

# The Case of East Timor before the International Court of Justice – Some Tentative Comments

*Maria Clara Maffei \**

## I. Introductory Remarks

1. On 22 February 1991 Portugal submitted an application to the International Court of Justice (ICJ) instituting proceedings against the Commonwealth of Australia. Portugal was acting on behalf of, and in the interest of, the people of East Timor in bringing the claim, while simultaneously defending its own interests. In 1989 Australia concluded an agreement with Indonesia concerning the delimitation and the exploitation of the continental shelf of East Timor. According to the Portuguese application Australia, *inter alia*, thereby infringed the right of the people of East Timor to self-determination.

A brief examination of the events involving East Timor in the 1970s is necessary before the Portuguese application can be considered.

## II. Issues Relating to the Right of East Timor to Self-determination

2. Timor is an island in the eastern part of the archipelago of Nusatenggara, between the Indian and Pacific Oceans. The western part of the island has been Indonesian since 1954. The territory of East Timor includes the island of Ataúro, the islet of Jaco and the enclave of Oé-Cusse. East Timor has a surface of 18,899 square kilometres and in 1974 its population was estimated at 653,211. East Timor has been under Portuguese administration since 1586. It became a Portuguese overseas province in 1896 and its status as such was confirmed by Portugal in 1926.

From the UN General Assembly Resolution 1542(XV) of 1960 onwards, East Timor has been classed as a non-self-governing territory. The process of decolonization of East Timor began in May 1974. After the change of its political

\* University of Parma.

regime, Portugal recognized the right of the East Timorese people to self-determination by a constitutional law and by a memorandum to the Secretary-General of the United Nations. In July 1975 Portugal reaffirmed the right of the people of East Timor to self-determination by another constitutional law. Portugal then delegated the decision on the political future of the territory to a People's Assembly, which was to be elected in October 1976 by universal, secret and direct suffrage.

At that moment the people of East Timor had three different options for the exercise of their right: independence, integration into Portugal, or integration into Indonesia.

On 28 November 1975 an East Timor liberation movement, FRETILIN (Frente Revolucionária de Timor-Leste Independente), issued a declaration of its intention to proclaim unilaterally the independence of the territory as the Democratic Republic of East Timor. Two days later two other political organizations, MAC (Anti-Communist Movement) and APODETI (Associação Popular Democrática Timorese),<sup>1</sup> proclaimed the integration of East Timor into Indonesia on behalf of the people of Portuguese Timor. Portugal did 'not accept claims of independence or of integration into third States that were not in accordance with the fundamental principle of the Portuguese decolonization process – namely that of ensuring respect of the wishes of the people for the exercise of their right to self-determination, taking into account the specific circumstances of each territory'.<sup>2</sup>

On 7 December 1975 Indonesia invaded the territory of East Timor by armed force and occupied it. Immediately Portugal brought the matter before the United Nations General Assembly and the Security Council.<sup>3</sup> On that occasion many States condemned the Indonesian intervention.<sup>4</sup>

On 31 May 1976 the Regional Popular Assembly of East Timor, appointed by the Provisional Government created on 17 December 1975 after the proclamation of integration, approved a motion for the integration into Indonesia. On 17 July 1976, by

1 The most important political parties of East Timor, besides FRETILIN and APODETI, are UDT (União Democrática Timorese), KOTA (Klibur Oan Timor Aswain) and the Partido Trabalhista. MAC is a coalition of UDT, KOTA and Partido Trabalhista.

2 See UNYB (1975) 857.

3 The relevant acts concerning East Timor adopted by the United Nations organs are: General Assembly Resolution 3485(XXX) adopted on 12 December 1975 by 72 votes to 10, with 43 abstentions; Resolution 384(1975) adopted unanimously by the Security Council on 22 December 1975; Resolution 389(1976) adopted by the Security Council on 22 April 1976 by 12 votes to 0 (Japan and United States abstained); General Assembly Resolution 31/53 adopted on 1 December 1976 by 68 votes to 20, with 49 abstentions; General Assembly Resolution 32/34 adopted on 28 November 1977 by 67 votes to 26, with 47 abstentions; General Assembly Resolution 33/39 adopted on 13 December 1978 by 59 votes to 31, with 44 abstentions; General Assembly Resolution 34/40 adopted on 21 November 1979 by 62 votes to 31, with 45 abstentions; General Assembly Resolution 35/27 adopted on 11 November 1980 by 58 votes to 35, with 46 abstentions; General Assembly Resolution 36/50 adopted on 24 November 1981 by 54 votes to 42, with 46 abstentions; General Assembly Resolution 37/30 adopted on 23 November 1982 by 50 votes to 46 with 50 abstentions.

4 See UNYB (1975) 859.

The Case of East Timor before the International Court of Justice

an Indonesian law, East Timor became the 27th province of Indonesia (effective from 17 August 1976).

3. In its application to the ICJ, Portugal maintains that the right to self-determination of the people of East Timor is 'opposable' to Australia. This is based on the assumption that the East Timorese people have not yet actually exercised their right to self-determination, contrary to affirmations which have been made on several occasions both by Indonesia and by the political parties of East Timor.

As a matter of fact, in the East Timor case, there seem to be too many parties claiming to act on behalf of the East Timorese people and too many interpretations of self-determination. All the political parties of East Timor, when proclaiming independence or integration into Indonesia, asserted that they represented the people. Even Indonesia justified its armed intervention in East Timor by maintaining that it was in response to a request from the parties which favoured integration, and which represented the majority of the people. Portugal too in its application to the ICJ declared that Portugal 'alone is legally empowered to represent the people of East Timor until its self-determination'. All these claims concerning the capacity of representing the people and, consequently of exercising the right to self-determination on their behalf, clearly have a very strong political nature. The following remarks make no attempt to take sides with regard to an essentially political question. Their aim is merely to deal with some aspects of the problem from the legal point of view.

4. As far as the *capacity of representing the people* is concerned, how far the aforesaid parties may be considered to be representative is very much open to question. Each political party certainly represents *some* of the people, but it is highly unlikely that any of them may be considered to represent *all* the people of East Timor.<sup>5</sup> Although references to the political parties of East Timor are frequent, the organs of the United Nations have so far avoided taking up a clear position on this problem in their resolutions. The General Assembly, in its Resolution 3485(XXX), refers to the political parties representing the people of Portuguese Timor without naming them, however (para. 2). According to Article 39 of the Council's provisional rules of procedure the Security Council invited the members of the political parties of East Timor to participate in the discussion when the East Timorese question was being considered.

Some references are more specific. FRETILIN was heard several times by the General Assembly before the resolutions were passed, and it is also mentioned by name in the texts.<sup>6</sup> This would suggest that, *inter alia*, this party had a certain degree of control in the territory. It is worth noting that in Resolution 32/34 of 1977 the General Assembly called upon both the Government of Indonesia and the leadership of FRETILIN to facilitate the entry of relief organizations into East Timor in order to

5 These doubts were cast by some States during the debates in the United Nations context, while other States recognized the representativeness of FRETILIN; see UNYB (1975) 858.

6 See Resolution 31/53; 33/39; 34/40; 35/27; 36/50; 37/30.

assist the people of the territory. One of these relief organizations was the International Committee of the Red Cross (para. 7). However, according to the Working Paper prepared by the UN Secretariat concerning East Timor,<sup>7</sup> FRETILIN's resistance was declining. This has been imputed both to Indonesian military force and to lack of arms, ammunition and medical supplies.

The representative value of the Provisional Government of East Timor and the Regional Popular Assembly appointed by it is likewise highly debatable. In particular, the Assembly did not respect the principle of direct consultation of the population.<sup>8</sup> Moreover, the Assembly approved the motion for integration into Indonesia without a sufficient number of impartial witnesses. Indonesia itself, before deciding to annex East Timor, preferred to send a mission to the territory to verify once more the real wishes of the population. East Timor was annexed only after the mission had provided Indonesia with a positive report. It is not clear, however, how the mission carried out its work and whether the people really had the chance to express their will.<sup>9</sup>

In the UN context Portugal, as the administering power of East Timor,<sup>10</sup> appears to be the only party qualified to take action to promote the exercise of the people's right to self-determination.<sup>11</sup> Obviously this does not imply that Portugal has the right to exercise self-determination. It has already been said that Portugal will represent the East Timorese people only until the latter exercise their right to self-determination. In other words, Portugal will be in no position to represent East Timor once the people of East Timor exercise that right.

The UN resolutions refer to Portugal as the administering power of East Timor. It is worth recalling, however, that the United Nations censured the behaviour of Portugal and its servants in East Timor: namely the Governor, civilian personnel and the military as they abandoned East Timor at the end of August 1975. In its Resolution 384 (1975) the Security Council expressed regret that the Government of Portugal had not discharged fully its responsibilities as administering power in the territory under Chapter XI of the United Nations Charter.

It is true that there has been no physical Portuguese presence in East Timor since August 1975. However, Portugal did insist on its capacity as administering power. In this capacity it has accordingly carried on several activities consisting in diplomatic initiatives and in efforts to solve the problem of East Timor with the assistance of the

7 A/AC.109/623 of 11 August 1980, paras. 22 and 23.

8 On the composition of the Regional Popular Assembly, see Guilhaudis, 'La question de Timor', *AFDI* (1977) 314.

9 Doubts on the impartiality of the mission are justified as Indonesian soldiers were present in the territory of East Timor, the struggle against the Indonesian invaders continued and there were no impartial controls on its work. See also *infra* para. 7.

10 Portugal is expressly considered as the administering power of the territory of East Timor in Resolution 3485(XXX); 384(1975); 34/40; 35/27; 36/50; 37/30.

11 Of course, in this case, the most important party allowed to act in the United Nations context is the East Timorese people; the problem lies in the impossibility of identifying the people with a single political party.

## The Case of East Timor before the International Court of Justice

United Nations. Portugal itself recognizes, in its application, that the occupation of the territory by Indonesia entails *de facto* limitations on its own powers in East Timor. Nevertheless, Australia's negotiation and conclusion of the agreement with Indonesia has provoked a strong reaction from Portugal. In its application Portugal expresses the opinion that Australia is impeding the fulfilment of the duties of Portugal to the people of East Timor and to the international community, and is infringing the right of Portugal to fulfil its responsibilities.<sup>12</sup> But if in the same application Portugal has recognized the *de facto* limitations on its powers through Indonesia's occupation of East Timor, the aforesaid opinion of Portugal would appear to be untenable. In theory Australia may have infringed on Portugal's rights and responsibilities. In practice Portugal could not fulfil its duties and responsibilities in any case because of the previous integration of the territory into Indonesia. Portugal's position as regards East Timor at present consists mainly in cooperating with the Secretary-General of the United Nations, as was stated in General Assembly Resolution 37/30 of 1982. The work consists in exploring avenues for the achievement of a comprehensive settlement of the problem of East Timor, based on the exercise of the right to self-determination (para. 1).

Finally, it is worth recalling that it is debatable whether the *animus derelinquendi*, which is necessary to relinquish sovereignty over a territory, is also necessary for the relinquishment of administration of a non-self-governing territory.<sup>13</sup> In any case Portugal's activity could be considered as proof of its lack of *animus derelinquendi* with regard to East Timor.

5. The East Timor question is riddled with doubts. There are doubts as to the representative legitimacy of the Provisional Government of East Timor and of the Regional Popular Assembly. There are doubts about the results obtained by the mission sent by Indonesia. There are further doubts on whether popular wishes concerning integration were genuine. All these uncertainties are reinforced by the absence of impartial witnesses. The Provisional Government did invite the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to attend the meeting of the Regional Popular Assembly, during which the motion for integration was adopted. Also Indonesia, on the occasion of the mission, invited the Special Committee, the Secretary-General and the Security Council of the United Nations to send observers, but they refused. The absence of the United Nations observers, notwithstanding invitations to attend, can be interpreted as a sign of the will not to recognize the presence of Indonesia in East Timor and not to legitimize the process of decolonization and the exercise of the right to self-determination outside the machinery of the United Nations. Thus, in explaining the reasons for its refusal, the Special Committee seemed to keep the new East Timorese governing organs (i.e. the Provisional Government and the Regional Popular Assembly) at a distance. The

<sup>12</sup> See para. 34(2)(b) of the application.

<sup>13</sup> The necessity of the *animus derelinquendi*, however, is controversial even for the loss of sovereignty.

Special Committee stated that, in dealing with the question of non-self-governing territories, it was guided by relevant General Assembly resolutions, and that it had not been involved in the proceedings leading up to the Regional Popular Assembly's meeting to which it had been invited. Moreover – added the Special Committee – the United Nations (the Security Council and the Special Representative of the Secretary-General, in particular) were still seized of the problem of East Timor.

6. All the various parties involved *interpret the exercise of the right to self-determination* in different ways, even though they all agree that the people of East Timor have (or had) a right to self-determination. For instance, it is not clear whether some political actions constitute the *exercise* of the right to self-determination or whether they are more simply *aimed at the exercise* of this right. Thus, according to FRETILIN, the establishment of the Democratic Republic of East Timor as an independent and sovereign State was indispensable for the subsequent exercise of the right to self-determination, which might have led to integration into Indonesia. In other words, the East Timorese people could not have chosen integration into Indonesia before independence, since only a free population can make a free choice. This implies that the problem of integration can only be solved after the decolonization process (and not during it). By this reasoning, FRETILIN denies that a colonial country can choose to pass directly from colonial domination to integration into another State without previously becoming independent. From this point of view FRETILIN seems not to accept the criteria laid down in UN General Assembly Resolution 1541(XV) of 15 December 1960. According to this resolution non-self-governing territories can reach self-government by

- (a) emergence as a sovereign independent State;
- (b) free association with an independent State; or
- (c) integration with an independent State (Principle VI).<sup>14</sup>

No temporal distinction among these three possibilities is mentioned in the resolution. What is really important, as expressly stated in further principles of the same resolution, is that the choice has to correspond to the freely expressed will of the people.<sup>15</sup>

The position of UDT is completely different from that of FRETILIN. According to statements made by UDT representatives during the debate at the Security Council in December 1975,<sup>16</sup> the first step towards gaining independence was integration into Indonesia. As soon as better conditions for peace and order had been achieved, the people of East Timor were to be granted their right to self-determination with the

14 These criteria are also embodied in General Assembly Resolution 2625(XXV) of 24 October 1970 (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations).

15 See Principle VII as regards free association, and Principle IX as regards integration.

16 See UNYB (1975) 861.

### The Case of East Timor before the International Court of Justice

assistance and under the supervision of the United Nations. This means that there exists 'an integration into Indonesia' which does not constitute *per se* the exercise of the right to self-determination, but which is more simply a means for allowing that exercise in a peaceful and orderly fashion.<sup>17</sup> From this interpretation it would follow that in the case of East Timor three acts concerning integration exist. The first is the proclamation of MAC of 30 November 1975; the second is the motion for integration approved by the Regional Popular Assembly on 31 May 1976; the third is the effective integration decided by Indonesia in July 1976. The legal qualification of the second and the third acts is fairly simple. However, as far as the first is concerned, it is not clear how it was possible to proclaim unilaterally the integration into a State without the consent of that State.<sup>18</sup> Nor is it clear what the legal meaning of such a proclamation may be.

7. Any examination concerning the effective exercise of the right to self-determination by the people of East Timor cannot disregard the *effects of the Indonesian intervention* and subsequent presence in the territory on such an exercise. MAC and Indonesia seem to agree that the intervention was necessary in order to create adequate conditions for an orderly exercise of the right to self-determination.<sup>19</sup> However, can a political party, which does not represent all the people and which has not been elected by the people, have the right to ask for the intervention of a foreign country?<sup>20</sup> In other words, the MAC's request does not appear to be sufficient to make the armed intervention lawful. It does in fact appear that the Indonesian intervention assured the success of the political parties favouring integration rather than the free exercise of the right to self-determination. It may even be possible to admit that the mission sent to East Timor by Indonesia represented a sort of popular consultation, in other words a means to exercise the right to self-determination. It is however strongly questionable that the people were in the condition to *freely* express their will. The most distinctive feature of the right to self-determination is the fact that it has to reflect the wishes of the people freely expressed. It appears that in the case of East Timor the people could not exercise such a right, as the Indonesian presence and the support given to the anti-communist coalition probably distorted the results of the consultation.<sup>21</sup>

17 According to Indonesia, this same necessity of peace and order, together with humanitarian reasons, constitutes the justification of its armed intervention.

18 As Indonesia has always denied that its intervention in East Timor constituted an annexation of the territory, it cannot be interpreted as consent to the integration.

19 On the problem whether the necessity of providing 'political stability' could prevail over the principle of self-determination, see Elliott, 'The East Timor Dispute', 27 *ICLQ* (1978) 244.

20 The fact that MAC needed the Indonesian support to succeed might be proof that MAC represented the people only in part.

21 From this point of view the Indonesian intervention also infringes the already mentioned General Assembly Resolution 2625(XXV) of 1970, according to which 'Every State has the duty to refrain from any forcible action which deprives people (...) of their right to self-determination, freedom and independence'.

The idea that integration into Indonesia constitutes the exercise of the right to self-determination is indirectly denied by the General Assembly. In its Resolution 31/53, para. 5, the General Assembly

rejects the claim that East Timor has been integrated into Indonesia, *inasmuch as the people of the Territory have not been able to exercise freely their right to self-determination and independence.*<sup>22</sup>

8. Indonesia emphasized the fact that its intervention did not constitute an annexation. This demonstrates that in the case of East Timor, unlike in many other situations concerning the right to self-determination, there are no territorial claims or questions of territorial integrity which could conflict with that right. Notwithstanding its intervention, Indonesia has always maintained that it has no territorial claims regarding East Timor. It has supported the right of the East Timorese people to self-determination, even though it has sometimes also stressed its ethnic, cultural or historical links with Timor. In this case, Indonesia did not intend to enforce the principles it advocated for the other colonial territories in the region. Under these principles, Indonesia's boundaries should coincide with the limits of the old Dutch East Indies.<sup>23</sup> As East Timor was not a part of the East Indies, the East Timorese people could exercise the right to self-determination.

9. As regards the *Indonesian presence in East Timor*, FRETILIN and more recently other East Timorese political parties<sup>24</sup> have put forward the idea that it constitutes a new form of colonialism. However the repeated reference to the capacity of Portugal as administering power as contained in the resolutions adopted by United Nations organs confirms that this idea has not been accepted in the United Nations context.<sup>25</sup> What is more, if Indonesia really had replaced Portugal in a colonial relation with East Timor, it would now be the colonizing country. This would result in an anomalous case of decolonization with three parties involved: the colonized country, i.e. East Timor, the colonizing State, i.e. Indonesia, and an administering power, i.e. Portugal which is the former colonizing State. In any case, according to customary international law, as far as the exercise of the right to self-determination by the East Timorese people is concerned, it is not important to verify whether Indonesia is or is not the present colonizing country. Indonesia's presence in East Timor could be considered as alien domination maintained by force.

22 Emphasis added.

23 Indonesia tried to enforce this principle, for instance, in the case of West Irian, where the claim to territorial integrity finally overcame the right to self-determination.

24 See, e.g., UNYB (1986) 964.

25 See, on the contrary, Guilhaudis, *supra* note 8, at 319.

### III. Issues Raised by Portugal's Application to the ICJ

10. Portugal's submission of the application to the ICJ draws attention to the situation of East Timor once more. The dispute centres on the 'opposability' to Australia (a) of the duties of, and delegation of authority to, Portugal as the administering power of the territory of East Timor and (b) of the right of the people of East Timor to self-determination and related rights (the right to territorial integrity and unity and permanent sovereignty over natural wealth and resources). Portugal maintains that as administering power it is invested with duties and powers which are 'opposable' *erga omnes*. Similarly the rights of the people of East Timor are 'opposable' *erga omnes*. These duties, powers and rights as well as Article 25 of the United Nations Charter were infringed upon by Australia. According to Portugal the latter has incurred international responsibility *vis-à-vis* both the people of East Timor and Portugal. This is because Australia negotiated and concluded an agreement with Indonesia concerning the exploration and exploitation of the continental shelf in the area of the Timor Gap,<sup>26</sup> and because Australia is still negotiating with Indonesia the delimitation of the same continental shelf. In Portugal's opinion, therefore, Australia has contravened both the general obligation to negotiate with the competent State, i.e. Portugal, on a matter of common interest, and the specific obligation to negotiate with that State on questions relating to the maritime areas of direct concern to East Timor.

11. The continental shelf of Australia and Indonesia was delimited in 1972 by an agreement between the two countries, but the delimitation did not concern the Timor Gap. Portugal considers that this fact constitutes a sufficient recognition by Australia that the question of the rights over the continental shelf and its delimitation in the Timor Gap concern only Australia and East Timor. It is worth remembering, however, that in 1972 East Timor had not yet been integrated into Indonesia.

The agreement which has given rise to the dispute between Portugal and Australia was concluded at the end of 1989. It concerns in particular the exploration and exploitation of hydrocarbon resources. It also contains some provisions on the exercise of jurisdiction. It establishes a zone of cooperation consisting of three areas, A, B and C. Area A, which is in the centre, is an area of joint exploration, exploitation and jurisdiction, administered by a Joint Authority composed of representatives of the two States. Areas B and C are to be explored and exploited by Australia and Indonesia respectively, although the other State receives a part of the resulting tax revenues. Area A and area C are included in the area claimed by Portugal as being subject to the exclusive rights to the continental shelf appertaining to East Timor.

Portugal protested promptly and vigorously to the Australian Government against these negotiations, stressing the right to self-determination of the people of East Timor

26 The Timor Gap is the area lying between East Timor and Australia.

and its own status as administering power of the territory. In its reply, Australia invoked its freedom to recognize or not recognize rights or situations, and to deal with other States, regardless of the origin of the territorial acquisitions. Portugal protested again to the Australian Government after the adoption of the Australian internal acts implementing the agreement with Indonesia.

12. The Portuguese application is based both on the law of the United Nations and on customary international law.

In particular, *as regards the law of the United Nations*, Portugal relies upon Articles 1 para. 2, 55, 56, 73 and 75 *et seq.* of the Charter. It also appeals to the resolutions passed by the United Nations organs in the application of that law, including the resolutions concerning the East Timorese question.<sup>27</sup> Moreover, according to Portugal, Australia did not comply with the obligations deriving from Article 25 of the Charter as it did not carry out Security Council Resolutions 384 and 389.

*As regards customary international law*, Portugal relies upon (a) the higher principles of self-determination of peoples and the integrity and unity of non-self-governing territories, as supported and expressed by State and United Nations practice together with the jurisprudence of international tribunals and of the International Court of Justice; (b) the principle of permanent sovereignty of peoples and States over their natural wealth and resources, as supported and expressed by State and United Nations practice; (c) the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights of 16 December 1966 (Article 1, paragraphs 1 and 2 in particular).<sup>28</sup> Finally, Australia did not comply with its obligation, deriving from custom, to negotiate with Portugal.

13. The Portuguese application calls on the Court to adjudge and declare that in its negotiation of the agreement with Indonesia, Australia (a) infringed and is infringing the rights of the East Timorese people to self-determination, to territorial integrity and unity and to permanent sovereignty over their wealth and natural resources; (b) infringed and is infringing the powers and rights of Portugal as administering power of East Timor and is impeding the fulfilment of its duties to the people and to the international community; (c) is contravening Security Council Resolutions 384 and 389, in violation of Article 25 of the UN Charter and of the obligation to cooperate in good faith with the United Nations. Furthermore, the Court has been called upon to declare that, by excluding any negotiation with Portugal regarding the Timor Gap, Australia has failed and is failing in its duty to negotiate with Portugal. The Court has consequently been called upon to declare that Australia has incurred international responsibility and has caused damage. Reparation must therefore be granted to the East

<sup>27</sup> *Supra* note 3.

<sup>28</sup> As both Portugal and Australia are Parties of the two Covenants, they are obliged to respect the norms embodied therein, even if these norms did not reflect customary international law.

## The Case of East Timor before the International Court of Justice

Timorese people and to Portugal, in such form and manner as may be indicated by the Court.<sup>29</sup>

14. The most interesting aspect of the case of East Timor is the acquisition of territory by force by Indonesia.<sup>30</sup> This action has a number of consequences with respect to the validity of the agreement between Australia and Indonesia on the continental shelf. One of the possible consequences of the use of force is non-recognition of the acquisition of territory resulting from that use. This entails that States should not perform any act that might result in legitimizing the situation. This is clearly stated in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States. This declaration provides that 'no territorial acquisition resulting from the threat or use of force shall be recognized as legal'. Should this statement constitute a customary rule of international law, Australia has infringed that norm by negotiating with Indonesia and thereby recognizing that Indonesia exercises sovereignty over a territory acquired by force. It is however doubtful that the principle of non-recognition constitutes a binding rule of international law. In its reply to the Portuguese protests of February 1990, Australia clearly stated that there is no binding legal obligation not to recognize the acquisition of territory by force. Moreover, according to Australia, recognition of such acquisition does not imply approval of the means of acquisition. In the case of East Timor, Australia seems to have preferred to apply the principle of effectiveness, thus considering the situation of East Timor lawful.<sup>31</sup>

On the other hand, in the present case the principle of effectiveness is probably impaired by many factors. First of all, the exercise of sovereignty by Indonesia in East Timor cannot be considered normal and stable as is required by international law for the acquisition of sovereignty. In East Timor there is not a continuous and peaceful display of the functions of State by Indonesia.<sup>32</sup> The struggle of FRETILIN and in general of the East Timorese people against the Indonesian invaders, as well as the bloodshed, is still continuing.<sup>33</sup> Moreover, in the United Nations context East Timor is

29 The requests made by Portugal have been summarized here. For further details, see para. 34 of the Portuguese application.

30 As for the problems regarding the jurisdiction of the Court and the admissibility of the Portuguese application, see the contribution by Chinkin, in this issue at 206.

31 Actually there appears to be something ambiguous in Australian behaviour and in its 1990 statement. On the one hand, Australia negotiated with Indonesia as regards the Timor Gap. On the other hand, it asserted the separation between the agreement and the East Timor issue. Again, on one side, Australia recognized the acquisition of East Timor made by Indonesia while, on the other, it declares its support of discussions between Portugal and Indonesia over the 'residual' question concerning East Timor. As regards its position in the UN context, Australia voted in favour of the first General Assembly Resolution of 1975 deploring the military intervention of the armed forces of Indonesia in Portuguese Timor. In 1976 and 1977 it abstained. From 1978 to 1982 Australia voted against the General Assembly resolutions concerning East Timor.

32 By these words the arbitrator Max Huber, in the *Island of Palmas* case, defined the prerequisites for the acquisition of sovereignty; see the award of April 1928 in *UN Reports of International Arbitral Awards* II 829.

33 The legitimacy of the struggle of the people of East Timor to achieve the right to self-determination and independence is reaffirmed, *inter alia*, in General Assembly Resolution 31/53 (para. 1).

still regarded as a non-self-governing territory and Portugal is considered the administering power. The United Nations resolutions deploring the presence of Indonesia in East Timor and inviting Indonesia to withdraw its armed forces could affect or have an impact on the 'normality and stability' of the exercise of sovereignty by Indonesia.<sup>34</sup> In other words, does the content of the United Nations resolutions reflect the opinion of the international community? If the answer is affirmative, three important consequences could derive from it. First, the capacity of Portugal as administering power would be 'opposable' to Australia. Second, the right to self-determination of the people of East Timor would be 'opposable' to Australia. Third, Australia could not accordingly enforce the principle of effectiveness. By enforcing the principle of effectiveness Australia chose to negotiate with Indonesia and not with Portugal. This choice is not disinterested. Australia is probably more interested than Indonesia in oil exploitation. The text of the agreement is particularly favourable to Australian interests. It also temporarily resolves a difference of opinion that existed between Australia and Portugal concerning the extension of the margin of the continental shelf.<sup>35</sup> In any case Portugal would not have been able to implement any agreement in the territory of East Timor, despite its alleged right as administering power to negotiate on behalf of the East Timorese people. A broad interpretation of Article 73 of the United Nations Charter would confer Portugal with this capacity. Finally, the international community has a rather inert attitude towards East Timor. If Australia had to wait until the East Timorese people had exercised their right to self-determination its chances of exploiting the resources of the continental shelf in the Timor Gap would be deferred *sine die*.

15. If the principle of non-recognition of unlawful acquisition of territory cannot be considered a general rule of international law, the Australia-Indonesian agreement is valid from this point of view. From another point of view, however, the agreement could infringe international law as it does not respect the right to self-determination of the people of East Timor. The agreement should therefore be considered null and void

34 It is interesting to note, however, that the United Nations resolutions do not qualify the Indonesian intervention as an aggression, notwithstanding some proposals in that sense. The Indonesian action is qualified, for instance, as 'military intervention', and as a 'violation of the territorial integrity of Portuguese Timor' [see paras. 4 and 5 of General Assembly Resolution 3485(XXX)]. This certainly constitutes, however, the 'use of armed force' which is prohibited by the UN Charter and which is the basis of the definition of aggression given in General Assembly Resolution 3314(XXIX) of 14 December 1974. Besides its political meaning (the occurrence of an act of aggression, *inter alia*, makes the Chapter VII of the Charter applicable), the omission of the word 'aggression' referred to the Indonesian action shows that the presence of Indonesia is considered by the United Nations organs, above all, as impairing the exercise of the right to self-determination in compliance with the rules of the United Nations system. This confirms the idea that, according to the United Nations, the right to self-determination has not yet been exercised by any party representing the people of East Timor. Moreover, the lack of any mention of 'aggression' in the United Nations resolutions can partly explain the reason why Portugal decided to base its application substantially on the infringement of the right to self-determination.

35 Even before the Indonesian occupation, Australia has always maintained that East Timor does not create any sovereign claims in the zone corresponding to the present zone of cooperation.

### The Case of East Timor before the International Court of Justice

because it violates *jus cogens*, according to Article 53 of the 1969 Vienna Convention on the Law of Treaties.

On the other hand, Australia could maintain that the people of East Timor have already exercised their right to self-determination by choosing to integrate into Indonesia, thus becoming one of the latter's provinces.<sup>36</sup> The right to self-determination is enshrined in a rule of customary international law. However, Australia may assert that the methods of exercising this right are not only those laid down in the United Nations Charter and practice. These can be considered simple 'guide-lines', which are only binding on the Organization. Were this view sound, the agreement on the continental shelf in the Timor Gap could be considered valid and lawful.

It is worth noting that Portugal cannot (and, in fact does not) invoke the invalidity of the agreement between Australia and Indonesia because Article 66 of the Vienna Convention allows *only the Parties* of the treaty violating *jus cogens* to submit the dispute to the International Court of Justice.<sup>37</sup>

16. It is important here to make a distinction between the right to self-determination from the right to permanent sovereignty over natural wealth and resources. Infringement of the right to self-determination may have taken place in the negotiation and conclusion of the agreement *per se*. This agreement has deprived the East Timorese people of the chance to express their will. Moreover, it constitutes the recognition of Indonesian sovereignty which has been acquired through the violation, *ex hypothesi*, in 1975 and 1976, of the right to self-determination. Infringement of the right to permanent sovereignty over natural resources may be said to occur only if the resources are concretely exploited by the two States, without sharing the benefits with the people of East Timor. On the contrary, even if the agreement between Australia and Indonesia had allowed the people of East Timor to benefit from the exploitation of the resources of the continental shelf, the right to self-determination would have been infringed.

In its reply to the Portuguese protests of February 1990, Australia showed a degree of concern for the well-being of the East Timorese people. It stated, *inter alia*, that closer relations deriving from the agreement with Indonesia would make Australia more influential in this matter.<sup>38</sup> It is difficult, however, to envisage that Australia

36 This is in fact the opinion of Indonesia.

37 Moreover, as Article 66 of the Vienna Convention can hardly be considered as customary law, it is binding only for the contracting Parties of the convention itself. Australia is a Party of the convention (since 13 June 1974), while Portugal and Indonesia are not Parties of it. The decision of the Court could have *indirect* effects upon the legal situation of Indonesia as regards the agreement on the continental shelf. If the Court declared that Australia is responsible, the latter could be induced to withdraw from its agreement with Indonesia. In this case, however, the interests of Indonesia would be affected by the decision of Australia and not by the judgment of the Court. On the possibility that the decision of the Court may affect the rights of Indonesia, see Chinkin, *supra* note 30.

38 It must be noted, however, that an agreement containing provisions more favourable to Australia than to Indonesia does not seem the most effective means of promoting the well-being of the East Timorese people.

would have the capacity to compel Indonesia to respect the right of the people of East Timor to sovereignty over natural resources. This would entail the recognition that East Timor is not actually an Indonesian province. Even enforcement of the principles contained in the third resolution annexed to the final act of the United Nations Conference on the Law of the Sea of 1982 is subordinate to the recognition that the territory and the people in question do not have a self-governing status. Nor could Australia have made any mention of the rights of the East Timorese people to self-determination and to sovereignty over natural resources. To do so would have made any negotiations with Indonesia impossible. Indeed, in this light, the presence of Indonesia in the territory would have lost any valid legal justification.

17. According to the Portuguese application, the negotiations, the conclusion of the agreement and the internal acts to implement it have caused particularly serious *legal* and *moral damage* to the people of East Timor and to Portugal. This will also become *material damage* if the exploitation of resources begins.

The *material damage* is a future event which will only occur when and if the exploitation of natural resources actually commences. This should not however affect the Court's chances of pronouncing on the matter. If the Court decides in Portugal's favour, it ought also to be able to determine what reparation is due from Australia. An internationally wrongful act can exist even without the presence of moral or patrimonial 'damage'. This is clearly stated in the 1973 Report of the International Law Commission to the General Assembly on Draft Articles on State Responsibility (Commentary to Article 3).<sup>39</sup> The notion of 'legal damage' has been used by scholars to refer to the damage deriving directly from the breach of an international obligation,<sup>40</sup> when such a breach does exist but has caused neither economic nor moral damage. More recently, the concept of 'legal' or 'juridical' damage as an aspect of 'moral' damage has been explained by Special Rapporteur Gaetano Arangio-Ruiz in his Second Report on State Responsibility.<sup>41</sup>

It is obvious that moral and legal damages are more difficult to assess. It may also be difficult to determine the amount and the form of reparation. According to the

39 See *Yearbook of the International Law Commission* (1973) II, 183.

40 In its commentary, *ibid.*, the ILC, without mentioning the expression 'legal damage', refers to 'damage which is (...) inherent in any breach of an international obligation'; the ILC considers it a superfluous element for the existence of an internationally wrongful act. On this subject see Tanzi, 'Is Damage a Distinct Condition for the Existence of an International Wrongful Act?', in M. Spinedi and B. Simma (eds), *United Nations Codification of State Responsibility* (1987) 1.

41 See A/CN.4/425 of 9 June 1989, 10. The existence of moral damage deriving from a violation of international law which does not cause material damage has been admitted also by States; see, e.g., the Memorandum of France to the Secretary-General of the United Nations in the *Rainbow Warrior* case, *RGDIP* (1987) 1046. The existence of moral and legal damage has been invoked by New Zealand in the same case; see the arbitral award of 30 April 1990, *RGDIP* (1990) 839, at 868. The Tribunal has recognized the existence of 'immaterial damage' of a moral, political and legal nature.

Second Report on State Responsibility, in cases of moral damage the specific remedy is satisfaction, in its various forms.<sup>42</sup>

The case of East Timor appears to be very interesting also from the point of view of the damage suffered and its reparation. If the Portuguese claims are to be considered well-founded, then the three abstract aspects of damage (moral, legal and material) are probably present.<sup>43</sup> Portugal was excluded from the negotiations on the Timor Gap. This could be considered a violation of Portugal's honour and dignity given its status as the administering power. Such an interpretation would support a claim to moral damage. Portugal asserts that the negotiations are in breach of the obligation to negotiate with the competent State. If this is true, then the negotiations themselves could constitute legal damage. Lastly, the effective exploitation of natural resources could represent a clear example of material, in other words economic or patrimonial, damage.<sup>44</sup>

#### IV. Concluding Remarks

18. This case will give the International Court of Justice the opportunity to deal with several important issues. The attitude of the Court towards the right to self-determination has varied in the past. In the *South West Africa* cases the Court avoided taking up a clear position on the problem of self-determination. It simply rejected the claims of Ethiopia and Liberia by holding that these countries did not have any legal right or interest in the subject matter of the claim. In its advisory opinion of 21 June 1971 on *The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court stated that the principle of self-determination is applicable to all non-self-governing territories.<sup>45</sup> In its advisory opinion of 10 October 1975 concerning the

42 See A/CN.4/425, 79. On the reparation of moral damage see also the position of France in the *Rainbow Warrior* case, Memorandum, *RGDIP* (1987) 1047; *RGDIP* (1990) 870. France denies the possibility of a pecuniary compensation (*indemnisation pécuniaire*). A monetary compensation of moral and legal damage has been admitted, in principle, by the Arbitral Tribunal in the *Rainbow Warrior* case, *RGDIP* (1990) 874. On the problem see also Migliorino, 'Sur la déclaration d'illicéité comme forme de satisfaction: A propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du *Rainbow Warrior*', *RGDIP* (1992) 61-74.

43 It is worth noting that, in the East Timor case, if legal or moral damages do exist, they are suffered both by Portugal and by the East Timorese people, while the material damage, if it occurs, will be suffered only by the latter, who will be concretely deprived of their wealth and natural resources. The existence of moral damage suffered by the people constitutes an interesting problem as usually persons (of a State's Nationals or Agents) or States, and not peoples, are considered as possible parties which can suffer such damage, see Sections 2 and 3 of Chapter I of A/CN.4/425.

44 If the Court rendered a decision favourable to Portugal before the exploitation of natural resources starts, the decision might prevent the material damage occurring. This means that the reparation (of the moral and legal damage) could be mere satisfaction; on this problem see Chapter III of A/CN.4/425 and A/CN.4/425/Add. 1 of 22 June 1989, 25 (Article 10 of the Draft Articles).

45 ICJ Reports (1971) 16.

Maria Clara Maffei

*Western Sahara*<sup>46</sup> the Court drew attention to the principles governing self-determination in the United Nations context. In this case it recognized the right to self-determination 'through the free and genuine expression of the will of the people of the Territory'.<sup>47</sup>

If Australia files no preliminary objections and if the Court decides to go into the merits of the East Timor case, it will once more have to consider the right to self-determination. It will therefore have to pronounce on the exercise of this right by the East Timorese people. The Court will probably give its own interpretation of the events that took place in the 1970s in East Timor. If the Court comes to the conclusion that the East Timorese people have not yet exercised their right to self-determination,<sup>48</sup> the outcome will be interesting. In this case the Court will have to consider the right to self-determination from an unusual and new perspective, that is, in its relationship with the law of treaties.

46 ICJ Reports (1975) 12.

47 Ibid. at 60.

48 This conclusion would be in conformity with the relevant UN resolutions.