 1990 and early 1991 in apparent extrajudicial executions. A pattern of short-term detention, ill-treatment and torture of political detainees also appeared to have worsened. More than 400 people had been detained in East Timor since late 1988 for alleged involvement in pro-independence political activities, at least 200 of them since early 1990. Many might have been prisoners of conscience and many had reportedly been ill-treated or tortured in custody. 28/

44. Amnesty International noted that there remained serious limitations on the reporting of human rights violations in East Timor despite the "opening" of the Territory to tourism and commerce in January 1989. Persons suspected of disseminating human rights information in East Timor and Indonesia were closely watched and had a well-founded fear that they might themselves become victims. Telephone and postal communications were monitored and contacts with foreign journalists and tourists or with international organizations like ICRC were sometimes the subject of investigation. While some foreign visitors had been able to travel with apparent freedom in certain parts of the Territory, most continued to be subjected to close surveillance by military and police intelligence. Finally, notwithstanding government assurances that access to the Territory was unrestricted, and in spite of repeated requests, Amnesty International had not yet been permitted to visit East Timor or Indonesia. 28/

V. OTHER DEVELOPMENTS

A. The Dili incident of 12 November 1991

45. On 28 October 1991, shortly after Portugal's suspension of the proposed visit by a parliamentary delegation, two Timorese youths were killed in an altercation between anti- and pro-Indonesian factions in Dili.

46. On 12 November, after a memorial service in a local church for one of the deceased, a procession of some 2,000 people went to Santa Cruz cemetery, where the man had been buried two weeks before. Some demonstrators were carrying FRETILIN flags and were chanting anti-Indonesian slogans. According to numerous press reports, as the peaceful procession marched to the cemetery, an Indonesian army major and a soldier were stabbed, although not fatally wounded. After demonstrators had reached the cemetery, security forces opened fire at the crowd, killing and wounding an undetermined number of people. According to Country Reports on Human Rights Practices for 1991, 19 victims were buried in unmarked graves and for two days after the incident the army denied ICRC access to the military hospital to which the dead and wounded had been taken. 29/

47. According to press reports (The Guardian (London), 7 January 1992, The Observer (London), 17 November 1991, The New Yorker, 9 December 1991, The Times (London), 14 November 1991), the incident was witnessed by five foreign visitors, including two United States journalists representing The New Yorker magazine, a United Kingdom cameraman who filmed the events at the cemetery,

and an Italian missionary. These eyewitnesses in their accounts sustained that the shooting had started without any warning from the military or provocation by the demonstrators.

48. Amnesty International reported that it had received unconfirmed reports that between 60 and 80 additional people were extrajudicially executed on 15 November and their bodies also buried in unmarked graves outside Dili. Those killed were said to have included witnesses to the 12 November incident as well as suspected or known political activists arrested at the time of the incident and in house-to-house searches over the following days. The organization also reported that dozens of East Timorese demonstrating peacefully in Jakarta on 19 November had been detained by security forces. Unofficial sources to which representatives of Amnesty International spoke said that at least 35 people had been held at the Jakarta Central Police Station. 30/

49. On 18 November, the Government of Indonesia appointed a seven-member National Commission of Inquiry headed by a Supreme Court justice to conduct an on-site inquiry into the incident. The Commission met with the "Governor" of East Timor and other government and religious officials, as well as with members of the military and police. It held interviews with 132 eyewitnesses, visited hospitals and conducted several on-site reconstructions of events. 31/

50. In its preliminary report, released 26 December 1991, 27/ the Commission noted that eyewitnesses had provided differing accounts of aspects of the incident, especially disagreeing as to whether warning shots had been fired and whether there had been fighting before shots were fired.

51. The Commission said that, according to the military command (KOLACOPS), the death-toll had reached 19, but that according to other eyewitnesses the death-toll varied from 50 to over 100.

52. The Commission said that a total of 91 persons were reported to have been treated for wounds but that the actual number of wounded might well have been higher than officially reported. The Commission reported that approximately 90 persons were missing. 31/

53. The Commission concluded that the shootings were "not an act ordered by or reflecting the policy of the Government or the Armed Forces". It stated that the incident was "essentially a tragedy which should be deeply regretted" and that the actions of a number of security personnel "exceeded acceptable norms and led to the casualties". It was recommended that action be taken against all involved in the incident and that they be brought to trial in accordance with the rule of law.

54. Asia Watch, in a report issued on 3 January 1992, noted that after studying the preliminary report of the National Commission of Inquiry, reviewing Indonesian press coverage and interviewing people in Dili, it had concluded that the report was flawed by the Commission's ties to the Indonesian Government and the lack of experience of its members in conducting

such investigations. It said that, given the way the investigation was conducted, the Commission's findings, which upheld the army's position that security forces had fired on the demonstrators in self-defence, could not be accepted. Asia Watch acknowledged that it was the first time the Indonesian Government had ever recognized the need to respond so publicly to international criticism, that the head of the Commission appeared to take his assignment seriously, that the preliminary report was critical of security forces and that it acknowledged that the official death-toll of 19 was far too low. 32/

55. Asia Watch also reported that as of mid-December 1991 the situation in East Timor remained tense with hundreds of people still not knowing whether their missing relatives were detained, in hiding or dead. It said that one local source had reported that the atmosphere of fear and terror was worse than at any time since 1975. It noted also that there were reports of ongoing arrests and killings. 33/

56. In a statement issued on 13 February 1992, the European Community said it was encouraged by the prompt response which the Commission's report had elicited from the highest Indonesian authorities and welcomed the condolences expressed by the President of Indonesia to the people of East Timor and his commitment that such an incident must not happen again. However, the Community and its member States remained concerned about other aspects of the question: they hoped that further investigations would result in all those responsible being identified and, where appropriate, disciplined or brought to trial, and that those investigations would also produce clear information about the number killed and the fate of those still missing. The Community welcomed the involvement of the United Nations in the process and the appointment of Mr. S. Amos Wako as the personal representative of the Secretary-General to obtain clarification of the events (see para. 57). They supported the endeavours by the Secretary-General to achieve a just, comprehensive and internationally acceptable settlement of the question of East Timor, with full respect for the legitimate interests and aspirations of the East Timorese. They supported the start of a dialogue without preconditions between Portugal and Indonesia under the auspices of the Secretary-General, as contained in the constructive Portuguese proposal.

57. The Special Rapporteur on Torture, Mr. Kooijmans (see paras. 17 and 18), said that while the events did not fall directly within his mandate, as a representative of the United Nations Commission on Human Rights he felt constrained to describe and evaluate what he saw and heard during and after the events. The Special Rapporteur noted, inter alia, that information about what had sparked off the shooting differed widely. According to the authorities, the crowd was disorderly, demolishing shops and houses and using weapons, including a hand-grenade, against members of the security forces. Others claimed there was no provocation from the crowd. The Special Rapporteur noted that as he was about to leave East Timor on 13 November, he requested, in order to express sympathy, to be taken to the hospital where dozens of wounded were being treated. His request was refused, with the explanation that a visit by the Special Rapporteur to the wounded would be

68. In a letter dated 3 December 1991 to the Secretary-General, the Permanent Representative of the Netherlands transmitted the text of a declaration of the European Community and its member States on the situation in East Timor, issued on the same day, and requested that the letter and its annex be circulated as a document of the General Assembly (A/46/747).

69. In a note verbale dated 29 May 1992 to the Secretary-General, the Permanent Representative of Indonesia, with reference to the note verbale from Portugal of 1 May 1992 concerning the transmission of information on East Timor under Article 73 e of the Charter (A/47/189), reiterated the position of his Government concerning the Dili incident and annexed press releases on the question issued by the Permanent Mission of Indonesia (A/47/240).

70. In a letter dated 5 June 1992 to the Secretary-General, the Permanent Representative of Portugal transmitted the text of a statement of his Government on the trial and sentencing of East Timorese in Jakarta and Dili in connection with the event of November 1991 (A/47/259).

71. In a letter dated 26 June 1992 to the Secretary-General, the Permanent Representative of Portugal transmitted the text of a statement of his Government on East Timor, issued on 23 June 1992, and requested that the letter and its annex be circulated as a document of the General Assembly (A/47/299).

72. In a letter dated 10 July 1992 to the Secretary-General, the Permanent Representative of Portugal transmitted the text of a statement of his Government, issued on 26 May 1992, concerning the trials and sentencing of East Timorese in Jakarta and Dili (A/47/331).

73. In a letter dated 10 July 1992 to the Secretary-General, the Permanent Representative of Portugal transmitted the text of a statement of his Government, issued on 2 July 1992, on the sentencing to life imprisonment of a Timorese in Dili (A/47/332).

V. ECONOMIC AND SOCIAL CONDITIONS 38/

74. In the absence of information submitted by the administering Power under Article 73 e of the Charter, for the reasons explained in paragraph 4, the material in this section has been derived from other sources.

75. According to Indonesian publications, the prevailing economic and social conditions in East Timor can be described as follows:

General

Economic growth in 1991 was estimated at over 11 per cent. Of the total output, an estimated 49.68 per cent was contributed by agriculture; 21.1 per cent by services; 12.9 per cent by construction; 9.5 per cent by trade; and 6.8 per cent by other sectors.

Indonesian budgetary allocations for development in East Timor for 1992/93 increased by 35.8 per cent as compared to the previous year. The "East Timor provincial administration" was allocated Rp 71.1 billion 39/ for the implementation of 126 agricultural and industrial projects. In addition, the Government allocated Rp 67.2 billion for the construction of elementary schools, procurement of drinking water, road improvement and reforestation projects.

Natural resources

According to a survey conducted in 1989 by the Indonesian National Investment Coordinating Board and the Agency for the Assessment and Application of Technology, East Timor has significant mineral deposits: 3 million cubic metres of marble, 115.57 million cubic metres of bentonite, as well as phosphate, manganese, gold, copper, chromium, dolomite, wollastonite and clay.

Agriculture

In 1990, food production was as follows: rice, 50,172 tons; corn, 73,635 tons; green beans, 1,016 tons; soya beans, 69 tons; peanuts, 1,375 tons; cassava, 10,567 tons; sweet potatoes, 35,179 tons; and vegetables, 10,924 tons.

In 1991, cornfields covered an area of 23,000 hectares and rice paddy fields, 61,000 hectares. East Timor was close to achieving self-sufficiency in rice, with only 8,000 tons of rice imported from other regions, as compared to 24,000 tons in 1990.

The Territorial Government set a target of developing 400 hectares of new rice paddies in 1992/93 to achieve self-sufficiency in rice production.

In 1989, there were more than 136 kilometres of irrigation canals in East Timor, capable of supplying water for 6,000 hectares of paddy fields.

In 1989, animal husbandry indicators were as follows: cows, 63,612; horses, 24,993; goats, 91,214; buffalo, 43,554; sheep, 31,099; pigs, 256,031; chickens, 494,767; broilers, 144,614; and ducks, 31,750.

In 1989, 680 tons of ocean fish and 48 tons of freshwater fish were landed.

According to an Indonesian publication, three foreign companies had expressed interest in investing in businesses in Lautem regency, 255 kilometres east of Dili. A Japanese and a South Korean company were considering establishing joint ventures with Indonesian counterparts to process canned fish products, while an Australian firm was considering development of a cattle-raising project in cooperation with "domestic" firms.

Forest

Forested areas in East Timor consist of 25,165 hectares of nature reserve, 13,687 hectares of forest for recreational purposes, 432,277 hectares of protected forest, 170,484 hectares of limited forest, 45 hectares of productive forest and 10,000 hectares of convertible forest.

Communications

In 1989, the road network of East Timor consisted of 650 kilometres of "national roads" (49 per cent asphalt and 51 per cent gravelled) and 989 kilometres of "provincial roads" (22 per cent asphalt and 78 per cent gravelled).

From 1976 to 1989, 20 bridges were constructed, with a total length of 959 metres. In 1988/89, Rp 21,800 million was allocated to road network construction. In 1989, 330 traffic signs were installed in Dili and other areas.

In 1989, there were 187 buses, 1,964 passenger cars, 1,567 trucks and 5,476 motorcycles. The Comoro airport was being improved.

Dili seaport, with a 180-metre quay 9 metres deep, can accommodate 5,000 d.w.t. vessels. Three to five vessels call at the port weekly. Other local seaports are under construction at Pante Makasar (Ambeno), Laga (Baucau), Con (Lautem), Beasu (Viqueque) and Betano (Manufahi).

Industries

For 1990/91, Rp 1.5 billion was allocated for executing integrated development projects in Nitibe (Ambeno), Ossu (Viqueque), Alos (Manufahi), Manatuto and Maro (Lautem), Maubara (Liquisa) and Dili.

As of the end of 1988, there were 1,032 units of industrial enterprises, comprising seven multifaceted industries and 1,025 small-scale and handicraft industries. Multifaceted industries employed 830 persons and produced goods valued at Rp 1,380 million. Small-scale establishments and businesses employed 3,949 persons and produced goods worth Rp 1,330 million. It was estimated that 90.4 per cent of those enterprises were privately owned.

Education and social services

In 1988/89, there were 26 kindergartens with 1,713 pupils and 73 teachers; 565 primary schools with 128,566 students and 4,357 teachers; 90 junior high schools with 33,314 students and 1,179 teachers; and 33 upper secondary schools with 11,818 students and 675 teachers.

In 1989, there were two universities, Timor Timur University and Open University, and one academy, the Kataketik Academy. The Open University was attended by 701 students, and Kataketik Academy by 48 students.

In March 1992, it was reported that the only school in the Territory which gave instruction in Portuguese and taught Indonesian as a second language would be shut down with the agreement of Roman Catholic Church authorities. The Indonesian newspaper said that the school had become notorious following reports that many of its students had been involved in the demonstration that had led to the 12 November incident. The school is located near the Santa Cruz cemetery. 40/

Health

There were eight State-run general hospitals and a number of public health centres. The medical personnel included 6 specialists, 149 physicians, 75 midwives and 452 nurses. The ratio of physicians to the population was 1:7,000. In 1989/90, over Rp 3 billion was allocated to public health programmes.

Tourism

The Government of Indonesia allocated Rp 100 million for tourism development in East Timor in 1991/92. The funds were to be used for the development of coastal resorts, parks and other facilities. The Indonesian Directorate General of Tourism had assigned a team to survey areas in East Timor which might be developed into tourist resorts.

Notes

1/ World Population Prospects, 1990 (United Nations publication (ST/ESA/SER.A/120), Sales No. E.91.XIII.4), p. 140.

2/ For details, see corresponding sections of the previous working papers contained in documents A/AC.109/L.1328, A/AC.109/623, 663, 715, 747, 783, 836, 871, 919, 961 and 1001.

3/ See General Assembly resolutions 1699 (XVI), 1807 (XVII), 1913 (XVIII), 2107 (XX), 2184 (XXI), 2395 (XXIII), 2507 (XXIV), 2707 (XXV), 2795 (XXVI), 2918 (XXVII), 3113 (XXVIII), 3294 (XXIX), 3485 (XXX) and 31/53, relating to the question of Territories under Portuguese administration, including East Timor; see also Assembly resolutions 32/34, 33/39, 34/40, 35/27, 36/50 and 37/30 on the question of East Timor.

4/ See A/35/233, A/36/160, A/37/113, A/38/125, A/39/136, A/40/159, A/41/190, A/42/171, A/43/219, A/44/262, A/45/172, A/46/131 and A/47/189. Owing to lack of official information from the administering Power, the information contained in the present paper has been derived from published reports.

5/ A/38/352, A/39/361, A/40/622, A/41/602, A/42/539, A/43/588, A/44/529 and A/45/507.

Notes (continued)

6/ General Assembly decisions 38/402, 39/402, 40/402 and 43/402; see also A/41/PV.3, A/44/PV.3, A/45/PV.3 and A/46/PV.3.

7/ Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 23 (A/38/23); ibid., Thirty-ninth Session, Supplement No. 23 (A/39/23); ibid., Fortieth Session, Supplement No. 23 (A/40/23); ibid., Forty-first Session, Supplement No. 23 (A/41/23); ibid., Forty-second Session, Supplement No. 23 (A/42/23); ibid., Forty-third Session, Supplement No. 23 (A/43/23); ibid., Forty-fourth Session, Supplement No. 23 (A/44/23); and ibid., Forty-fifth Session, Supplement No. 23 (A/45/23); A/AC.109/PV.1363, 1366, 1367 and 1368.

8/ See Official Records of the Economic and Social Council, 1983, Supplement No. 2 (E/1983/14-E/CN.4/1983/60).

9/ Ibid., 1985, Supplement No. 2 (E/1985/22-E/CN.4/1985/66), paras. 276 and 277.

10/ E/CN.4/Sub.2/1988/L.26 and press release HR/3361.

11/ See E/CN.4/Sub.2/1989/58-E/CN.4/1990/2; E/CN.4/1991/2-E/CN.4/Sub.2/1990/59.

12/ E/CN.4/Sub.2/1991/SR.26.

13/ E/CN.4/1992/17/Add.1, p. 14.

14/ E/CN.4/1992/SR.54/Add.1.

15/ See HR/CN/345.

16/ Indonesian Observer, 9 April 1992.

17/ Far Eastern Economic Review, 26 March 1992.

18/ The New York Times, 21 October 1990.

19/ Indonesian Observer, 8 April 1992.

20/ O Público (Lisbon), 6 March 1992.

21/ Press release No. ICJ/495, 6 March 1991.

22/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 4 (A/46/4), p. 16.

23/ The Australian (Melbourne), 26 August 1991.

Notes (continued)

24/ Permanent Mission of the Republic of Indonesia to the United Nations, press release No. 05/PR/110691.

25/ Press statement of the Indonesian Mission, No. 02/PR/92 of 25 February 1992; The Sunday Age (Australian), 23 March 1992.

26/ The Guardian, 23 April 1992.

27/ United States Department of State, Country Reports on Human Rights Practices for 1991, Indonesia (United States Government Printing Office, Washington, D.C., February 1992), pp. 892-909.

28/ A/46/714, annex I, p. 8

29/ United States Department of State, Country Reports on Human Rights Practices for 1991, Indonesia, p. 861.

30/ A/46/714, annex II, pp. 13-14.

31/ Permanent Mission of the Republic of Indonesia to the United Nations, press release No. 10/PR/123191, 31 December 1991 (A/47/240, annex IV).

32/ Permanent Mission of the Republic of Indonesia to the United Nations, press release No. 03/PR/92, 28 February 1992 (A/47/240, annex VI).

33/ Asia Watch, vol. 4, No. 1, 3 January 1992, p. 1.

34/ Ibid., vol. 3, No. 23, 12 December 1991, para. 1.

35/ E/CN.4/1992/17/Add.1, paras. 48, 53, 64 and 65.

36/ Far Eastern Economic Review, 2 April and 4 June 1992.

37/ O Público (Lisbon), 14-15 April 1992.

38/ The information has been derived from various sources: Antara, 11 January 1992; East Timor Strives for a Better Future, published by the Public Relations Bureau of East Timor, 1990, pp. 34-37; and Facts on East Timor, House of Representatives of the Republic of Indonesia, 1990, pp. 30 and 33.

39/ The currency of the Territory is the Indonesian rupiah. As of 7 July 1992, US$ 1.00 equals Rp 2030.54.

40/ Jakarta Post, 30 March 1992.