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Peacock
pledges
support
for UN
action

Indonesian troops take control of East Timor

THE NATIONAL TIMES, DECEMBER 15-20, 1975

The Timor invasion

Women and
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says Fre

Australia supports Indonesia
takeover of East Timor

CREDIBILITY GAP

Australia and the
Timor Gap
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VICTORIA UNIVERSITY OF TECHNOLOGY



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Credibility Gap

Australia and Timor Gap Treaty

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Preface

Much has been written about the Timor Gap Treaty. Australian Government pronouncements in defence of the Treaty cannot but be dismissed as public posturing in the face of an obviously illegal and immoral policy.

Australia's position can be summarized in two points: a) it has recognized Indonesia's territorial acquisition of East Timor by force and b) having done that, it could not refuse to enter into a Treaty with Indonesia.

Foreign Affairs Minister, Senator Gareth Evans argued in Parliament that there is no legal obligation in International Law not to recognize territorial acquisition by force. This is simply indefensible under the United Nations Charter and in modern International Law which explicitly bars the threat or use of force in international relations and recognition of territory acquired by force.

One could conclude from Senator Evans' statement that Australia's foreign policy will now be in support of the threat or use of force in international relations and of recognition of territorial acquisition by force. A logical conclusion of present Australian foreign policy would be that Iraq's annexation of Kuwait is legal. But, of course, Australia sent warships to blockade Iraq at the request of the US. Australia cannot manipulate norms of International Law to suit its immediate interests.

Australia is deluding itself by boasting that it has a strong case under International Law. It does not. And it is deluding itself if it is counting on Portugal not taking the matter to the International Court of Justice. (ICJ).

Canberra commissioned a study from Prof. Don Grieg, Dean of the ANU's Law School, a specialist in International Law. However, if Prof. Grieg is as "independent" a scholar as many of his colleagues in a School which boasts to be a mere extension of the Department of Foreign Affairs and Trade, then Australia will continue to delude itself and might in the end pay a heavy price. Portugal is an 800 year old nation, a Member of the EEC and NATO with high standing among African and Latin American States. Its recent re-election by the 54-member UN Economic and Social Council (ECOSOC) to the UN Human Rights Commission (now comprising 53 members) in the first ballot by a large majority is indicative of Portugal's standing in the UN. Australia got in only in the second ballot and with a slim majority.

In 1991 Portugal will take over as President of the EEC. If Portugal decides then to request an "Advisory Opinion" to the ICJ, through a resolution of the UN General Assembly, it is highly unlikely that its EEC fellow members will not support a move by its own President. And once the matter goes to the ICJ, it is simply unthinkable that any of the Court's 15 judges would risk his professional credibility by giving a favourable opinion on the Treaty.

The first question the Judges will consider will be the right of the people of East Timor to self-determination and whether this right has been fully exercised or extinguished with the integration into Indonesia and passage of time. The answer to this is obvious in view of the overwhelming body of evidence against Indonesia, namely two United Nations' Security Council resolutions (Sec. Res. 384 and 389).

Even Australia maintains that no valid act of self-determination has taken place in East Timor. In fact Australia is the only industrialised country to have extended *de facto* and *de jure* recognition of Indonesia's annexation of East Timor. The US still adheres to the position that no valid act of self-determination has taken place in East Timor and has not accorded *de jure* recognition to the annexation even though it has given *de facto* recognition.

If the ICJ is of the opinion that the people of East Timor do have a right to self-determination and such a right has not been exercised, it flows from that that a Treaty which affects the people of East Timor is null and void. For Australia to win the case, it would have to prove that the people of East Timor either do not have the right to self-determination or that such a right has been exercised. It is obvious that Australia or Indonesia will not be able to mount any credible defence of its position inasmuch as Australia's long-standing official position has been that no valid act of self-determination has taken place in East Timor. Hence, its very cavalier argument that there is no binding legal obligation not to recognize territorial acquisition by force.

A more sober view on the controversial "Timor Gap Treaty" came from the chief executive officer of BHP, Brian Loton. Quoted in the Business section of *Sydney Morning Herald*, ("Legal mire delays Timor oil search", by Bruce Hextall, June 21, 1990) Mr. Loton said: "Exploration of the Timor Gap (...) might be delayed until the late 1990s because of a host of legal problems". According to the *SMH* when the Zone of Co-operation Treaty was signed, the oil industry hoped to begin exploring as early as next year but exploration companies are becoming increasingly reluctant to put money into the 61,000 sq. km.

Australian oil companies would be well advised not to jump into the Timor Gap area. A future government of an independent East Timor would certainly review all oil exploration agreements in the area and will not be bound by any agreement signed by third parties. Australian oil companies that join in the violation of the Timorese maritime resources might see their licences revoked and the exploration and drilling rights transferred to American companies, such as Oceanic Exploration of Denver, Colorado.

A good advice to Australian business: wait and see how things develop in the next 5 to 10 years.

Jose Ramos Horta

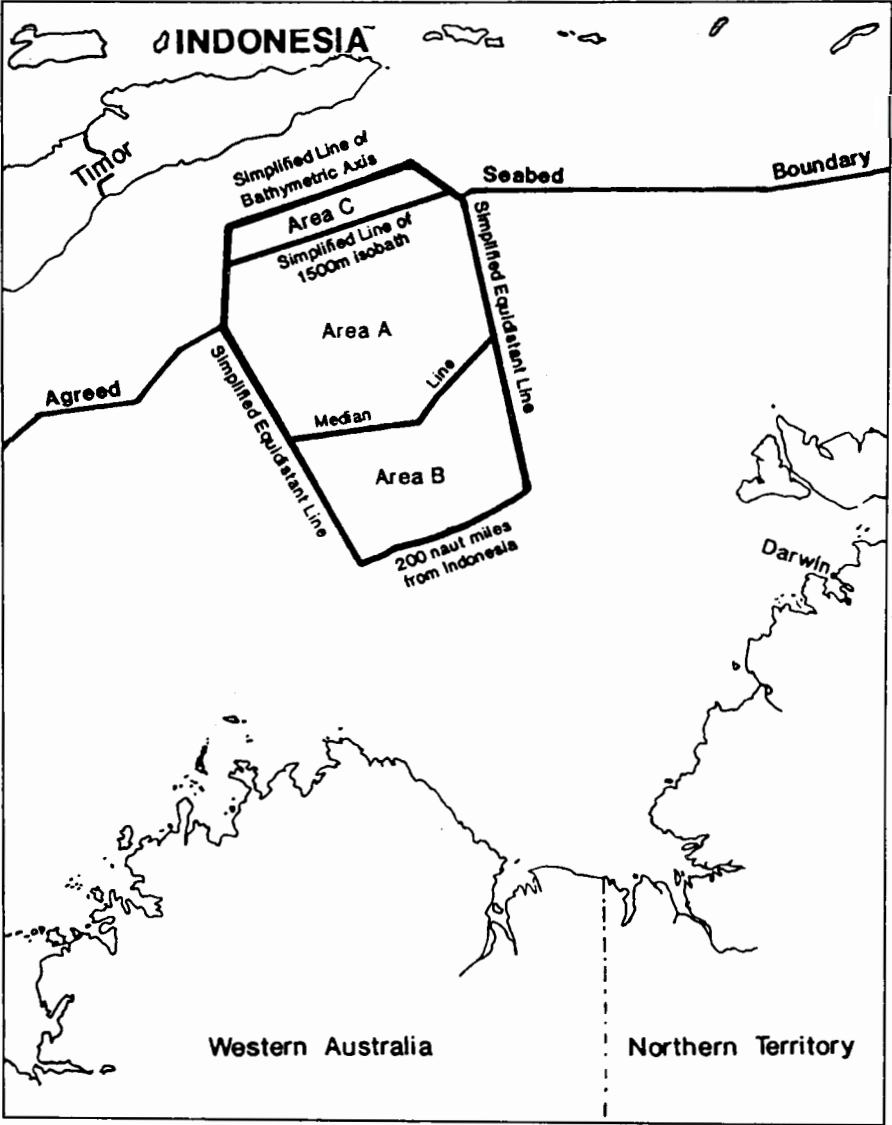
Introduction

On December 11 1989 Australia and Indonesia signed an agreement for a joint zone of co-operation for the exploration of oil in the disputed area known as the Timor Gap, north-west of Darwin between Australia and East Timor. Whilst the agreement involves compelling economic imperatives for both Australia and Indonesia, as well as boosting the shaky bilateral relationship, these considerations cannot be pursued in isolation from equally compelling international obligations of a legal and ethical nature.

East Timor is regarded by the UN as a non-self governing territory under the administering authority of Portugal, so there would seem to be substantial grounds in international law precluding such an agreement.

This paper examines the implications of the Timor Gap agreement in the context of the politics of international law and the rights of the East Timorese people. Part One examines the evolution and history of the Timor Gap dispute leading to the announcement of the interim agreement for the Joint Development Zone on 5th September, 1988. Part Two then examines the implications of the Indonesian annexation of East Timor, and the effect of the UN's non-recognition of this upon the Gap negotiations. Taking the issue of the denial of East Timorese self-determination from a "micro" to a "macro" level, Part Three examines East Timor in the global context of self-determination, using a regime analysis. Finally, Part Four examines the current initiatives to regenerate the cause of East Timorese self-determination being taken by Portugal, other states, non-governmental organisations, and the United Nations.

Timor Gap — *Zone of co-operation*



DFAT BACKGROUND

1. History of the Timor Gap Negotiations

In September 1988 Australia and Indonesia settled on an interim agreement for a joint zone of co-operation for the exploration of oil in the disputed area known as the Timor Gap, north west of Australia and East Timor. The region known as the Timor Gap arose as a consequence of maritime boundary agreements struck between Australia and Indonesia in 1971-2, which fixed the boundary in the Arafura and Timor Seas, but left a gap opposite what was then Portuguese Timor. It was the subject of separate negotiations between Australia and Portugal in 1974-5, but Portugal was willing to wait for the outcome of the Third U.N. Law of the Sea Conference, which among other things was dealing with the delimitation of maritime boundaries between adjacent states.

In 1975-76, when Indonesia invaded and annexed East Timor, it also inherited the dispute over the Timor Gap. It would seem that Australia's decision to recognise the annexation was strongly influenced by a desire to resolve the Timor Gap issue. In August 1975, the Australian Ambassador to Indonesia Mr. Dick Woolcott sent a cable to the Australian Department of Foreign Affairs in which he stated:

"We are all aware of the Australian defence interest in the Portuguese Timor situation but I wonder whether the Department has ascertained the interest of the Minister of the Department of Minerals and Energy in the Timor situation. It would seem to me that this Department might well have an interest in closing the present gap in the agreed sea border and this could be much more readily negotiated with Indonesia than with Portugal or independent Portuguese Timor. I know I am recommending a pragmatic rather than a principled stand but that is what national interest and foreign policy is all about ..."

In October 1976, ten months after the Fretilin declaration of independence for East Timor and the subsequent Indonesian annexation, Australian and Indonesian officials began informal negotiations to establish a sea-bed boundary between Australia and East Timor. Fretilin lodged protests against the negotiations. However the politically sensitive issue of Australia's recognition of the Indonesian annexation caused negotiations to stall. It was feared that if Canberra opposed Indonesia's incorporation of East Timor at the United Nations, Indonesia could retaliate by freezing the boundary talks. During the December 1978 visit to Canberra by Indonesian Foreign Minister Dr. Mochtar Kasumaatmadja, Australian Foreign Minis-

ter Andrew Peacock announced the Fraser Government was ready to accord *de jure* recognition of Indonesia's control over East Timor as an essential preliminary to finalising the sea-bed boundary.² Thus *de jure* recognition was granted when in February 1979 the Australian government formally commenced negotiations with Indonesia. This put Australia in the minority of the world's nations in recognising Indonesia's sovereignty over East Timor.

The Area's Petroleum Potential

Stakes were high for both sides in the Timor Gap negotiations, because seismic survey work carried out by oil companies (prior to the suspension of exploration permits by the commencement of formal government negotiations in 1979) had highlighted the petroleum potential of the area. The only well sunk in the Gap, Flamingo No.1 in 1971, had encountered good shows of oil and gas at 3,700 metres.³

Located within the Gap was a geological structure known as *Kelp*, the largest structural closure known on the entire Australian continental shelf and reputedly the largest undrilled structure of its kind in the world. Potentially it could hold oil, gas or merely sea-water. But a 1977 inhouse study by French oil company Elf Aquitaine concluded that it was very possible "an extremely large discovery" would be made in the structure, due to its size and the fact that it lay on trend with the Sunrise and Troubadour discoveries.⁴ Australian Department of Foreign Affairs officials went into the Timor Gap negotiations in 1979 using an estimate of a potential one billion barrels of oil, but there has been a wide diversity and hope expressed by others. More optimistic forecasts go as high as seven billion barrels of oil and one billion barrels of condensate (light oil).⁵

This potential for high level oil discovery made resolution of the Timor Gap issue vital for both countries' future energy and economic prospects. According to optimistic forecasts, successful oil recovery in the Gap could be twice the size of the Bass Strait reserves (now rapidly dwindling) and would therefore ensure Australia's energy independence into the next century. Discovery of new reserves is also of vital importance to Indonesia, Asia's only OPEC member, as due to the current rate of rising consumption and dwindling reserves, Indonesia could be a net importer of oil by 2001.⁶

Disputed Boundaries

So at the start of the 1979 negotiations, both sides clearly hoped for a prompt resolution of the boundary issue, but this was not to be. The Fraser government hoped that the Indonesians would settle for an extension of the 1971-2 agreements, so that the frontier would be a more or less straight line

joining the confirmed boundaries on either side of the Timor Gap. Australia's position has been to argue that there are two discrete continental shelves between Australia and Indonesia and that the natural dividing line is the southern edge of the Timor Trough, a trench some 3000 metres deep that lies closer to East Timor than to Australia. Indonesia rejected this and instead claimed (as Portugal had previously) that the boundary should be the line of equidistance between the south coast of Timor and the coast of Northern Australia.

In the 1971-2 agreements, a formula had been used to split the difference between the Australian and Indonesian claims. As a result, Australia gained control of about three-quarters of the continental shelf areas between Australia and Indonesia, with the agreed boundary lying along the southern margin of the Timor Trough on the continental slope. Prior to the start of the 1979 negotiations, Mochtar claimed that Indonesia had been "taken to the cleaners" over the 1971-2 delimitation and that unless the Fraser government was prepared to vary the formula used previously, it might take five years to reach a solution in the Timor Gap. Mochtar stated: "I think there will be other parties who do not want it to last five years. Let's put it that way."⁷

It would seem he was apparently calculating that pressure for an early settlement from affected oil companies and from the Northern Territory and Western Australian governments (which had issued the now suspended permits) would prompt Canberra to yield ground. Nevertheless at the same time Indonesia was also under some pressure regarding the granting of exploration rights to the Oceanic Exploration Company of Denver, USA. In December 1974, the Portuguese government granted exploration rights to Oceanic in the disputed area. This was in spite of the fact that the Whitlam government had already leased a large part of the area to a consortium comprising Australian Aquitaine Petroleum Pty. Ltd. and Esso Exploration and Production Aust. Inc. The Portuguese government ignored Australian government protests. In 1979 Oceanic spokesmen were negotiating the reactivation of the East Timor offshore lease with Indonesia, but commented that the outstanding question for Indonesia was "just making sure that the offshore boundaries with Australia are in order."⁸

However four unsuccessful rounds of talks between Australia and Indonesia were held from February 1979 to October 1981, when a stalemate occurred with both sides refusing to yield ground.

In February 1984, the first round of talks between the new Hawke government and the Indonesians occurred. The Department of Foreign Affairs urged the Government to make new concessions in order to achieve an agreement, warning that delays in negotiating the sea-bed boundary were playing into the Indonesians' hands due to recent international law

developments, and that Australia "could lose the Kelp structure."⁹ It was during 1984 that the Australian delegation first proposed a joint development zone (JDZ) for the Gap. However Jakarta's response was cool. Mochtar, a professor of international law and Indonesia's foremost expert on the Law of the Sea, claimed that Indonesia's bargaining position in the Timor Gap negotiations had been strengthened by the Third UN Convention on the Law of the Sea (UNCLOS III 1982), which had been ratified by both Australia and Indonesia: "I think the median line is a fair settlement ... the Indonesian position is based squarely on the law existing at present ... as laid down in the new Law of the Sea Convention ... In effect Australia is saying 'Negotiate in 1984 on the basis of the 1958 convention which has already been revised.' It's an untenable position."¹⁰ Mochtar acknowledged that a political compromise decision would have to be made to resolve the issue, but noted that as far as Indonesia was concerned, things had not reached the stage where a political decision was required. "I'm content to leave it at the technical level" he said in April 1984, "we are not in a particular hurry."¹¹

Another reason Jakarta appeared to have the upper hand in 1984 was due to increasing pressure on the Australian government from oil companies and the Western Australian and Northern Territory state governments, who had issued the now suspended permits. The pressure on Canberra to give ground had grown more acute since the successful Jabiru oil discovery off Australia's North West coast in late 1983 by the BHP consortium, (who also have key interests in the Timor Gap). The oil companies saw this as highlighting potential in the adjacent Timor Gap even further.

In 1985 Indonesia's bargaining position in interpretation of boundary law was further strengthened by an International Court of Justice (ICJ) ruling on a boundary dispute between Libya and Malta. Malta won the case, using arguments parallel with Indonesia's interpretation of UNCLOS III 1982.¹²

Asked how UNCLOS III 1982 specifically affected arguments between Australia and Indonesia on matters such as whether the parties would be free to negotiate, Mochtar said a median line was one principle involved but not the only one and parties could deviate from a median line if they wished. "It takes two to agree on the criteria for negotiation," he added.¹³

However there was one aspect of UNCLOS III that neither Australia nor Indonesia cared to dwell on.

RESOLUTION III OF UNCLOS III

UNCLOS III adopted a resolution (Resolution III) that deals with territories whose people have not yet attained self-governing status.¹⁴ UNCLOS was concerned that such territories might not receive the benefits of

UNCLOS upon obtaining independence if in the interim their rights were waived by a foreign governing power. The resolution states that in the case of such territories, UNCLOS shall be implemented for the benefit of the people of the territory with a view to promoting their development. Any exercise of these rights shall take into account the relevant UN resolutions. Current UN policy views East Timor as a non-self-governing territory administered by Portugal and the UN General Assembly has repeatedly opposed Indonesian control over East Timor, and called for an act of self-determination.

Thus it would seem fairly apparent that Resolution III is applicable to East Timor and would operate to preclude Australia and Indonesia from negotiating to divide the resources of the Timor Gap between themselves. Yet for strategic economic and political reasons, neither Australia nor Indonesia is willing to concede that they may be in breach of international law. Due to the very fact of its annexation of East Timor, Indonesia flatly denies that East Timor is a non-self-governing territory administered by Portugal.

Australia, keen to gain access to an area the oil reserves of which are said to be potentially larger than Bass Strait, has been equally unwilling to accede to any international legal barriers. In the words of the Australian Department of Foreign Affairs: "Our legal advice is that the resolution has no bearing on these discussions either as to their nature or substance".¹⁵ The UN Under-Secretary-General, in reply to an inquiry by Dr Keith Suter (an Australian lawyer and church social justice spokesperson) in 1984 regarding the applicability of Resolution III to East Timor, stated that: "The UN so far has not taken a position with regards to this matter."¹⁶

As Resolution III states that UNCLOS III is to be implemented for the benefit of the people of the territory, it would seem to imply that maritime delimitation in the Timor Gap will be a matter between Australia and East Timor, when the latter achieves self-governing status. In delimitation negotiations, it would be expected that (for geographical reasons) East Timor would presumably adopt essentially the same stance as Indonesia has taken in its negotiations with Australia. However, East Timor might well insist on a more fundamental revision of boundaries in the Timor Gap area. Neither Portugal nor Fretilin recognises the 1971/2 delimitation agreements between Australia and Indonesia which used the southern boundary of the Timor Trough as an approximate boundary guide. Portugal and Fretilin refuse to recognise this delimitation because it restricts their access to the seabed, and Fretilin claims that the delimitation and oil leases granted by the Western Australian Minister for mines in 1977 represent *de jure* recognition of Indonesia's authority.¹⁷

JDZ Interim Agreement

Talks in October 1985 agreed in principle on the adoption of a JDZ for the Timor Gap. However the issue of the JDZ boundaries remained a matter of protracted negotiations. A breakthrough was finally achieved with the announcement of the interim agreement on September 5, 1988. It was considered an encouraging sign for Australian — Indonesian relations that a compromise was able to be achieved on what once seemed an intractable dispute. The breakthrough appeared to coincide with a general improvement of relations in 1988 after the long chill precipitated by the March 1986 *expose* of the Suharto family's wealth and alleged corruption by David Jenkins in the *Sydney Morning Herald*. In 1988, middle-ranking Indonesian Tourism Minister Susilo Sudaman attended the Brisbane Expo, the first official Indonesian visitor since the December 1985 tour by Foreign Minister Mochtar. Although only a junior emissary, the visit by Sudaman can be interpreted as a cautious act of conciliation on Indonesia's behalf. The rapport established by the two newly incumbent Foreign Ministers in 1988, Australia's Gareth Evans and Indonesia's Ali Alatas was also a key factor in enabling agreement on the first major institutional link between the two countries. But a major influence on the breakthrough was no doubt the realization on both sides of the folly of leaving such potential resources untapped. An Indonesian source said: "The political will was on the side of Indonesia as well as economic objectivity. They realise it's better to have an agreement which allows some exploration rather than no agreement and no exploration at all."¹⁸

The Zone of Co-operation specified by the interim agreement of September 5, 1988 is a delicate compromise which recognises both countries' claims to the area. Three separate zones have been created in the 60,000 sq.km. Timor Gap.

The southern boundary represents Indonesia's claim to a 200 nautical mile jurisdiction, while the northern boundary represents Australia's claim to a boundary set by the continental shelf, the extension of the Australian land mass.

Zone A, containing the Kelp, is the largest and potentially richest zone. It will be jointly developed with exploration activity regulated by a joint ministerial council, and tax revenue will be shared equally. Zone B will be under Australian jurisdiction, with Indonesia receiving 16% of company tax. Zone C will be under Indonesian jurisdiction with Australia receiving 10% of company tax.¹⁹

The initial term proposed is 40 years. However the JDZ may be terminated at any time if the two Governments agree to a permanent sea-bed boundary. Exploration in the JDZ must await the signing of a formal treaty between Australia and Indonesia which is expected in December 1989.²⁰

However at the time of the interim agreement in September 1988 it was hoped drilling in Zone B under Australian jurisdiction would be able to commence in early 1989. But when the latest release of exploration permits occurred in April 1989, the Federal Government was unable to offer any exploration acreage in Zone B.²¹ This suggests negotiations with Indonesia have not yet progressed to the point where the Australian Government feels confident to initiate exploration in the agreed Australian area.

Australian Foreign Minister Gareth Evans has rejected Portugal's claim that the Timor Gap treaty is "a blatant and serious breach of international law"²² by claiming that "It won't in any way influence the course of the negotiations with Indonesia".²³ But Canberra's hesitancy in releasing exploration acreage in Zone B may reflect concern over the statement by Portugal's Foreign Minister Joao de Deus Pinheiro that Portugal intends to take Australia to the International Court of Justice (ICJ) for violating international law in its plan to develop oil reserves in the Timor Gap. (November 1988)²⁴

Another contentious issue resulting from the JDZ announcement is the problem of status regarding company permits frozen over a decade ago by the commencement of negotiations. The issue is currently being examined by an Australian-Indonesian working party and is a matter of considerable tension between the oil industry and the Australian government.

Suspended Oil Exploration Permits

Before exploration permits were frozen in 1979 by the commencement of Gap negotiations, oil companies had spent some \$50 million on exploration in the Gap.²⁵ Since the September 1988 interim agreement, the government has faced more intense pressure from oil companies to restore permits. In a corporate sense, the oil companies involved in the Timor Gap are very important players who hold substantial commercial leverage in Australia. They are:

- the Woodside Petroleum led consortium which includes Shell Development, BP Petroleum and BHP. BHP already has strong interests in the Timor Sea with the Jabiru and Challis fields. The Woodside consortium had four permits in what is now Zone A and had drilled two wells. They are the most affected by the JDZ decision because two of their permits WA36P and NTP11 are straddled by the Kelp structure.
- the Petroz NL-Western Mining consortium which had one permit in what is now Zone B and had done some 5000km² of seismic survey work.
- Elf Aquitaine, the French oil giant which had one permit in what is now Zone A (the joint zone) and did some 3000km² of seismic survey work, as well as drilling two wells.²⁶

Despite possessing permits that covered the highly prospective Kelp structure, oil companies deferred drilling commitments in the 1970's, preferring to await resolution of the boundary issue as they feared uncertainty as to title. It was felt the problem of title might be exacerbated if a large discovery were made before resolution of the border, as Indonesia might be tempted to revive the Portuguese claim of a median dividing line and thereby try to reclaim Australian permit areas.²⁷

The status of formerly suspended permits in the light of the Timor Gap agreement is an issue of great concern to the oil companies. A Woodside spokesman has stated that the consortium expects the Australian government to "fully support and uphold our position", whilst private sources within the oil industry have stated that compensation would have to be considered if pre-existing rights were not upheld.²⁸

The oil industry and the government have generally suffered a strained relationship with bitter disputes over such contentious matters as resource tax. In April 1989, the Federal Government made a conscious move to seek peace with the oil sector by announcing its intention to seek a "new, co-operative approach" to reviewing policy. This was announced by Resources Minister Senator Peter Cook in a speech described as a "potential circuit breaker" at the APEA (Australian Petroleum Exploration Association) conference on April 11, 1989.²⁹

Thus it can be seen that whilst the Timor Gap JDZ interim agreement overcomes what had become a prolonged stalemate in the maritime boundary delimitation talks, it has also highlighted other problems, including the unclear status of oil companies' pre-existing rights, and the arguable illegality of the agreement itself, based on Portugal's threat to take Australia to the ICJ.

Thieves' honour

According to an editorial in the Australian-East Timor Association newsletter of December 1988, the deal between Australia and Indonesia over the Timor Gap represents a 'friendship between thieves' that will earn Australia no respect.³⁰ In November 1988, on the thirteenth anniversary of the Indonesian annexation, Timorese solidarity groups converged on Canberra. A delegation met with Australian Foreign Minister Senator Gareth Evans, and told him that any resources in the Gap belonged to East Timor and that Australia should be negotiating with East Timor. The meeting ended with Evans "affirming his personal support for the right of East Timorese self-determination".³¹ Nevertheless, national self-interest in the form of potential oil revenue has been sufficient to explain the rejection by three Australian governments; (Whitlam, Fraser and Hawke) of the East Timorese right to self-determination.

The editorial goes on to state that the fact that the negotiations were drawn out over a ten year period "would seem to indicate that the Australian government has been a reluctant partner in violating international law". But recent confirmation that formal ratification of the treaty should occur in December 1989, suggest that Australia is not overtly concerned about tarnishing its international image. In any case, Australia already has the dubious distinction of being in the minority of the world's nations to grant *de jure* recognition to the Indonesian annexation.

Part Two will now examine the implications arising from the Indonesian annexation of East Timor for the agreement; analysing the issue of denied political and economic self-determination.

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2. The Indonesian Annexation and its Consequences

The Charter of the UN in Article 1, paragraph 2, indicates one of the purposes of the UN as being:

“To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”

In its Advisory Opinion on the Namibia case, the ICJ stated that:

“...the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the UN, made the principle of self-determination applicable to all of them”¹ General Assembly Resolution 1514(xv) of 1960, the Declaration On the Granting of Independence to Colonial Countries and Peoples, proclaims the right of self-determination to all peoples and territories which have not yet attained independence. Paragraph One of the Annex to G.A. resolution 35/118, the Plan of Action for the Full implementation of Resolution 1514(xv) obligates states to do their utmost to promote the full implementation of that resolution. In order to assist the process of self-determination, a Special Committee on the Implementation of the Declaration With Regard to the Granting of Independence, (also known as the ‘Special Committee of Twenty Four’), maintains a list of territories to which the Declaration is applicable. As a non-self-governing territory, East Timor appears on this list as a territory to which the right of self-determination is applicable.²

The ICJ’s Opinion in the Western Sahara case is forthright in proclaiming the existence of the “right” of self-determination as a “norm of international law applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations.”

Judge Dillard said:

“the cardinal restraint which the legal right self-determination imposes is...(that) it is for the people to determine the destiny of the territory.”³

But were the East Timorese given the chance to “determine the destiny” of their territory?

Prior to the annexation of East Timor in 1975, Indonesia never laid any claim to the apparently unattractive Portuguese colony. Intense international pressure through the UN and diplomatic channels was applied to Portugal from the late 1950s to the mid 1970s to decolonize. Indonesia repeatedly endorsed UN resolutions affirming the right to self-determination and independence of Portugal’s non-self-governing territories.

The left wing coup in Lisbon in April 1974 brought about an abrupt and profound change to the status quo in Timor, as there was no longer a wish by the authorities to retain the colonies. Three political parties emerged:

UDT — an “establishment” party favouring federation with Portugal.

Fretilin — more radical and nationalist, demanding the right to independence and the immediate participation of Timorese in local government.

Apodeti — a minor grouping favouring integration with Indonesia.

Tension between the parties erupted into civil war, and the withdrawal of the Portuguese left Fretilin in effective control by August 1975.

By June 1974, Fretilin's Jose Ramos Horta had obtained an unequivocal written assurance from Indonesia's Foreign Minister Adam Malik that: “in view of the principles upheld by his country”, Indonesia supported the right of the Timorese to self-determination. “The government as well as the people of Indonesia have no intention to increase or expand their territory” continued Malik.⁴ Attention given to East Timor by Indonesia's military intelligence increased rapidly during the remainder of 1974, leading to the conclusion that an independent East Timor would be contrary to Indonesia's interests. On the basis of suddenly invoked cultural, ethnic and historical ties between both peoples, Indonesia argued that: “an integration of the territory into Indonesia would represent valid decolonisation”.⁵

Late in 1974, two meetings took place between President Suharto and Australia's Prime Minister Mr Whitlam, in which the latter, despite his active international stand in favour of self-determination in more distant regions, indicated that Australia would not oppose an Indonesian annexation of East Timor. In Whitlam's view, Fretilin was a “nomenclature with overtones of East Germany, North Korea and North Vietnam”.⁶ Malcolm Fraser had also criticised Fretilin for being communist, so with the change of government in Canberra, Suharto knew that any “anti-communist” action Indonesia took over the East Timorese problem would be supported by Canberra. The Indonesian invasion began on 29th November, 1975. Australia, coincidentally, was distracted by its own internal political crisis.

Why did the Indonesians decide to intervene in East Timor? There were probably several motivations. First, the spectre of nationalist disintegration and separatism was one that constantly haunted the Indonesian government. The example and encouragement an independent East Timor would give to internal ethnic groups in Indonesia to secede from a Java-dominated central government was not one the Indonesian government welcomed. They also feared having an unstable and possibly communist East Timor on one of their borders. The Timorese political parties were viewed as immature by the Indonesians and there was a general irritation with Lisbon's perceived irresponsibility and ineptitude in not fulfilling its colonial responsibilities.

Of major influence to Indonesia in its decision to annex East Timor was the perceived “green light” given by Australia and more importantly the United States of America. It is possible that the USA might have averted

the Timor takeover, according to a former CIA officer who states: “[The USA] had lots of time to move the Indonesians in a different direction. Instead, we got right on the Indonesian bandwagon.⁷ Only twelve hours before the annexation occurred, U.S. President Gerald Ford and Secretary of State Henry Kissinger left Jakarta after a state visit. Before leaving Jakarta, Kissinger told reporters that “the USA understands Indonesia’s position on the question of East Timor”.⁸ According to a State Department legal adviser, at the time of the invasion, ninety percent of Indonesian weaponry used was of U.S. origin.⁹

It is the contention of James Dunn, (former Australian Consul in Dili), that the Indonesian generals had their own ideas as to what should happen in East Timor in the event of Portuguese withdrawal as far back as 1966¹⁰ and that the change in government in Lisbon in 1974 merely sped up those aspirations under the control of General Ali Murtopo, who realized that the new leftist Government in Lisbon would probably favour the leftist party Fretilin.¹¹ Under Murtopo’s tutelage, ‘Operasi Komodo’ was put into action setting out to thwart independence moves by the East Timorese and to destabilize the colony, frightening the East Timorese into thinking in terms of integration.

Indonesian Views of Self-Determination

Of its moves to integrate East Timor, Indonesia has offered three explanations in terms of self-determination:

Firstly it argues that integration with Indonesia constituted self-determination because it was in accordance with the will of the East Timorese people, indicated by four acts: the November 1975 Proclamation by four parties sympathetic to union with Indonesia, the May 1976 resolution of the East Timor “Regional Popular Assembly”, the subsequent petition to the Indonesian president and parliament, and the Indonesian fact-finding mission of June 1976.¹² But as pointed out by Professor Roger S. Clark, none of these acts satisfies the conditions set forth in Principle IX of G.A. Resolution 1541(xv) for a legitimate and genuine expression of will to integrate with a sovereign state. These conditions include the prior attainment of an advanced state of self-government, universal adult suffrage and the impartial conduct of the democratic process.¹³

Indonesia’s second explanation of integration in terms of self-determination is that regardless of any explicit consent, there are historical, ethnic, cultural and geographical ties between Indonesia and East Timor which establish East Timor as an integral part of Indonesia. This is strongly refuted by Clark.¹⁴

The final explanation by Indonesia is the argument that independence was “not a realistic hope for East Timor in view of the backwardness and

economic weakness of the population". (Foreign Minister Adam Malik, December 1974).¹⁵ This is again refuted by Clark who points out that apart from offshore petroleum prospects, a 1975 UN report described East Timor as having "fertile lands, valuable forests and probably deposits of copper, gold and manganese."¹⁶ But regardless of this, Resolution 1514(xv) rebutted any suggestion that a lack of economic viability was grounds for delaying independence to a non-self-governing territory; paragraph three states that: "inadequacy of political, economic, social and educational preparedness should never serve as a pretext for delaying independence".

Australia's Recognition of Annexation

Australia's *de jure* recognition of Indonesia's annexation of East Timor, (as discussed in Part One) was inconsistent with the East Timorese right to self-determination. However, Australia was keen to resolve the Timor Gap issue for reasons of certainty, to enable exploitation of the extensive marine and mineral resources, and to improve the always volatile relations between Australia and Indonesia. The continuation of negotiations would appear to indicate that Australia plans to recognize the annexation regardless of any international obligations not to do so. Australia has been reluctant to acknowledge that the annexation and its recognition of it are in breach of the U.N. Charter and of customary international law. Merely to uphold, as appears to be the present government's view, that Australia recognises Indonesia as the state in possession, and can therefore choose to negotiate with it on that basis is to ignore both the U.N. resolutions specifically relating to East Timor and those dealing with the annexation of territory by force generally. The cumulative effect of these resolutions is that both the Security Council and the General Assembly have declared that Indonesia engaged in an unlawful act in annexing East Timor, breaching several articles of the U.N. Charter.

International Law

On one view, that taken by the Australian Government in this instance, U.N. resolutions regarding the status of East Timor are only of "peripheral interest"¹⁷ to the Australian/Indonesian negotiations. This, however, ignores a potential international legal obligation not to recognize Indonesia's annexation of East Timor: a duty breached by the Timor Gap negotiations. The Australian Government view would seem to reflect an interpretation of international law that acts of aggression can be ignored and violators of international law can obtain good title to territory which they seize. This was a proposition expressly denied by the United States and a number of Latin American states in the Montevideo Convention on Rights and Duties of States, 165 L.N.T.S. 19. Article 11 of that treaty provided that "The

contracting states definitely establish as the rule of their conduct the precise obligation not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation, nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily."

Although on first sight this may seem to be a mere regional rule for the Americas, the principles inherent in Article 11 of the Montevideo Convention would appear to be embodied, albeit on a higher level of generality, in article 2 paragraph 4 of the UN Charter, which states:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN."

Thus universal application was bestowed upon the Montevideo principle. This was reinforced in the 1970 Declaration on Principles on International Law Concerning Friendly Nations and Co-operation Among States in Accordance with the Charter of the UN, General Assembly Resolution 2625 (xxv). This Resolution, unanimously adopted (and agreed to by Australia) states that:

"The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal." In 1974, Australia again was a party to the unanimous adoption of a Resolution, No.3314 the Definition of Aggression. Article 5, paragraph 3, states that:

"No territorial acquisition or special advantage resulting from aggression shall be recognised as lawful." Article 38 of the Statute of the International Court of Justice suggests two of the sources of international law are

- a) international conventions (treaties)
- b) international custom as evidence of a practice accepted as law.

It would appear difficult to escape the conclusion that the proposition supported by the 1970 and 1974 resolutions is either one of customary international law (regarding the resolutions as an authoritative, unanimously accepted statement of the law on this point) or of international treaty law (regarding the resolutions as an authoritative interpretation of the Charter, which as a treaty is representative of the contractual obligations of parties to it).

Enshrined the 1974 Definition of Aggression is an obligation on states not to deal with Indonesia as though it were the legal government of East

Timor. This is a similar obligation to that on states not to recognize the illegal presence of South Africa in Namibia, an obligation recognized by the ICJ in its Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*.¹⁸ Much of what the Court said in that case applies by analogy to the present situation.

THE CASE OF NAMIBIA (formerly South West Africa)

South West Africa (Namibia) is a territory of small population but great economic and political importance, due to its rich diamond and uranium deposits which are mined by South African, British and other foreign interests. In 1950, after South Africa declined to place South West Africa under the trusteeship system, the U.N General Assembly asked the ICJ for its advice on the status of the territory. The Court advised unanimously that:

“South West Africa is a territory under the international Mandate assumed by the Union of South Africa on Dec. 17, 1920”¹⁹

In October 1966, by Resolution 2145(xxi), the General Assembly terminated the mandate, on the grounds that South Africa had failed to fulfil its obligations in respect of the administration of the Mandated Territory. The Security Council called upon South Africa to withdraw from Namibia [Resolutions 264(1969) and 269(1969)]. When South Africa failed to do so, the Security Council adopted Resolution 276(1970) which declared 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 July 1970, the Security Council requested an Advisory Opinion from the International Court of Justice on the question:

“What are the legal consequences for states of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276(1970)?”²⁰

The Court concluded (by 13 votes to 2):

- 1 “that the continued presence of South Africa in Namibia being illegal, South Africa is under an obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory”
and by 11 votes to 4:
- 2 “that States Members of the United Nations are under obligation to recognize the illegality of South Africa’s presence in Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of or lending support or assistance to such presence and administration.”

In pronouncing upon the binding nature of the Security Council decisions in question, the Court recalled a passage from its Advisory Opinion of 11 April 1949 on *Reparation for Injuries suffered in the service of the U.N.*

“The Charter has not been content to make the Organization created by it merely a centre for ‘harmonizing’ the action of nations in the attainment of these common ends’ (Article 1, para. 4). It has equipped that centre with organs and has given it special tasks. It has defined the position of the Members in relation to the Organization by requiring them to give it every assistance in any action undertaken by it (Article 2, para. 5).”²¹

Article 25 of the Charter states:

“The Members of the U.N agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

The Opinion on Namibia reinforced the nature of Article 25, by stating that it is for Member States to comply with such a decision “including those members of the Security Council who voted against it and those Members of the U.N who are not members of the Council.”

In the Namibia case, the Court went on to say at paragraph 117:²²

“... a binding determination, made by a competent organ of the U.N to the effect that a situation which is illegal cannot remain without consequence...(paragraph 112)... it would be an untenable interpretation to maintain...that Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it.”

Also paragraph 122 proclaims that “member States are under 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.”

Analogous obligations would arise in the Timor Gap situation by substituting ‘Indonesia’ for South Africa and ‘East Timor’ for Namibia.

Furthermore, paragraph 123 says member States “should also make clear to the South African authorities that the maintenance of diplomatic or consular relations with South Africa does not imply any recognition of its authority with regard to Namibia.”

Australia can have no legal grounds for justifying its *de jure* recognition of Indonesia’s incorporation of East Timor, signified by the commencement of negotiations over the Timor Gap in February, 1979. The ICJ also states in the Namibia case at paragraph 124: “the restraints which are implicit in the non-recognition of South Africa’s presence in Namibia...impose upon member States the obligation to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.”

The ICJ advisory opinion on Namibia is clearly analogous to the Timor situation, where Indonesia's continued presence in East Timor has also been declared illegal by organs of the United Nations. Accordingly, with respect to the Timor Gap negotiations, Australia should recognize that "no state which enters into relations with [Indonesia] concerning [East Timor] may expect the U.N or its Members to recognize validity or effects of such relationship, or of the consequences thereof" (paragraph 126 of Namibia ICJ advisory opinion)

With regard to the "use of force" resolutions, Australia is under an international legal obligation not to recognize Indonesia's acquisition of East Timor, a duty breached by the negotiations regarding the Timor Gap. Also breached is the obligation of states under Article 25 of the Charter to carry out the decisions of the Security Council (in regard to Resolution 384). Furthermore there is a broader obligation in Article 2, paragraph 5 of the Charter, encompassing decisions of the General Assembly as well (with regard to East Timor see Resolution 34/85), to give the United Nations "every assistance in any action it takes in accordance with the present Charter." Australia's dealings with Indonesia in respect of East Timor are not in respect of this obligation assisting the UN in its efforts to obtain self-determination for the East Timorese.

If finalised, the Timor Gap joint venture agreement can be seen as an exercise by which Australia and Indonesia divide between themselves the potential wealth of East Timor. This raises the issues of economic self-determination and permanent sovereignty over natural resources.

Economic Self-Determination and Permanent Sovereignty over Natural Resources

The issues of economic self-determination and Permanent Sovereignty over Natural Resources are examined in detail in 1988 by the Report of the Commission of Inquiry into the Rehabilitation of the Worked-Out Phosphate Lands of Nauru.²³ The Nauru case has potentially strong analogies to East Timor with regard to the Timor Gap. In Nauru, exploitation of the natural resource of phosphate occurred without any effective consultation with the Nauruans. If the Timor Gap JDZ goes ahead, exploitation of seabed hydrocarbons will occur without any consultation with the East Timorese. It is the principle of Permanent Sovereignty over Natural Resources which forbids such action.

This principle is based on the important consideration that economic independence is an integral part of sovereignty. The strands of sovereignty include freedom in the areas of political, economic and military affairs. In the words of Georg Schwarzenberger: "Without a minimum of political,

economic or military de facto independence, *de jure* independence is meaningless.”²⁴

Economic freedom entails the ability to achieve and maintain political and military independence, thus to take away control of a country’s natural resources is to “appropriate a part of that sovereignty.”²⁵

Even if a people is dependent, they are in no way deprived of this right of economic independence, according to the Nauru Commission. It is a right always in existence, but while a people is dependent, “their ability to assert their right is suspended. When they achieve independence, this right, always inherent...becomes assertible.”²⁶

The right to economic self-determination is a right not only of nations, but of peoples, and has been recognised in a number of international resolutions. For example, Article 5 of Resolution 1803 (xvii) of 14th December, 1962, states that sovereignty of peoples over their natural resources must be furthered by the mutual respect of states, while Article 7 states that violation of the rights of peoples and nations to sovereignty over natural resources is contrary to the spirit and principles of the UN Charter.

Within the 1966 International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, Article 1 speaks of the rights of *peoples* to self-determination, while Article 1(2) states that: “In no case may a people be deprived of its own means of subsistence.” If economic independence is a necessary part of self-determination, then economic independence is also a right of peoples.

The principle of Permanent Sovereignty over Natural Resources was incorporated in Article 2 of the Charter of Economic Rights and Duties of States. From the early 1950s, the issue of exploitation of natural resources was receiving authoritative clarification by the General Assembly. In the first session of the Committee on Natural Resources in 1971, it was stated on behalf of the Secretary-General that:

“The principle of national sovereignty over natural resources has been proclaimed so frequently and so solemnly that it has by now acquired the weight of a Charter principle.”²⁷

Within another report in 1976 entitled *Exercise of Permanent Sovereignty over Natural Resources and Use of Foreign Capital and Technology for their Exploitation*, the Secretary-General observed that this right went beyond the mere formal possession of these resources, and involved not only the freedom to decide on the manner in which they shall be exploited and marketed, but also the capability to exploit and market them, so that the people of the state may benefit effectively from them”.²⁸

With regard to expectations of commercial agreements involving the movement of natural resources (such as the Timor Gap JDZ), Resolution 523(vi) of 12th January, 1952, emphasized that whatever agreements were

reached “should not contain economic or political conditions violating the sovereign rights of underdeveloped countries including the right to determine their own plans for economic development”.²⁹

Both the Nauru and now the East Timor case have not attracted the large degree of attention that surrounded the case of Namibian uranium. However the principle involved in all three situations is the same: whether another power, mandatory or otherwise, could exploit the sovereign natural resources of a dependent territory.

General Assembly Resolution 2271(xxxv) of 6th March, 1981: “Question as to Namibian Uranium” is an indication of how strongly the international community, when compelled to confront the issue of permanent sovereignty, views the exploitation of a people’s natural resources. This resolution is particularly strong, as it was set in the context of the illegality of the South African presence in Namibia, but this only strengthens the analogy to East Timor. The UN viewed the exploitation of Namibia’s resources as a major obstacle to its gaining political independence. Similarly, the plundering of Timor Gap resources would deny East Timor a strong economic basis on which to sustain a claim for political independence. Upholding East Timor’s right to permanent sovereignty over its natural resources in the Timor Gap would destroy Indonesia’s repeated argument that as an independent state, East Timor would not be economically viable. It seems that South Africa is a more popular political target than Indonesia or Australia, leading to much greater scrutiny of Namibia than East Timor or Nauru.

EFFECT OF U.N.’s FAILURE TO RECOGNIZE INDONESIA’S INCORPORATION OF EAST TIMOR UPON GAP AGREEMENT NEGOTIATIONS

The argument that the Timor Gap negotiations are in breach of the UN Charter and of customary international law has been outlined. The General Assembly and the Security Council have spoken many times against Indonesia’s aggression and denial of the right of self-determination to the Timorese people.

The Australian government stance reflects the view that:

“resolutions of the U.N. General Assembly on the Timor question are not legally binding...there are no international law norms conditioning the recognition of sovereignty and it is up to each state to decide when to confer recognition.”³⁰ The fact that Australia recognised Indonesian sovereignty *de jure* in 1979 (by its commencement of Gap negotiations with Indonesia) is taken to be decisive for the legality of the agreement.

Portuguese protests are not paid much heed, firstly because of Australia’s decision to proceed to a bilateral agreement with Indonesia and secondly because:

“internationally, Portugal is seen to be vainly asserting colonial rights no longer relevant on the world scene.”³¹

The Goa Analogy

It has been claimed in a Parliamentary Library research paper that the situation resembles the Indian invasion of the Portuguese colony of Goa in 1961;

“India was criticised for its use of force in the course of the takeover but few nations were prepared to defend Portugal’s continued sovereignty in the territory.”³²

But the Goa analogy is not entirely appropriate, for there no question of self-determination arose, it was merely Indian aggression versus Portuguese colonialism. When the matter was debated in the Security Council, neither side was able to command sufficient votes to have a resolution adopted. Indonesia was, on the other hand, soundly condemned for its invasion of East Timor, both in the Security Council (twice) and in the General Assembly (numerous times). Portugal’s objection to the Australian actions appears to be on principled grounds. To the extent that Portugal continues to be regarded by the UN as the “administering authority” of East Timor, it is in a context where Portugal is pledged to complete the self-determination process aborted by Indonesia. A better analogy than the Goa one is the role of the United Kingdom in respect of Zimbabwe where the UK was able finally to play a “vestigial” role in the ultimate decolonization of that country — some years after the abortion of that process by the Smith regime.

Although the UN Charter is the central focus in Australia’s international legal obligations in this matter, the 1982 Law of the Sea Convention (to which Indonesia and Australia are both signatories) also supports the argument. Article 301 of that treaty provides that:

“In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”

To the extent that Indonesia makes claims concerning the resources of the sea and continental shelf areas surrounding East Timor, it can hardly claim to have refrained from the threat or use of force. In denying Timorese self-determination, it has acted in breach of other principles of law embodied in the UN Charter. Australia, in condoning those acts, is a party to Indonesia’s breaches of the letter and spirit of Article 301, it may be argued. Australia may be breaching them in its own right by acting inconsistently with East Timor people’s rights.

Resolutions 1541(xv) and 1514(xv), the Declaration on the Granting of Independence to Colonial Countries and Peoples were treated as international law by the ICJ in the Western Sahara case. What is the implication of a failure to comply with the relevant standards of self-determination?

The Peremptory Norm of Self-Determination

If it can be established that self-determination is not merely a principle of customary international law, but also a peremptory norm, then Article 53 of the Vienna Convention on the Law of Treaties provides that:

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”

A “peremptory norm”, or *jus cogens*, is one from which absolutely no derogation is permitted; it exists to protect overriding values and interests of the community at large. The direct function of a peremptory norm “appears to be to limit the right of subjects of law to conclude agreements *inter se*, ...so as not to injure the rights or interests of other subjects of law.”³³ It is widely held that the principle of self-determination as perceived in Resolutions 1514(xv) and 1541(xv) is just such a norm. In 1963, the International Law Commission, in its commentary to the draft articles of the law of treaties, suggested that the principle of self-determination could be cited as an example of *jus cogens*. However, because the content of law is not static, the Commission decided against including any examples of *jus cogens* in the article itself. Thus the reference to self-determination appears only in the commentary.³⁴ Resolution 35/118 treats the right to self-determination as a rule of *jus cogens*, a fundamental norm from which no derogation is possible. Thus no treaty made in contravention of the rule is valid — including the Australian-Indonesian Timor Gap agreement.

No matter how keenly or “voluntarily” arrangements or agreements are entered into, they may nonetheless not be enforceable because, to borrow a term from the law of contract, the agreement is “unconscionable”. As Professor Roger Clark puts it:

“every legal system contains in its corpus of law a doctrine that some contractual agreements are simply void because they contravene community policy. One might mention an agreement to sell oneself into slavery...or the Baby M surrogate mother case. The law speaks of those and comparable agreements as ‘contrary to public policy’.”³⁵

Any agreement that conflicts with the peremptory norm of self determination is thus void. However there are problems concerning possible methods of invalidating such treaties. There is a serious defect in the procedural articles of the Vienna Convention, Articles 65 and 66, as the right to claim the invalidity of a treaty because of an alleged conflict with a peremptory norm is limited to the parties to that treaty.(!) This would

appear to conflict with the purpose of *jus cogens* to: "protect the overriding interests and values of the international community of states."³⁶ Because of the Convention's procedural inadequacies for invalidation of treaties, it is necessary to look for other means of invalidation outside the Vienna Convention.

The main forms of reaction by the international community of States to violations of peremptory norms are enforcement and punitive action, declaration of invalidity, non-recognition and condemnation of unlawfulness.³⁷ However the international community of states does not always react consistently to violations of peremptory norms, for reasons of political expediency. But this failure to achieve consistency does not negate the value and existence of peremptory norms in international law, for as Lauri Hainnaken observes: "Law is inevitably applied in the context of a political process."³⁸

Part Three will now examine the international community reaction to violations of the peremptory norm of self-determination. A comparative study of East Timor with cases is placed against a background of regime analysis of self-determination.

NOTES

- 1 *Namibia case*, I.C.J. Reports 1971, p.31
- 2 Clark, R.S. statement to the Sub-Committee on Petitions, Information and Assistance of the U.N. Special Committee of Twenty Four on the Implementation of Resolution 1514(xv), 2 May, 1989
- 3 *Western Sahara case*, I.C.J. Reports 1975, p.12
- 4 Malik, A. quoted by Dunn, J. *Timor: A People Betrayed*, (Jacaranda Press, Milton Qld., 1983), p.108
- 5 *ibid.*, p.148
- 6 Whitlam, E.G. "Indonesia and Australia: Political Aspects" in Mackie, J.A.C. (ed.), *Indonesia: The Making of A Nation*, (Research School of Pacific Studies, ANU, 1980), p.755
- 7 CIA source quoted by Southerland, D. "U.S. might have averted tragic Timor takeover", *The Christian Science Monitor*, December 17, 1980, p.1
- 8 Kissinger, quoted by Kohen, A. "Invitation to a Massacre in East Timor", *The Nation*, February 7, 1981, p. 136 at p.139
- 9 Kohen, *supra*, p.138
- 10 Dunn, *op. cit.*, p.105
- 11 Dunn, J.S. "Portuguese Timor — the Independence Movement from Coalition to Conflict", *Dyason House Papers* 1975, p.2
- 12 Clark, R.S. "The 'Decolonization' of East Timor and the UN Norms on Self-Determination and Aggression, *Yale Journal of World Public Order*, Vol.7, No.1 Fall 1980, p.1
- 13 *ibid.*
- 14 *ibid.*, pp.19-21
- 15 Malik, quoted by *ibid.*, p.31
- 16 Clark, *ibid.*, p.32
- 17 Gath, S. "Australia-Indonesia Maritime Boundary: The Timor Gap", Australian Parliamentary Library Legislative Branch Research Paper, 17 December 1985
- 18 *Namibia case*, I.C.J. Reports 1971, p.16
- 19 *International Status of South West Africa case*, I.C.J. Reports 1950, p.128 at pp.143-144
- 20 *Namibia case*, *op. cit.*
- 21 ICJ Advisory Opinion *Reparation for Injuries Suffered in the Service of the UN*, quoted *ibid.*
- 22 *ibid.*
- 23 *Nauru Commission Report*

- 24 Schwarzenberger, quoted by *ibid.*, p.939
- 25 *ibid.*, p.940
- 26 *ibid.*, p.938
- 27 *ibid.*, p.950
- 28 *ibid.*
- 29 *ibid.*, p.952
- 30 Sutherland, J. "Australian-Indonesian Sea-Bed Boundary Agreement", *Australian Parliamentary Library Legislative Research Service Paper*, 21 September 1988, pp.2-3
- 31 Gath, *op. cit.*
- 32 Gath, *op. cit.*
- 33 Hannikainen, L. *Peremptory Norms (Jus Cogens) in International Law*, (Finnish Lawyers' Publishing Company, Helsinki, 1988), p.1
- 34 *Yearbook of the International Law Commission* 1963, Vol.II, document A/5509, chapter II, section B, article 37 and commentary, paragraphs (1) to (5)
- 35 Clark, R.S. "Free Association — Critical View", paper at a conference on the Future Political Status of the U.S. Virgin Islands, University of the Virgin Islands, February 26-27, 1988, p.1
- 36 Hannikainen, *op. cit.*, p.724
- 37 *ibid.*, pp.301-307
- 38 *ibid.*, p.304

3. The Global Context of Self-determination

International community reaction to violations of the peremptory norm of self-determination has not been consistent. According to Lauri Hannikainen, the peremptory obligations concerning self-determination “may compromise only obligations with regard to a colonial-type domination”¹ It seems that the international community has not reacted sufficiently consistently to attempts of States to annex a neighbouring dependent territory, where the populations of the State and the territory have ethnic and or cultural similarities.

But the distinction made in international community reaction between classical ‘colonial-type’ domination and the annexation of a neighbouring dependent territory is made on purely political grounds and I would argue that such a distinction cannot be sustained. Peremptory obligations must apply in all situations where a peremptory norm is violated, for “there can be no derogation from a peremptory norm” (Article 53 Vienna Convention). But whereas classical European ‘salt-water’ colonialism was easily frowned upon by the Third World majority for its imperialism, this form of colonialism is now virtually extinct. It has been replaced by a new form of colonialism: annexation of neighbouring dependent territories, for example the cases of East Timor, Western Sahara, Eritrea, and West New Guinea. The most important feature of this new type of colonialism is that it is the oppression of Third World territories *by other Third World States*. The Third World majority finds it a very difficult and sensitive issue to condemn one of its own members. This is particularly the case with East Timor; the Third World majority is reluctant to act too strongly against Indonesia, a leading Non-aligned and decolonized state. Portugal, cast in the role of shunned imperialist, finds that its attempts to revive the East Timor issue are seen by many in the Third World majority as Portugal “vainly asserting vestigial colonial rights no longer relevant on the world scene”.²

In examining the reasons why the peremptory norm of self-determination concerning East Timor has not been given high priority by the international community, a reflection can be made on the general fate of the self-determination issue today. The concept of ‘international regimes’, (used as an analytical framework), may aid in the analysis of the evolution of an ‘international self-determination regime’ and its current implications.

International Self-Determination Regime

Krasner's now classic definition provides that regimes are implicit or explicit "principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area"³ in international relations. For Haas, "norms are specifications of behaviour required to make principles real. Rules specify behaviour to make norms real, decision-making procedures tell us how rules can be triggered".⁴

Evolution of the UN self-determination regime shows how conflicting priorities and interests of states have shaped it in a way which reflects not the requirements of the common good of an emerging international community, but those of the most powerful actors. The norms defining the regime of nineteenth century European colonialism collapsed as a result of the erosion of the power of its supporters, the European states. But it would appear that the UN self-determination regime has been restricted in its scope to decolonization of the European empires.

Krasner suggests three main variables in regime creation, persistence and dissipation.⁵ Firstly, the self-interest of states aiming to maximize their own utility. For example, in the past, the United States' strong support for the dismantling of European empires has not been unconnected with perceived advantages to the United States accruing from world trade liberalization.

The second variable in regime evolution is political power, either in the service of collective interests or in the service of particular hegemonic interests. The regime associated with self-determination has fluctuated in strength with changes in support and commitment by powerful international actors or blocs. The difference between the 'Western' compromise on self-determination, and the aspirations of the initially weak minority of ex-colonial states makes the self-determination regime initially adopted a hegemonically imposed one rather than a consensually negotiated one. Lack of universal legitimacy may undermine long-term durability.

Given strategic and other considerations at the time, a commitment to unrestricted self-determination and total decolonization may appear more costly than beneficial to hegemonic interests. This was the situation that the U.S. as hegemon in the emerging self-determination regime immediately following World War Two found itself in. Perceived constraints facing the U.S. due to its newly acquired superpower status meant that the hegemonic principles underlying the regime were no longer those of liberal humanitarianism but reflected a more 'realist' compromise.

Norms and principles are the third main causal variables for Krasner in regime development. A superstructure of diffuse principles (he cites sovereignty — "the concept of exclusive control"⁶ as the most important

example in international politics) condition the substructure of defining norms and principles directly related to the regime's issue area. The fundamental tension existing between self-determination and state sovereignty has been an impediment to the development of a comprehensive self-determination regime.

Analysis of particular empirical cases in the self-determination regime can determine the extent to which a change in regime strength, scope and nature has occurred. The most practical indication of regime strength is the degree of compliance by states with its injunctions. Thus there is a need to compare actual state practice regarding self-determination with the formally specified norms and procedures of self-determination regime theory. For, as Donnelly puts it "the real norms and procedures of a regime arise from the practice of its participants, which rarely is unrelated to but often is not exactly what is specified in the legal texts".⁷ In the two decades after World War Two the so-called "Third World majority", which included most new post-colonial states, emerged with growing voting power in world forums such as the UN. The anti-colonial bloc's power was able to shape the UN self-determination regime, consequently making its scope exclusively anti-European colonial. Collusion with the Soviet Union enabled the Third World to further strengthen its quest to "liquidate the remnants of colonialism"⁸ and enable Third World colonies to enter the global system as sovereign states. The process of decolonization peaked in the early 1960's. But once decolonization of the classic type was virtually complete, the scope of the regime was not expanded to include the new form of colonial oppression by Third World post-colonial states.

A distinction must be drawn between decolonization which leads to internal colonialism, as in Punjab and Bougainville, and subsequent annexation by decolonized states as in Western Sahara, Eritrea and East Timor. The former have been accepted as necessary incidents of decolonization and the formation of viable states. If self-determination were to be granted to peoples in all such states, the fragmentation which would result would be unacceptably destabilizing to the present world order. The latter, while often not drawing the wrath of the Third World allies of the annexing state may yet be amenable to self-determination. The cases of Third World colonialism/annexation in East Timor and Western Sahara are of interest in this respect, as the latter — in contrast to the former — is still actively debated internationally as a case of denied self-determination.

Both East Timor and Western Sahara are cases where disengagement by a European power led to forceful absorption into neighbouring states. In both of these cases there have been demands for self-determination, but they have not been successful so far, although there have been some progressive moves recently regarding the Western Sahara situation (discussed below).

In 1981, UN General Assembly Resolution 36/103 included as one of the elements of the non-intervention principle the duty of a state to refrain from any forcible action which deprived peoples under colonial domination or foreign occupation of their right to self-determination, freedom and independence. If these conditions did not occur, UN interference by support of liberation movements was deemed legitimate. However, there has been inconsistency in the application of this principle.

In the post-1975 period, the UN self-determination regime has had, in Haas' terms, limited effectiveness, with selective application of increasingly conflicting principles and norms indicative of regime incoherence. One example of this selectivity can be seen in the admission of liberation movements to Observer status in accordance with the 1975 Vienna Convention of the Representation of States in their Relations with International Organizations of Universal Character.

Neither support nor Observer status has been provided to Fretilin or Polisario, the liberation movements in East Timor and Western Sahara respectively; whereas those movements active against South Africa — SWAPO (South West African Peoples Organization) and ANC (African National Congress), or against Israel — the PLO (Palestine Liberation Organization) — have been granted both legitimizing benefits.

The process of regime decay has been underlined by the increasing gap between the Third World dominated General Assembly and Special Committee of Twenty Four that deals with the implementation of Resolution 1514 (xv), and the position of Western states on issues to do with self-determination.

International Support for Principle of Self-Determination

Empirical evidence of eroding support for the principle of self-determination can be seen by examining the international community reaction to the East Timor and Western Sahara cases. The table below sets out all General Assembly resolutions on East Timor between 1975 and 1982.

Table i

Resolutions on East Timor in the UN General Assembly⁹

Year	Resolution	For	Against	Abstention
1975	3485(xxx)	72	10	43
1976	31/53	68	20	49
1977	32/34	67	26	47
1978	33/39	59	31	44
1979	34/40	62	31	45
1980	35/27	58	35	46
1981	36/50	54	42	46
1982	37/30	50	46	50

The first UN General Assembly resolution after the invasion of East Timor was 3485(xxx), sponsored by Algeria, passed on 12th December, 1975 (72/10/43-see table i). It called upon "all States to respect the inalienable right of the people of Portuguese Timor to self-determination...[and] strongly deplores the military intervention of the armed forces of Indonesia in Portuguese Timor."¹⁰

Votes in favour were cast by an assorted group of mainly African and Asian states, notably Algeria, the Soviet bloc, China and, interestingly, Australia. Votes against were cast by Indonesia and its ASEAN partners (except Singapore), India (which saw an analogy to its occupation of Goa in 1961), Saudi Arabia and Japan. Abstentions included most Western European and pro-western Latin American states, Singapore, larger Islamic states, and the United States (whose main concern was to minimize the importance given to the issue).

Two main factors appear to have determined the voting: firstly, the principle of non-aggression and peaceful coexistence — the threat to the security and sovereignty of small nations represented by such actions; secondly, the strength of relations between the voters on one hand and either Indonesia or Portugal on the other. These relations were either bilateral, regional, via third parties, or affected by prior colonial associations. Concern for the East Timorese themselves, expressed through the recognition of the Democratic Republic of East Timor (proclaimed by Fretilin on 28th November, 1975), came from fellow former Portuguese colonies in Africa, with whose ruling parties Fretilin had developed close links, reinforced by ideological affinity. Support by China of these new African states, and the lack of relations between China and Indonesia accounted for the strong support China initially provided to the newly proclaimed republic.¹¹ During the subsequent seven years, the issue of East Timor was debated annually in the General Assembly, despite the reluctance and lack of interest of most powers, especially the superpowers, which despite the apparent support of the Soviet Union for Fretilin, were in practice both in favour of Indonesia's annexation.¹²

Support for pro-East Timor resolutions was eroding steadily. As table i shows, the number of votes in favour progressively declined, while votes against increased. Abstentions have remained fairly constant in number, if not in composition. The tone of the resolutions has likewise changed. Although they all at the outset prominently claim to 'reaffirm the inalienable right of the people of East Timor to self-determination', later resolutions fail to condemn Indonesia's occupation, and express more attention to the humanitarian needs of the East Timorese, which UN agencies are requested to satisfy.

Notable shifts in voting patterns had occurred by 1981. The United States

and Australia shifted to opposition, as did Japan, Mauritania, Morocco, Papua New Guinea, Singapore and a number of right wing Latin American dictatorships, together with the principal Arab League states. Abstentions came mainly from Western European states needing to cultivate good relations with both Indonesia and Portugal, Latin American democracies (sympathetic to an oppressed people but sensitive to pressure from the United States), part of the Soviet bloc (allowing the Soviet Union itself to keep up appearances by voting in favour), key African states such as Ghana and Nigeria, and Oceanic states such as Fiji and Western Samoa. The supporters of East Timor were increasingly reduced to a small faithful core headed by the former Portuguese colonies in Africa, Brazil (aiming to establish influence and important markets in those former colonies), a residual part of the Communist group of states including the Soviet Union, China (whose direct assistance to the Democratic Republic of East Timor had meanwhile ceased), some small, mainly socialist states in Africa, Asia and Central America, plus newcomers such as Vanuatu and Viet Nam.

After 1982, the supporters of East Timor did not push for a debate, apparently fearing that there was no longer sufficient support in the General Assembly for adoption of resolutions regarding the right of the East Timorese to self-determination. Debate has thus been postponed from one year to the next.

The Contrast with the Western Sahara

Unlike East Timor, the case of the denial of self-determination in Western Sahara is still actively debated in the General Assembly. Western Sahara had been a Spanish colony since 1884. In 1975, after much delay, Spain agreed to hold a referendum on self-determination in the territory under UN auspices. King Hassan of Morocco, who had previously supported the principle of self-determination for the territory, claimed it for Morocco on the basis of "historic title" predating Spain's colonisation (somewhat similar to India's argument about Goa). A similar, overlapping claim was made by the Republic of Mauritania. On request from the General Assembly, the ICJ issued an advisory opinion in 1975 which did not find "a tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity"¹³ and supported the application of the principle of self-determination. But one day after the ICJ opinion was announced, King Hassan called for a peaceful invasion of Western Sahara. Here the case of Western Sahara can be distinguished from the East Timor situation. Unlike Spain, Portugal has not condoned acts of aggression against its former colony but has consistently condemned Indonesia's actions, and in fact it was at Portugal's request that the Security Council convened in 1975 to consider the situation in East Timor. In

contrast, when the Security Council failed to take decisive action against the Moroccan invasion, Spain entered into the 'Madrid Agreement' ceding the territory to Morocco and Mauritania.¹⁴

Polisario, the independence movement of the Saharans, which is supported by Algeria, had succeeded, by 1979, in forcing the withdrawal of Mauritania from the southern section of the territory it had occupied, but this territory was then occupied by Morocco. Polisario continues to wage a guerilla war against the Moroccan occupation.

It is interesting to compare the voting pattern in resolutions on the Western Sahara (which have repeatedly stressed the role of the UN and the Organisation for African Unity in guaranteeing the Saharan people a free, fair and peaceful process of self-determination and called on Morocco to end its occupation) with that of resolutions concerning East Timor. (see table)

Table ii
RESOLUTIONS ON WESTERN SAHARA IN THE UN GENERAL ASSEMBLY¹⁵

Year	Resolution	For	Against	Abstentions
1978	33/31a	90	10	39
	33/31b	66	30	40
1979	34/37	85	6	41
1980	35/19	88	8	43
1981	36/46	76	9	57
1982	37/28	78	15	50
1983	38/40	adopted without vote		
1984	39/40	90	0	42
1985	40/50	96	7	39
1986	41/16	98	0	44
1987	42/78	93	0	50
1988	43/33	86	0	53

Whereas resolutions regarding East Timor have a roughly equal proportion of votes in favour, against and abstaining, that is not the case for votes on the Western Sahara. The latter have few, if any, votes against, and nearly twice as many in favour as abstaining. Because of strong Algerian diplomatic support, the political struggle of the Saharan people has been able to proceed primarily through state mechanisms, unlike East Timor which has mainly had to draw support from non-governmental bodies.

Efforts by the UN Secretary-General Perez de Cuellar and Organization of African Unity (OAU) Chairman President Moussa Traore of Mali to promote a "just and definitive solution"¹⁶ to the Western Sahara problem led to a breakthrough in 1988. In August 1988, an agreement in principle

was given by the two parties to the conflict — Morocco and Polisario to the joint proposals of the Secretary-General and the OAU Chairman. The agreement was that the United Nations, in co-operation with the OAU, should supervise a cease-fire and be responsible for the organization and conduct of a referendum, to enable the population of Western Sahara to exercise their right to self-determination “without any military or administrative constraints.”¹⁷ On 19 October, the Secretary-General appointed Hector Gros Espiell of Uruguay as Special Representative for Western Sahara to be the “sole and exclusive authority” during the transitional period between the installation of the ceasefire and the announcement of referendum results. Special Representative Espiell visited the area in January 1989 for preliminary discussions and negotiations.

What accounts for the greater support given to the cause of Western Saharan self-determination is the perceived greater impact on international order, rather than a widespread commitment to self-determination. An expansionist Morocco is seen as a threat to the OAU’s principle of the ‘sanctity’ of colonially inherited boundaries, which is crucial to the survival of many post-colonial multi-ethnic African states. Almost all of these states have been formed along the exact boundaries of former colonies. Those boundaries often cut through the territories of tribes and ethnic groups, leaving ethnically homogeneous groups divided. Allowing Morocco’s claim to part of the Western Sahara on the grounds of pre-colonial links would undermine the basis upon which many African states have been formed. Indonesia’s actions in East Timor are seen as less threatening to the interests of its neighbour states.

A number of conclusions can be drawn from a comparison of the self-determination issue in the East Timor and Western Sahara cases. Although in both cases self-determination is proclaimed as the central issue, in practice, less attention is paid to the rights of the populations involved than to the interests of the disputing states. The precedence of other priorities over self-determination is reflected in voting patterns for UN General Assembly resolutions. Formation and reformation of alliances occur according to the strength of ties between the disputing states and the voters. The small group of supporters loyal to the cause of self-determination comprises states which have no particular interest in common with the disputants, and which have themselves experienced an attempt to deny their right of self-determination in the past.

One crucial difference between Polisario and Fretilin is that Polisario has had both armed and diplomatic sponsorship by Algeria in its quest for statehood. Fretilin has not had similar support from any neighbouring state, certainly not from Australia, although Australian non-governmental support has remained significant. It has had active support only from

distant states like Mozambique, Angola and Portugal. No further progress in the recognition of an independent East Timor has occurred, and without the supply of arms, the resistance has weakened. The situation might have been very different if Australia had perceived the annexation of East Timor as a threat, as Algeria saw Moroccan annexation of the Western Sahara.

The Western Sahara case is further aided by the fact that UN efforts to constrain Morocco are backed by the OAU. Unfortunately, there is no analogous group to support East Timor. Indonesia has strong influence in ASEAN and is a leading light in the non-aligned movement. Even in the South Pacific Forum in which small states have a strong influence, the general disposition is to acquiesce to Indonesia's actions.

By invoking a communist threat through Polisario and Fretelin respectively, Morocco and Indonesia were able to obtain the favour of the United States towards their actions. Thus self-determination was placed below strategic considerations. However, despite considerable military and financial assistance to both Morocco and Indonesia from the United States, the Soviet Union has intervened in neither conflict. Both superpowers value good relations with both Morocco and Indonesia.

Thus it can be seen that unprincipled action by state actors has furthered the decay of the UN self-determination regime, which has not been expanded to encompass the new form of colonialism by Third World states. Alternative means of upholding the principle of self-determination have required the involvement of non-state actors. This has been notable in the case of East Timor, where limited support among UN member states is to be contrasted with the persistent interest of a wide range of transnational non-government organisations such as Amnesty International, the World Council of Churches, and the Catholic Church.

The End of the Self-Determination Regime?

If the UN self-determination regime is in a state of decay and limited effectiveness, what is to become of it? Are all quests for self-determination which are not backed by significant state support doomed to failure and obscurity? Vasquez and Mansbach argue that critical issues in world politics "do go through the stages of genesis, crisis, ritualisation, dormancy, decision-making and authoritative allocation."¹⁸ This sequence, they say, can be applied to analysis of the development of international regimes.

Observing the UN self-determination regime, various steps are identifiable: genesis, arising from the demands for an end to European colonialism; crisis, when a threat to established order is posed by genuine expressions of popular will; ritualization, when patterns of behaviour are set, such as at the UN, and dormancy, a stage during which an issue may be relegated to the periphery of public attention. This last stage would seem to be the stage in

which the UN self-determination regime presently stands. With the traditional colonial era almost completely ended, it is time to decide whether the self-determination regime is also at an end. The decision-making stage has previously manifested itself in the establishment of the regime in the 1940s, and its continuation into the 1970s. There was also authoritative allocation in the form of UN committees to foster the process, and other forms of active assistance. The regime reached the status of being "similar to effective government" as Vasquez and Mansbach describe that stage.¹⁹

According to Vasquez and Mansbach, dormancy may follow any of the stages, and may lead either to a return to crisis, or to the removal of the issue from the global political agenda. The very issue of East Timor's future has been placed under a spotlight by the Timor Gap interim agreement between Australia and Indonesia; the regime of self-determination currently dormant in Vasquez and Manbach's terms, may now either move to a crisis situation or else fade from global attention entirely. It seems unlikely that the international community will come to the military assistance of Fretilin.

Nevertheless, it is hard to believe that self-determination will completely fade from the international agenda. Already, it is starting to emerge in new forms, such as the independence movements of regional minorities in Europe such as the Basques and the situations in Brittany and Northern Ireland and the Baltic States in the Soviet Union. In the case of the Baltic States, it is hard to imagine a more legitimate case for self-determination, as they attained their independence after World War One, prior to their subsequent annexation. The recent breakthrough in the proposals for Western Saharan self-determination is of major significance for the East Timor situation, for it clearly indicates that self-determination may occur outside the old European 'salt-water' colonial situation. Thus with the establishment that the principle of self-determination exists beyond the classical colonial situation, the regime may rise, Phoenix-like, to play once again, a significant role in international affairs.

But given the present indifference of the majority of states to the principle of self-determination for East Timor, I believe that the role of non-government organisations will be instrumental in any such process of regime regeneration in the East Timorese situation.

In conclusion to this paper, Part Four will examine recent developments in the East Timorese dilemma on the world scene, given the focus arisen as a result of the Gap negotiations.

NOTES:

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- 4 Haas, E. "Regime Decay: Conflict Management in International Relations 1945-1981", *International Organization*, 37(2) Spring 1983, p.189 at pp.199-200
- 5 Krasner, *op. cit.*, p.186
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- 8 Ruggie, J.G. "The United States and the United Nations: Toward A New Realism", *International Organization*, 39(2) Spring 1985, p.343 at p.344
- 9 Source: UN Yearbooks for respective years
- 10 *UN Yearbook 1975*, p.865
- 11 Horta, J.R. FUNU, (Red Sea Press, Trenton N.J., 1987), p.109
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- 13 *Western Sahara Advisory Opinion*, ICJ Reports 1975, p.12, paragraph 162
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- 15 Source: UN Yearbooks for respective years
- 16 "Assembly welcomes efforts of Secretary-General and OAU Chairman to solve Western Sahara problem", *UN Chronicle*, March 1989, p.58
- 17 *ibid.*
- 18 Vasquez, J.A. and Mansbach, R.W. "The issue cycle: conceptualizing longterm global political change", *International Organization*, 37(2) Spring 1983, p.257 at p.274
- 19 *ibid.*, p.276

4. RESPONSES TO THE TIMOR GAP AGREEMENT

The issue of East Timor's future is at a crucial stage due to the current focus provided by the recent signing and pending implementation of the Timor Gap Treaty. The UN still regards Portugal as the administering power of East Timor. Portugal has the choice of either reasserting its status as the administering power of East Timor in order to hasten the process of decolonization, or else by failing to take any action, admitting in effect that it has abandoned its role in deciding East Timor's fate. The latter course of action would give Indonesia grounds to use the Gap agreement as further evidence to UN members that the East Timor issue has been resolved and should now be forgotten.

In the intervening years since the Indonesian invasion, Portugal's policy with regard to East Timor has been inconsistent and at times totally passive. However an angry response by Portugal to comments made by Australian Prime Minister Mr. Bob Hawke in an Indonesian television interview in 1985 was according to Jill Joliffe "the strongest and most dramatic stand Lisbon has taken since the Indonesian invasion."¹ In the interview, Mr. Hawke made his first public acknowledgement of 'the sovereign authority of Indonesia over East Timor' and later repeated the statement in the Australian Parliament, arguing that *de jure* recognition had already been extended previously by the Fraser Government in 1979. In his statement to Parliament, Mr. Hawke drew attention to the importance of resolving the sea-bed boundary negotiations:

"the successful conclusion of which is of importance to Australia [and] can in practice be concluded only with the Indonesian Government".²

This can be interpreted as the primary motive for recognition. The strong reaction to Mr. Hawke's statement by both Portugal's then President Eanes and the Portuguese Government was primarily motivated by genuine shock at what the Portuguese perceived as "Australia's crass opportunism in signing away Timorese human rights in exchange for expected access to the oil-rich seabed."³ This was echoed in Timorese anger at the Hawke statement; Fretilin President Xanana Gusmao described it as "a dirty political manoeuvre to cover up economic interests"⁴ while Fretilin UN representative Jose Ramos Horta said it was "a gross and irresponsible attempt to undermine the complex process being pursued by the UN Secretary-General".⁵ According to Joliffe, another motive for the dramatic stand taken by Portugal was an "element of outrage at what was seen as Australia's deception".⁶ For although the Portuguese were aware that there had been no official change in Australian policy since the granting of *de jure*

recognition by the Fraser Government, in his 1984 visit to Lisbon Australian Foreign Minister Bill Hayden had "avoided commitment while maintaining a promising air".⁷ The Portuguese hoped that as long as the previous policy was not asserted there might be some prospect of future change.

Another strong motive behind Lisbon's strong stance was the fact that 1985 was an election year in Portugal with both presidential and parliamentary elections. The ruling Socialist Party calculated that there could be some mileage in a strong Timor stand, fuelled by the long standing feud between Socialist Prime Minister Mario Soares and President Antonio Ramahlo Eanes. The President has special powers under the Portuguese constitution to formulate foreign policy on Timor.⁸ Eanes had a deep personal commitment to East Timor's right to self-determination and feared that the issue might disappear from Portugal's political agenda once he left office. Eanes did not stand for re-election and was replaced as President by the former Prime Minister Soares. In his inaugural address, Soares paid special attention to East Timor, stating that:

"Under the terms of our constitution, Portugal continues to shoulder the responsibilities that fall to her. True to such principles and responsibilities, we shall continue to do everything in our power to obtain for the people of East Timor their right to self-determination and independence."⁹

Soares has continued to take a personal interest in the East Timor problem. In Manila in July 1988, Soares told a thirteen nation conference that "Portugal cannot accept the situation of force and continues to struggle so that the inalienable right to independence of the martyred people of East Timor (will) be recognised."¹⁰

Following his June 1988 meeting in Portugal with members of the Portuguese Government and Parliament, it is the view of Mr. Tony Lamb, Federal Member for Streeeton and co-launcher of *Parliamentarians for East Timor*, that "after a long period of indecision Portugal is more active with regard to its responsibilities towards East Timor than at any time since 1975."¹¹ East Timor lingers on the Portuguese political agenda because the Portuguese Government has been unable to ignore constant reports from refugees still arriving in Portugal alleging large-scale human rights violations by Indonesia.

The Portuguese Government has protested to the Australian Government concerning negotiations for the Timor Gap joint development zone. When the Gap proposals were first aired in the press in 1985, the Portuguese Embassy in Canberra lodged a statement of protest with the Australian Department of Foreign Affairs. The statement said:

"The Portuguese Government cannot but consider strange the attitude of the Australian Government in negotiating the exploration of the resources of a territory of which Portugal is the administering power, a fact which is

internationally recognized ... It is needless to emphasize that ... the Timorese people (have not been) given the possibility of exercising their right to self-determination according to the relevant provisions of the UN Charter ... In view of the aforementioned, the Portuguese Government cannot but express to the Australian Government its vehement protest for the manifest lack of respect for international law”¹²

When in September 1988, the Timor Gap interim agreement was announced, Portugal again protested to the Australian government, stating that it considered the “ratification of such an agreement ... would constitute a blatant and serious breach of international law”.¹³ Under the auspices of the Secretary-General of the UN, talks under resolution 37/30 (of 1982) have been proceeding between Portugal and Indonesia concerning the East Timorese problem. So far, no qualitative change has occurred regarding the legal status of East Timor and East Timorese representatives have not been included in the talks. Although it has not yet undertaken any concrete action, Portugal has stated that it “will act promptly, according to the legitimate interests in question”.¹⁴

Portugal has acknowledged that “the legitimate interests in question” are those of the East Timorese, and that Portugal has no interest for itself.¹⁵ But exactly how Portugal will “act promptly” in defense of East Timorese interests remains to be seen.

Portugal's Options

One option open to Portugal is to lodge a complaint with the General Assembly and the Security Council pursuant to the Peaceful Settlement of Disputes Provisions in Chapter VI of the UN Charter. However, as a practical matter, the Security Council and the General Assembly could do no more than protest the illegalities involved. Given UN voting patterns in the 1980's concerning East Timor, it is unlikely that any such resolution proposed by Portugal would be adopted.

A second option for Portugal is to take Australia and Indonesia to the International Court of Justice for this “interference” in Portugal's “internal affairs”. But whereas both Australia and Portugal have accepted the jurisdiction of the ICJ, Indonesia has not. Were Portugal to bring suit against Australia, to renounce its acceptance of the compulsory jurisdiction of the ICJ might cause Australia embarrassment, having always prided itself on its “good” international profile. If an ICJ decision went contrary to Australia's interests, Australia would have to decide whether or not to disobey the ICJ.

It is possible that if Portugal were to bring suit against Australia, the ICJ might decline to hear the case in the absence of Indonesia which it might regard as an indispensable party. One way of circumventing the fact that

Indonesia has not accepted the jurisdiction of the ICJ would be for the Portuguese to seek a vote in the General Assembly to get an Advisory Opinion from the ICJ on the legality of the Indonesian position, (as was done in the Western Sahara case).

However such a move requires Portuguese initiative and organization in procuring the necessary votes in the Assembly to seek the Advisory Opinion. An earlier attempt to get Portugal to do this several years ago with a draft resolution prepared by Fretilin's Jose Ramos Horta did not succeed.¹⁶ But current informed speculation is that Portugal does intend going to the ICJ.¹⁷ Recently, Portugal has begun to voice its concern and protest over the Timor Gap negotiations within the UN, which has resulted in Indonesia and Portugal exchanging harsh words by means of retaliatory letters to the UN Secretary-General.

In a letter dated 9 November 1988 from the Permanent Representative of Portugal to the UN addressed to the Secretary-General, Portugal conveyed its official protest concerning the Timor Gap interim agreement. In the statement, Portugal said: "Since the Government of Indonesia lacks the legitimacy to undertake commitments regarding a territory which it occupies illegally ... the Government of Portugal as of now declares its intention to resort, in due course to the appropriate international instances (sic) with a view to asserting the rights inherent in the people of East Timor."¹⁸

Portugal requested the text of this statement to be circulated as an official document of the Special Committee On the Situation With Regard to the Implementation of the Declaration On the Granting of Independence to Colonial Countries and Peoples. On 28 March 1989, the Permanent Representative of Indonesia to the UN sent a letter to the Secretary-General with regard to the "untenable contents" of Portugal's statement of November 10, 1988. The Indonesian letter describes the Timor Gap interim agreement as "yet another indication of the positive bilateral relations existing between Indonesia and Australia" (!) and states that the agreement "will facilitate co-operation to the mutual benefit of their peoples, including in East Timor, by contributing to their accelerated development through expanding economic activity, including investments and business ventures involving foreign investors, as well as the promotion of the trade and tourism industries." The Indonesian letter goes on to say that "the ill-conceived and specious allegations as contained in the Portuguese letter cannot but be considered an unacceptable interference in the internal affairs of a sovereign State."

Finally the Indonesian letter states that: " ... contrary to Portugal's attempts to cast aspersions upon Indonesia, it is most gratifying that ... more and more States, including at the UN, the Movement of Non-Aligned Countries and other international and regional forums, have come to

recognize and appreciate that today the East Timorese are enjoying fully the political freedoms and economic and social progress that are their birth-right under the constitutional guarantees accorded to every citizen of the Republic of Indonesia.”¹⁹

Indonesia requested that its letter be circulated as an official document of the General Assembly and also the Security Council.

In response, Portugal delivered another letter to the Secretary-General on 11 April 1989, in which it requested that its letter of 10 November 1988 also be circulated as an official document of both the General Assembly and the Security Council. The Portuguese letter of 11 April 1989 also reiterated Portugal’s “full support to the mandate entrusted by G.A. Resolution 37/30” (to guarantee the Timorese people their legitimate right to self-determination) and Portugal’s “firm and deep commitment to aid in your (the Secretary-General’s) efforts aimed at finding a just, comprehensive and internationally acceptable settlement to this question”.²⁰

It remains to be seen whether Portugal will back up its words with action. It is possible that now political stability has replaced the turmoil of Lisbon politics in the mid 1970’s, new confidence may well provide the impetus for Portugal to move beyond rhetoric to concrete action on the East Timor issue. Since its recent joining of the European Economic Community (EC) on January 1, 1986, Portugal has been successful in obtaining vocal support from the EC on the East Timor issue. On July 10, 1986, the European Parliament passed a resolution calling on Indonesia to end its occupation of East Timor and create conditions for an act of self-determination. The resolution was adopted by 162 votes to 42 with 30 abstentions.²¹ Most recently, in February 1989, a statement in support of East Timor’s right to self-determination was made on behalf of the twelve European Foreign Ministers at the UN Commission for Human Rights in Geneva.²²

East Timor and UNCHR

Another significant move for the East Timor issue occurred in August 1989, when by a narrow vote the UNCHR Sub-Commission on Prevention of Discrimination and Protection of Minorities succeeded in putting the East Timor issue back on the UNCHR agenda for discussion in February 1990,²³ after it had been voted off several years ago. Efforts to adopt a similar resolution in 1988 had failed. A key reason for the successful 1989 result was the secret ballot tactic (adopted by vote) to allow for independent voting on sensitive resolutions. Another strong influence which influenced supporters was the decision by the Japanese representative to co-sponsor the resolution. In 1988 the Japanese had felt constrained not to take a position at variance with the Japanese Foreign Ministry which maintained a fairly cautious view on human rights issues. Factors influencing the

change in the Japanese delegate's stance at the UNCHR in August 1989 were the influence of effective lobbying by the Japan Free ET Coalition, as well as the looming political changes in Japan. Another influence was the fact that Japanese big business has its own rivalries with the Suharto family and in cynical diplomatic terms, human rights may be seen "as a soft give-away to lobbyists and a way to 'have a go' at the Suharto regime."²⁴ Some twenty non-governmental organizations (NGO's) [including Amnesty International, Asia-Watch and Tapol] put submissions to the UNCHR Sub-Commission in August 1989 in relation to East Timor, reflecting the view of Mr. Pat Walsh, [head of the Human Rights Office of the Australian Council for Overseas Aid (ACFOA)] that East Timor is the most important decolonization issue for NGO's today.²⁵

East Timor and the Vatican

Also significant in the reactivating of debate concerning East Timor was the recent visit by Pope John Paul II to the territory. Part of an official visit to Indonesia, the Pope's visit was interpreted by some as bestowing *de facto* recognition of Indonesian control. Nevertheless the Vatican (a UN member state) continues to administer the Diocese of East Timor directly from Rome, rather than via Jakarta. In February 1989, the Apostolic Administrator of Dili, Bishop Belo, raised the East Timor issue in a letter to the UN Secretary-General, in which he proclaimed: "The people of Timor must be consulted about its future through a plebiscite. Up to now, the people have yet to be consulted. Others speak in the people's name: Indonesia declares that the people of Timor have already chosen integration, but the people of Timor have never said so; Portugal wishes that time will take care of this problem. Meanwhile, we are dying as a people and as a nation."²⁶

Will Realpolitik triumph?

It would thus appear that with regard to East Timor, the regime of self-determination may be currently undergoing some form of regeneration. But whether there will be any lasting significant impact for the cause of East Timorese sovereignty remains to be seen. For whilst there have been clear breaches of international law in the East Timor situation, the lack of effectual mechanisms to deal with such violations leaves states free to play the game of world diplomacy according to the personal interests of *Realpolitik*. Thus Australia and Indonesia rapidly approach implementation of their joint treaty to exploit the resources of the Timor Gap.

NOTES:

- 1 Joliffe, J. "Why Portugal is so angry over Timor", *The Age*, 4 September 1985
- 2 Hawke, quoted by Suter, K. "Australia's new policy on recognising governments", *The Australian Quarterly*, Autumn 1989, Vol.61, No.1, p.59 at p.61

- 3 Joliffe, *op. cit.*
- 4 Gusmao, quoted in *ACFOA East Timor Report*, No.11 October 1985, p.2
- 5 Horta quoted in *ibid.*
- 6 Joliffe, *op. cit.*
- 7 *ibid.*
- 8 *ibid.*
- 9 Joliffe, J., "Soares singles out Timor in inaugural speech", *The Age*, 11 March 1986
- 10 Soares quoted in *Australia-East Timor Association Newsletter*, Vol.13 No.3, December 1988
- 11 Lamb, quoted in *ibid.*
- 12 Press Release, Portuguese Embassy, Canberra, 19 September 1985
- 13 Press Release, Portuguese Embassy, Canberra, 8 September 1988
- 14 *ibid.*
- 15 Letter, 28 July 1989, from His Excellency, Jose Luiz Gomez, Portuguese Ambassador to Australia
- 16 Letter, 29 June 1989, from Professor Roger S. Clark
- 17 *ibid.*
- 18 U.N. Document A/A.C.109/974, 30 December 1988, letter from the Permanent Representative of Portugal to U.N. Secretary-General
- 19 U.N. Document A/44/201 S/20546, 29 March 1989, letter from the Permanent Representative of Indonesia to the U.N. Secretary-General
- 20 U.N. Document A/44/223 B/20586, 11 April 1989, letter from the Permanent Representative of Portugal to the U.N. Secretary-General
- 21 ACFOA East Timor Update, November 1986, p.5
- 22 Information supplied in interview with Mr. Pat Walsh
- 23 U.N. Document E/CN.4/Sub.2/1989/L.34, 25 August 1989, Draft Resolution submitted to the Commission On Human Rights, Sub-Commission On Prevention of Discrimination and Protection of Minorities, Forty-First Session
- 24 Personal notes by an observer at the UNCHR Sub-Commission On Prevention of Discrimination and Protection of Minorities, Forty-First Session, Geneva, August 1989
- 25 Interview with Mr. Pat Walsh
- 26 U.N. Document A/AC.109/991, 9 May 1989, letter from Bishop Belo, Apostolic Administrator of Dili to the U.N. Secretary-General.

CONCLUSION

East Timor is a major test of international political integrity. The principle of self-determination as expounded in the UN Charter, numerous declarations and resolutions is an established part of international law, and arguably part of its highest form *jus cogens*. It is clear that the East Timorese have been denied that right by the Indonesian invasion. While few countries have recognised Indonesia's annexation, and condemnatory resolutions were passed for some years, the issue has since largely faded from the UN agenda. The only country apart from Indonesia and Portugal directly affected by the annexation, Australia, has recognised the annexation and, with Indonesia, negotiated a treaty based on it. Portugal, still recognised by the UN as the administering power, has shown signs of concern, but as yet has taken no positive diplomatic action to uphold the rights of the East Timorese people.

East Timor is one of comparatively few examples of wrongful annexations by post-colonial states. Either international law has clearly been breached but hardly any nation is prepared to protest, an indictment of international morality, or international law has lost coherence in the post-colonial era, apparently giving post-colonial states *carte blanche* to annex the territory by force, an equally serious indictment of international morality.

The agreement by Australia and Indonesia to exploit the resources of the Timor Gap regardless of the rights of the East Timorese people is as serious a denial of human rights as any "salt water" colonialism of past centuries. The international community's failure to have machinery to prevent such violations, or to use existing machinery to oppose or remedy them indicates that the maintenance of international morality, despite the lofty sentiments of the UN Charter, is still as elusive as ever.

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