AUSTRALIA AND EAST TIMOR
RIGHTS *ERGA OMNES*, COMPLICITY AND NON-RECOGNITION

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I see why you say that only men do evil, I think. Even sharks are innocent, they kill because they must. That is why nothing can resist us. Only one thing in the world can resist an evil-hearted man. And that is another man. In our shame is our glory. Only our spirit, which is capable of evil, is capable of overcoming it.

Ursula Le Guin, "The Farthest Shore"

I. INTRODUCTION

Long overdue, the suffering of the people of East Timor seems to near its end and independence is in sight. The downfall of President Suharto in 1998[1] was the catalyst for the change in the Indonesian position against self-determination in East Timor. His successor, President BJ Habibie,[2] announced on 27 January 1999 that Indonesia would let East Timor go if its people rejected autonomy.

The East Timorese were asked in a referendum on 30 August 1999 whether they accepted or rejected autonomy within Indonesia, with rejection leading to separation from Indonesia.[3] When the results were announced on 4 September, it showed that 21.5% of East Timorese had voted to accept autonomy while an overwhelming 78.5% had voted for independence.[4]

Before the referendum the United Nations Security Council established the United Nations Assistance Mission in East Timor ("UNAMET") to

[1] Refer to the BBC report at news1.thls.bbc.co.uk/hi/english/events/indonesia/latest_news/newsid_98000/98063.stm. Note that all websites in this article were either visited or re-visited in September 1999.

[2] On 20 October 1999, following a presidential election, President Habibie was replaced by President Abdurrahman Wahid, Australian Financial Review, 21 October 1999 at 1.

[3] Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor; Appendix, A Constitutional Framework for a Special Autonomy for East Timor; Agreement regarding the Modalities for the Popular Consultation; Agreement regarding Security. The texts of the instruments are at www.un.org/peace/etimor/etor.htm.

[4] Refer to the statement of United Nations Secretary General Kofi Annan on 4 September 1999 at www.un.org/peace/etimor/result_frame.

organise the consultation.[5]

In 1975 Indonesia claimed that the East Timorese had requested that East Timor be an integral part of Indonesia. As a result, its military forces invaded East Timor.[6] Since then and until recently, East Timor had been under the effective control of Indonesia. On this point, the international community is generally agreed that Indonesia invaded East Timor in an act of aggression. Under international law such an invasion was an illegal act that would incur the international responsibility of Indonesia.[7]

Against this background, it is the intention of this article to focus, not on Indonesia, but on third states and their relationship with East Timor. The obligations that rest on third states were brought to the fore by the *East Timor case*.[8] In that case, Portugal tried to hold Australia accountable in the International Court of Justice for siding with Indonesia,[9] including the signing by Australia of the so-called Timor Gap Treaty with Indonesia in 1989.[10]

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[5] See Security Council Resolution 1246, 11 June 1999.

[6] Within the same month of Indonesia's invasion of East Timor, the United Nations General Assembly and the Security Council passed similar resolutions that called upon all states to respect the territorial integrity of East Timor. The resolutions also called upon states to allow the East Timorese to exercise their right of self-determination: for example see General Assembly Resolution 3485, GAOR 30th Session, Supplement 34 at 118 (1975); Security Council Resolution 384 (1975), SCOR, 20th year, Resolutions and Decisions at 10. Resolution 3485 was adopted by 72 votes to 10 with 43 abstentions while Resolution 384 was adopted unanimously. Refer also to Petition of 31 May 1976: Krieger H (ed), East Timor and the International Community, Basic Documents (1997, Cambridge University Press, Cambridge) ("Basic Documents") 46-47. Note reference to the law on incorporation in East Timor (Portugal v Australia) [1995] International Court of Justice Reports 90, 96 at para 13 ("East Timor case").

[7] See Chapter III, Draft on State Responsibility, 1996 Report of the International Law Commission on the work of its 48th Session I ("(1996) ILC Report").

[8] Refer to note 6 above.

[9] For a discussion on Portugal's claim, see Application Instituting Proceedings of the Government of the Portuguese Republic, 22 February 1991, East Timor case, Basic Documents 371-376 ("Application of Portugal"). For comments on this case see Stepan, "Portugal's action in the International Court of Justice against Australia concerning the Timor Gap Treaty" (1992) 18 Melbourne University Law Review 918-927; Dugard, "1966 and all that, the South West Africa judgment revisited in the East Timor case" (1996) 8 African Journal of International and Comparative Law 549-563; Pummell, "The Timor Gap: who decides who is in control?" (1998) 26 Denver Journal of International Law and Policy 655-690.

[10] 1989 Treaty between Australia and the Republic of Indonesia on the Zone of

The Court declined to rule on Portugal's claims of Australian complicity in relation to Indonesia's actions in East Timor and on Australian breaches of international law by not recognising that Indonesia had breached East Timor's right *erga omnes* to self-determination. The Court rejected Portugal's pleas on the ground that to allow the pleas would be contrary to the precedent established in the *Monetary Gold case.*[11] This was despite the fact that Australia's conduct went beyond that of most other states in relation to East Timor,[12] especially its conclusion of the Timor Gap Treaty with Indonesia.[13] The territorial reach of the Treaty had extended to the continental shelf of East Timor and the Treaty had used the expression "the Indonesian Province of East Timor" in its title.[14]

The remainder of this article is divided into a number of sections. The next section, Section II, deals with: the facts that surround East Timor; the differing claims; and the *Monetary Gold case.* Section III will question whether Australia committed a denial of self-determination in East Timor and address Portugal's argument that there was a denial of a right *erga omnes*. Although it may be argued that Australia did not directly use armed force or denied self-determination in East Timor, yet in this regard the issue of complicity may have arisen. This is discussed in Section IV. Section V will focus on the issue of non-recognition and examine it. Owing to the particular circumstances of the East Timor case, non-recognition is discussed in relation to the acquisition of territory by the use of force. Lastly, Section VI presents concluding observations and remarks.

Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia ("Timor Gap Treaty"), (1990) 29 International Legal Materials 475-537; Basic Documents 346-355. See also the 1997 Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries. The text of this treaty is at beta.austlii.edu.au/au/other/dfat/treaties/notinforce/1997/4.html.

[11] Case of the Monetary Gold removed from Rome in 1943 (Preliminary Question) [1954] International Court of Justice Reports 19, 32-33 ("Monetary Gold case").

[12] See Counter Memorial of the Government of Australia, East Timor case, 1 June 1992 at 71-86 ("Counter Memorial of Australia"), Basic Documents 298-328.

[13] See also the 1997 Treaty between the Government of Australia and the Government of the Republic of Indonesia establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries. The text of this treaty is at beta.austlii.edu.au/au/other/dfat/treaties/notinforce/1997/4.html.

[14] Ibid.

II. FACTS, POSITIONS AND THE *MONETARY GOLD CASE*

Some facts

Since the sixteenth century, the territory of East Timor had been a colony of Portugal. The United Nations General Assembly considered the territories under the administration of Portugal as non-self-governing territories under Chapter XI of the United Nations Charter.[15] Portugal had accepted this position after the Carnation Revolution of 1974 and as a result started to think about the idea of independence and self-government for East Timor.

The process of decolonisation started with the formation of three major political parties in that colony. The political parties were: (1) the Fretilin (formerly ASDT), which was committed to independence; (2) the UDT, which was oriented towards a federation with Portugal, but with the possibility of independence; and (3) the Apodeti, which favoured integration into Indonesia. Later, the UDT shifted its position to pro-integration and staged a coup in August 1975 that was quickly defeated by the Fretilin. During this period, Portugal found itself unable to maintain order within East Timor and withdrew its administration to the offshore island of Atauro.

On 7 December 1975 Indonesia invaded East Timor and Portugal deserted East Timor altogether the next day.[16] Following this, allegations of human rights violations by Indonesia became numerous.[17] It is estimated that over 200,000 persons have died in East Timor since the invasion, caused by famine, diseases, the armed struggle, and human rights violations by the Indonesian regime.

Immediately after the invasion, the United Nations Security Council adopted Resolutions 384 and 389[18] which reiterated that Portugal was the administering power of East Timor. The Resolutions called upon Indonesia to withdraw its forces. In addition, all states were asked to respect the

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[15] See General Assembly Resolution 1542 (XXV), 15 December 1960, Basic Documents 29-30.
[16] East Timor case at 96 at para 13.
[17] For example the Santa Cruz massacre, Basic Documents 261-273.
[18] Security Council Resolution 384 of 22 December 1975 and Resolution 389 of 22 April 1976, Basic Documents 53-54, 93.

territorial integrity of East Timor and recognise the inalienable right of the East Timorese to self-determination. Between 1975 and 1982 the United Nations General Assembly adopted eight resolutions in total.[19]

The positions of Indonesia, Portugal and Australia

On 5 May 1999 Indonesia accepted that the East Timorese possessed the right to self-determination. However, when Indonesia invaded East Timor in 1975, it did the following:

1. accused the Fretilin of provocation against Indonesia and violence against other parties;
2. affirmed its resolve to defend its territorial integrity;
3. recalled that it had offered its good offices to assist Portugal in restoring security and general order in East Timor;
4. regretted the Fretilin's declaration of independence;
5. sympathised with the proclamation of the other parties that regarded themselves to be integrated into Indonesia; and
6. declared that it had the moral obligation to protect the people in Portuguese Timor.[20]

At the time, Indonesia had cast the above position as an East Timorese request for integration and accepted the request as an act of self-determination.[21]

Prior to 1974 Portugal, as the administering power, had resisted attempts for decolonisation. However, it eventually accepted the official United Nations position that its colonies were non-self-governing territories and that their peoples possessed the right of self-determination.[22] In 1976 Portugal affirmed its responsibility to safeguard East Timor's right to independence.[23] Consequently, Portugal submitted in its case against

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[19] Note General Assembly voting records, Basic Documents 129-133. No resolutions were proposed and adopted after 1982, due ostensibly to fear that further draft resolutions might not attract the necessary majority if voted on.
[20] Statement of the Government of Indonesia, 4 December 1975, Basic Documents 41-42.
[21] Statement of President Suhaarto, 7 June 1976, Basic Documents 47-49; Statement of Minister for Foreign Affairs, Ali Alatas, 20 February 1992, Basic Documents 275-278.
[22] Portuguese Council of State, Constitutional Law 7-74, 27 July 1974, Basic Documents 34.
[23] Constitution of the Portuguese Republic, 2 April 1976, Basic Documents 36.

Australia that the Timor Gap Treaty had resulted in the infringement of the right of the East Timorese to self-determination, territorial integrity, unity and permanent sovereignty over its national wealth and resources. In its pleadings before the Court, Portugal claimed that Australia had infringed Portugal's right as the administering power in East Timor, thereby impeding Portugal's ability to perform and fulfil its duties to the people of East Timor and the international community as a whole. Portugal also claimed that Australia had contravened Security Council Resolutions 384 and 389. Portugal claimed that these actions resulted in Australia's international responsibility and its obligation to redress the damage it committed to East Timor and Portugal.[24]

Australia rejected these claims on the ground that there was no binding obligation not to recognise the acquisition of territory acquired by force.[25] Australia argued that its recognition of Indonesia's actions in East Timor did not signify approval of the circumstances surrounding the acquisition of East Timor's territory. Australia pleaded that it recognised East Timor's right to self-determination and Indonesian sovereignty in East Timor, much in the same manner as it had done in the past when it recognised Portuguese sovereignty in East Timor. Australia stated that East Timor's right to self-determination continued to exist though its enjoyment had been postponed.[26]

Australia pleaded that although Security Council and General Assembly resolutions existed, there had been no new resolutions since 1982. The resolutions that existed were dated and as such could not be considered to be of indefinite validity.[27] Further, Australia argued that any investigation into the illegality of Australia's acts would have to be preceded by an investigation into the legal or illegal nature of Indonesia's action in invading and occupying East Timor.

On the question whether the Court could reach a decision on Australia's responsibility without a ruling on Indonesia's responsibility for the invasion and occupation of East Timor at the same time, the Court followed the precedent established in the *Monetary Gold case.* The Court

[24] Application of Portugal, Basic Documents 375.
[25] Department of Foreign Affairs and Trade, Australia, 23 February 1990, Basic Documents 356-357.
[26] Oral Pleading of Australia, 6 February 1995, Basic Documents 384.
[27] 7 February 1995, Basic Documents 385-386.

therefore accepted Australia's argument and refused to rule on the matter. To do so would result in a determination of the legality or illegality of the actions of Indonesia, a third state that was not a party to the proceedings.

As a result, the *status quo* was maintained between all the parties and this continued until early 1999. However, in the interim, the East Timorese agitated for self-determination, both within and outside East Timor. Then, on 12 January, the Australian government announced that it would support autonomy for East Timor leading up to independence.[28]

The Monetary Gold Case revisited

The jurisdiction of the International Court of Justice depends on the mutual consent of the states involved in a case.[29] Although Portugal and Australia had accepted the jurisdiction of the Court, Indonesia had not done so until very recently. The question that arose was whether the Court could exercise jurisdiction and determine Portugal's claim in the absence of Indonesia. If the Court ruled upon the actions of Australia, it necessarily implied a ruling upon the actions of Indonesia as well.

In the *Monetary Gold case* the Court had refrained from giving a decision, notwithstanding the acceptance of its jurisdiction by the parties.[30] The facts in that case related to gold owned by Albania that had been removed from Rome in 1943. The United Kingdom had claimed the gold as a judgment debt following an award against Albania for Albania's wrongful acts in the *Corfu Channel case.*[31] However, there was another claimant to the gold, Italy. Under an agreement, Italy and Albania were given the right to apply to the Court. Italy exercised that right but Albania did not. Italy objected and argued that the Court lacked jurisdiction in the absence of Albania. As such, Italy pleaded that the Court could not decide on the priority of the

[28] For the text see the BBC news report at 2.thls.bbc.co.uk/hi /english/world/asia-pacific/newsid_253000/253250.stm.

[29] Refer Article 36 of the Statute of the International Court of Justice.

[30] See Continental Shelf (Libyan Arab Jamahiriya/Malta) [1985] International Court of Justice Reports 13, 26; Frontier Dispute [1986] International Court of Justice Reports 554, 579; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene [1990] International Court of Justice 92, 114-116. See also Status of Eastern Carelia, Permanent Court of International Justice, 1923, Series B, No 5 at 28-29.

[31] (Merits) [1949] International Court of Justice Reports 4, 35. In this case, the International Court of Justice held that Albania was responsible for damage to British warships when they were mined in the Corfu Channel.

claims. The Court agreed:[32]

> To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

III. THE RIGHT OF SELF-DETERMINATION AS A RIGHT *ERGA OMNES*

Some preliminary observations are in order first of all. It will be assumed that the East Timorese possessed the right to self-determination[33] and could opt for independence.[34] The underlying basis for this is clear. The East Timorese lived in a territory that was not part of Indonesia. From the time of Indonesia's independence to the end of 1975, Portugal had administered East Timor.

When Indonesia invaded East Timor, it cannot be considered that this act provided Indonesia with any title to territory there. Although it may be argued that Indonesia's use of force in East Timor was not against the territorial integrity of any state *per se,* as East Timor was not a state,[35] the act concerned Indonesia's international relations with Portugal and was inconsistent with the purposes of the United Nations Charter. Even if the territory had been acquired through the lawful use of force, such as in self-defence, it would not have provided title to territory.[36]

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[32] Monetary Gold case at 32.

[33] Note Cassese A, Self-determination of Peoples: A Legal Reappraisal (1995, Cambridge University Press, Cambridge) 67-100.

[34] General Assembly Resolution 1541(XV), 15 December 1960, Basic Documents 28-29. See also Cassese A, Self-determination of Peoples: A Legal Reappraisal (1995, Cambridge University Press, Cambridge) 67-100.

[35] See General Assembly Resolution 2625 (XXV), 24 October 1970 on Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations ("Declaration on Principles of International Law"). Under the heading "Principle of equal rights and self-determination of peoples" para 6 provides: "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it."

[36] Compare Jennings R, The Acquisition of Territory in International Law (1963, Manchester University Press, Manchester) 54-56. On intervention see Clark, "The Decolonisation of East Timor and the United Nations Norms on Self-determination and Aggression" in Catholic Institute for International Relations ("CIIR") and International Platform of Jurists for East Timor ("IPJET"), International Law and the Question of East

In the *East Timor case,* the Court reflected on Portugal's position, a position that was intended to circumvent the *Monetary Gold case:*[37]

> It maintains, in effect, that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, individually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.
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> In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.

While the Court clearly endorsed Portugal's position, it went on to say:[38]

> However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.

The Court did not elaborate on the notion of rights *erga omnes* and denied, correctly, that resort to that notion would enable it to circumvent the principle established by the *Monetary Gold case.*[39] Portugal specified in its pleadings that the right to self-determination in East Timor entailed correlative obligations for all states within the international community, and not merely for Portugal as the administering power, or for Indonesia as the State with control over East Timor.[40]

Timor, 1995 at 65-102, 92-100; Burchill, "The ICJ decision in the case concerning East Timor: the illegal use of force validated?" (1997) 2 Journal of Armed Conflict 1, 8-12.

[37] East Timor case 102 at para 29, especially the Separate Opinion of Ranjeva J at paras 129, 131, the Dissenting Opinion of Weeramantry J at paras 142, 143, 172-173, 202, 205, 208, 209, 213-216, 221 and the Dissenting Opinion of Skubiszewski J at paras 248, 265-266, 275.

[38] Ibid 102 at para 29.

[39] Compare Jouannet, Le principe de l'Or Monétaire a propos de l'arret de la cour du 30 juin 1995 dans l'affaire du Timor Oriental (Portugal c Australie) (1996) 100 Revue générale de droit international public 673-714, 694-695; de Hoogh, "Intervention under Article 62 of the Statute and the quest for incidental jurisdiction without the consent of the principal parties" (1993) 6 Leiden Journal of International Law 17-46, 44.

[40] Memorial of the Government of the Republic of Portugal, East Timor case, 18 Nov-

Australia's reply was that Portugal had failed to take into account that the direct violation of the right of self-determination in East Timor was solely attributable to Indonesia, and that any other (indirect) violation could only be consequential to Indonesia's wrongdoing. Even if an obligation *erga omnes* to promote East Timorese self-determination existed, the alleged violation of that right lay in Australia's treaty relations with Indonesia. Consequently, the substance of Portugal's allegations were that Australia was not entitled to deal with Indonesia, since that state did not lawfully represent the people of East Timor.[41]

It follows therefore that a right *erga omnes* has as a corollary an obligation for each and every state *individually and independently* to respect that right. As indicated by Portugal, this obligation of respect implies that:[42]

> the party claiming entitlement to a right *erga omnes* may assert it against anyone who denies, disputes, questions or violates it... The fact that a right *erga omnes* is disputed or violated by a particular State singles out that State among all the obligated parties and authorizes the party entitled to that right to demand its respect from it.

Within the context of East Timor, this means that all states, including Australia, have to respect the right of self-determination of the East Timorese. In relation to the *East Timor case* it would appear that the Court's treatment of the notion of a right *erga omnes* in relation to self-determination is questionable.

There are a number of reasons for this. First of all, it has to be noted that rights exist to be exercised. When they are exercised, there must be a correlative obligation on other state(s) to respect the exercise of such

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ember 1991, Volume I at 178-179, and more generally at 99, 101-102, 177-185 ("Memorial of Portugal"); Reply submitted by the Government of the Republic of Portugal, East Timor case, 1 December 1992, Volume 1 at 95-98, 173-176 ("Reply of Portugal").

[41] See Counter Memorial of Australia 94 (more generally at 92-99 and 161-164); Rejoinder of the Government of Australia, East Timor case, 1 July 1993 at 37-40, 42, 51-54, 145-152 ("Rejoinder of Australia"); and Oral Pleading of Australia, 7 February 1995, Basic Documents 387.

[42] See Reply of Portugal at 174; the Further Application of Portugal, Basic Documents at 374, 375; Oral Pleading of Portugal, 30 January 1995 and 2 February 1995, Basic Documents at 378 and 382 respectively. See also the dissenting opinion of Weeramantry J in the East Timor case especially at 172.

rights.[43] In the absence of any such exercise, one may assume that the obligation would not be breached but would be respected also. This has been Australia's position:[44]

> Its obligation is to respect the outcome of any act of self-determination of the people of the territory, and to cooperate with the competent organs of the United Nations.

However, this conclusion must be qualified in so far as the conduct of a state may obstruct or prevent the exercise of a right, thus making it impossible for the right holder to exercise its rights. By the very nature of the rules on self-determination, the right of self-determination is matched by the obligation of the state on whose territory or under whose jurisdiction or control a people lives, to recognise it. In other words, that state has to respect and allow the exercise of the right. In principle, third states should not interfere with this and neither are they in a position to allow or disallow such peoples from pursuing self-determination.[45]

In the International Court of Justice, Weeramantry J did not agree with this position and stated:[46]

> The existence of a right is juristically incompatible with the absence of a corresponding duty. The correlativity of rights and duties, well established in law as in logic...means that if the people of East Timor have a right *erga omnes* to self-determination, there is a duty lying upon all Member States to recognize that right. To argue otherwise is to empty the right of its essential content and, thereby, to contradict the existence of the right itself.

It may be argued that actions such as those of Australia contradict the existence of the right of the people of East Timor to self-determination. However, even if Australia was to deny the very existence of the right of

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[43] Dissenting opinion of Weeramantry J in the East Timor case 208-209; de Hoogh AJJ, Obligations Erga Omnes and International Crimes – A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States (1996, Kluwer Law International, The Hague) 20-21; Galvão Teles and anor, "Portugal and the right of peoples to self-determination" (1996) 34 Archiv des Völkerrechts 2, 8-9.

[44] Counter Memorial of Australia 164.

[45] Ibid 166-167.

[46] See his dissenting opinion in East Timor case 209.

self-determination, this does not necessarily imply that it acted wrongfully. Subjects of law, whether on the domestic or international plane, are free to question the law, to question the existence of rights and obligations, and to act wrongfully if they so choose. The denial of rights possessed by others does not in itself constitute wrongful conduct.

Further, Australia's conduct does not *in fact* impede East Timor's right of self-determination. However, Weeramantry J stated that there was a correlation between the right of self-determination and the obligation by states to recognise the existence of that right. In fact, it was Australia's conduct and acceptance of Indonesia's original obstinate refusal to allow self-determination that raised Australia's duty regarding recognition. Australia's conduct cannot be viewed in isolation from Indonesia's conduct, and for that reason the idea of rights *erga omnes* imposing autonomous, independent obligations on Australia goes beyond the more sound notion of correlative obligations.

In the end, not every right is matched by an obligation *for all states.* This was bolstered by the Court's position that it must have jurisdiction to deal with a case in the first instance before it can even consider the substance, be it on rights *erga omnes* or otherwise. The Court's stance, which has been criticised,[47] implies that Australia's obligations, correlative to the *erga omnes* right of self-determination, are not autonomous or independent in nature. Further, Australia's alleged breach of the right *erga omnes* cannot be seen to be unconnected to Indonesia's breach of that same right.

If Australia's obligations and their breach were completely separate from those of Indonesia's, the Court could have circumvented the *Monetary Gold case.*[48] Thus, to avoid inconsistency, the Court should have ruled that Australia's *de jure* recognition of East Timor's incorporation into Indonesia breached the Timorese people's right *erga omnes.* The Court could have done this quite legitimately in view of the jurisdiction bestowed upon it by Portugal and Australia. Indonesia's absence before the Court, and the Court's consequent lack of jurisdiction in relation to that state, would not have mattered then. On the issue of Indonesia being affected by a judgment against Australia, it would have been possible to refer to Article

[47] For example see Coffman, "Obligations erga omnes and the absent third state" (1996) 39 German Yearbook of International Law 285, 309-321.

[48] Compare Klein, "Multilateral disputes and the doctrine of necessary parties in the East Timor case" (1996) 21 Yale Journal of International Law 305, 333-335, 344-345.

59 of the Statute of the Court that stipulates that the judgment is binding upon the parties to the case only.

The Court, however, declined to take that road. The reason for this, it is suggested, lies with the inaptness of integrating the notion of rights *erga omnes* within international legal structures.

It may be argued that rights *erga omnes* exist within the context of the United Nations Charter, General Assembly Resolution 2625, the 1966 International Covenant on Civil and Political Rights ("ICCPR"), and the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Besides Articles 55 and 56 of the Charter and Resolution 2625, Article 1(3) of the ICCPR provides:

> The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the Charter of the United Nations.

The General Comment adopted by the Human Rights Committee provides that the obligation of states to promote self-determination exists if there are peoples living in their territory. According to the General Comment it also exists in relation to peoples living in the territory, or under the jurisdiction or control of another state.[49] However that may be, it is argued that, *by its very nature,* the right to self-determination is of *erga omnes* character.[50] However, this argument remains unconvincing, as underlined above.

IV. COMPLICITY

A further question that arises is whether Australia by its actions was, or has become, an accomplice of Indonesia in committing aggression and has consequently denied East Timor of self-determination. Although Portugal has not made a formal claim to this effect, it has suggested as much.[51]

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[49] Human Rights Committee, General Comment 12 (Article 1), 1984 at para 6. For the text see www1.umn.edu.humanrts/gencomm/hrcom12.htm.

[50] Dissenting opinion of Weeramantry J in the East Timor case 205; see the Further Reply of Portugal at 105-110.

[51] Reply of Portugal at 46-61; Further Oral Pleading of Portugal, 2 February 1995, Basic Documents 382-383.

Portugal has claimed that Mr EG Whitlam had concluded that East Timor would not be a viable state when he was Prime Minister of Australia. Portugal has claimed also that Australia had refused to join in a proposed peacekeeping operation in East Timor but instead had supported Indonesia in its actions against East Timor.

Australia has denied these allegations and claims that it has always supported the right of self-determination for the East Timorese people. It has stated also that it does not condone the Indonesian use of force.[52] Be that as it may, an evaluation of Australia's actions during the crucial period lies beyond the scope of this article, which focuses on the issue of *de jure* recognition by Australia of Indonesian sovereignty in East Timor and the Timor Gap Treaty.

As a general starting point, account has to be taken of Article 27 of the Draft on State Responsibility adopted in the first reading by the International Law Commission in 1966.[53] The notion of complicity found in that provision is accepted under international law at present.[54] It provides:[55]

> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act, carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

In adopting this provision the Commission took a restrictive view on the types of complicity that would give rise to responsibility. It eliminated, for instance, the type of complicity known as "incitement" in domestic legal systems.[56] If this is the correct position, it would rule out Australia's

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[52] Rejoinder of Australia at 20-24.

[53] See Article 27 and Commentary [1978] Yearbook of the International Law Commission, Volume II, Part Two 99-105.

[54] Ibid at 103.

[55] Ibid at 99.

[56] Ibid at 99-102; compare dissenting opinion of Schwebel J in Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v United States) [1986] International Court of Justice Reports 14, 388-389. Note Declaration on Principles of International Law on propaganda for wars of aggression, encouraging the organisation of irregular forces for incursion into another state, instigating acts of civil strive, inciting subversive terrorist or armed activities directed towards the violent overthrow of the

responsibility for statements attributed to Mr EG Whitlam, made in conversations with President Suharto supporting the Indonesian invasion *before* it occurred.[57] It should be noted that the official Australian position has always been that Mr Whitlam did no such thing, and that Australia was critical of the means by which East Timor came under Indonesian control.[58]

The real question here is whether Australia, by its *de jure* recognition of Indonesian sovereignty over East Timor and by concluding the Timor Gap Treaty, provided "aid or assistance" to Indonesia. If so, it would have perpetrated "the commission of an internationally wrongful act". The Commission in its commentary indicated that for the wrongful act to occur, the aid or assistance that is given must:[59]

> have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act.

This seems to indicate that the aid or assistance concerned must be tangible, and excludes oral or other intangible support from its meaning. However, the Commission had stated earlier:[60]

> The aid or assistance provided may consist in the provision of the material means, but there can also be aid or assistance of a legal or political nature, such as the conclusion of a treaty that may facilitate the commission by the other party of an internationally wrongful act.

In light of this, it may be argued that the mere conclusion of the Treaty resulted in the commission of a wrongful act by Australia because the act had made it "materially" easier for Indonesia, as the receiving state, to commit the internationally wrongful act. It is arguable also that the Treaty

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regime of another state: paras 3, 8-9 under the heading "principle that states shall refrain in their international relations from the threat or use of force". See also para 2 under the heading "principle concerning the duty not to intervene in matters within the domestic jurisdiction of any state".

[57] Reply of Portugal at 46-61.

[58] Rejoinder of Australia at 20-24.

[59] Article 27 and Commentary at 104.

[60] Ibid at 102. See Quigley, "Complicity in international law: a new direction in the law of state responsibility" (1986) 57 British Year Book of International Law 77, 86-87.

helped to consolidate Indonesian sovereignty over East Timor, and in this sense it constituted tangible aid or assistance.

These arguments are not far-fetched.

First of all, by entering into the Treaty, it may be concluded that Australia supported or facilitated Indonesia's occupation and denial of self-determination in East Timor. The act would amount to *de jure* recognition of Indonesian sovereignty over East Timor, which would strengthen Indonesia's legal position. This is because Indonesia would be able to show support from another state in the international community. Australia's acceptance of the words, "Indonesian province of East Timor" in the title of the Treaty is evidence of this, thus contributing to the so-called process of "historical consolidation"[61] by Indonesia in East Timor.

Secondly, the conclusion of the Timor Gap Treaty "facilitated" Indonesia's denial of self-determination in East Timor. Australian recognition of Indonesian sovereignty over East Timor would signify that its people could not opt for independence. For instance, the Declaration on Principles of International Law indicates that:[62]

> [n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

In recognising Indonesia's sovereignty over East Timor, Australia denied East Timor the status of a non-self-governing territory, a "status [that was]

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[61] Jennings R, The Acquisition of Territory in International Law (1963, Manchester University Press, Manchester) 39-41, 61-65. Note that the consolidation of title through recognition by third states is subject to the requirement of effective possession: ibid at 40. On effectiveness, see the Reply of Portugal at 154-160.

[62] See para 7 under the heading "principle of equal rights and self-determination of peoples".

separate and distinct from the territory of the State administering it".[63] While Australia has professed orally its commitment to the right of self-determination of the people of East Timor, and acknowledges that East Timor is a non-self-governing territory,[64] its *de jure* recognition of Indonesian sovereignty over East Timor and its conclusion of the Timor Gap Treaty say otherwise.

Thirdly, the joint Australian and Indonesian exploration and exploitation of natural resources in the Timor Gap area amounts to support for the denial of East Timorese self-determination. On the basis of common Article 1(2) found in both the ICCPR and ICESCR, a populace has the right to dispose of its natural wealth and resources freely. It is obvious that the people of East Timor were not freely disposing, or free to dispose, of anything within the context of the Timor Gap Treaty.

The tricky part of Article 27 lies in the requirement that for aid and assistance to be unlawful, it must be "established that it is rendered for the commission of an internationally wrongful act." The Commission stated that the aid or assistance must be provided with:[65]

> the object of facilitating the commission of the principal internationally wrongful act in question. Accordingly, it is not sufficient that aid or assistance provided without such intention could be used by the recipient State for unlawful purposes, or that the State providing aid or assistance should be aware of the eventual possibility of such use. The aid or assistance must in fact be rendered with a view to its use in committing the principal wrongful act. Nor is it sufficient that this intention be "presumed"; as the article emphasizes, it must be "established".

The crux of the matter seems to lie with the statement that intention cannot be presumed, but must be established. The test seems to require tangible evidence, such as written or oral reports on government statements.[66]

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[63] Ibid at para 6.

[64] See for example the Oral Pleading of Australia, 8 February 1995, Basic Documents 389.

[65] Article 27 and Commentary 104. Note also the Commentary at 103: "The very idea of 'aid or assistance' to another State for the commission of an internationally wrongful act necessarily presupposes an intention to collaborate in the execution of an act of this kind and hence knowledge of the specific purpose for which the State receiving certain supplies intends to use them."

[66] Under the standard of the Commission the avowed opposition and protests would

However, to limit evidence to the professed position of a government would restrict the potential application of Article 27 unduly. One could hardly expect reports of negotiations to contain acknowledgments of intention on the part of the receiving state to use such aid or assistance for unlawful purposes. Similarly, one would not expect a providing state to indicate that its aid or assistance is to be used for facilitating certain acts when it knows that such acts would be wrongful.[67]

However, it is submitted that although intention cannot be presumed by virtue of the mere provision of aid or assistance, this should not prevent consideration being given to all the relevant circumstances to show intention.[68]

If this were the case, it is possible to argue that the intention behind the conclusion of the Timor Gap Treaty was in part to strengthen Indonesia's legal position on East Timor. This argument is strengthened by the reference in the title to the "Indonesian province of East Timor", a reference which is couched in deliberate terms. Since Indonesia and Australia exercise control in the maritime area between Timor and Australia, one would have thought that the reference was superfluous. It would have been sufficient for the Treaty to define the geographical area covered by it without the additional reference to East Timor in the title.

Another matter that arises is the distinction between international delicts and international crimes. The Commission provided the following examples of crime:[69]

> (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

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appear to negate any finding of intention. If one accepts the idea that knowledge of the existence of wrongful acts would suffice, then opposition or protests would not prevent a finding of complicity. Compare Quigley, "Complicity in international law: a new direction in the law of state responsibility" (1986) 57 British Year Book of International Law 77, 123-124.

[67] Ibid at 111.

[68] Special Rapporteur James Crawford does not seem to favour a different approach: Second Report on State Responsibility, A/CN.4/498, Add 1, 24 March 1999, paras 166-186, available at www.law.cam.ac.uk.rcil/ILCSR/Statresp.htm#Crawford.Report.

[69] Draft on State Responsibility Article 19 at para 3 and Commentary, Yearbook of the International Law Commission 1976, Volume II, Part Two at 95-122 [para (d) omitted].

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination; and

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

Article 51 determines that a crime entails all the consequences of an internationally wrongful act, including the consequences set out in Articles 52 and 53.[70] Further, Article 53(b) places an obligation on every state "not to render aid or assistance to the State which has committed the crime in maintaining the situation so created."[71] This appears to reflect the complicit behaviour of states that is provided in Article 27, which applies generally.

It is not clear from Article 51 if complicity may be established only upon proof of intent to maintain the situation created by the crime. However, after reading Article 53(b), it appears not. This is so because Article 53(b) applies as a "more special and severe consequence" of a crime. If the same requirements of Article 27 were to be read into article 53(b) they would clearly not present any special, more severe, consequence of a crime,[72] and if this were the case, Article 53(b) would be superfluous.

Some ambiguity remains nevertheless, as the commentary to Article 27 does not seem to be restricted to delicts. The reason is that the Commission points to the supply of arms to a state so that it may attack a third state, assistance to commit genocide, or support for *apartheid* as examples of complicity.[73]

If the same burden of proof were applied to international crimes, the possibility of holding a state responsible for having provided aid or assistance would be reduced dramatically. Even the sale of arms to a state engaged actively in an aggressive attack against another may not necessarily be accompanied by a specific intention to facilitate the

[70] Draft on State Responsibility Article 51 and Commentary, (1996) ILC Report para 66.
[71] Ibid Article 53 and Commentary; (1996) ILC Report para 66.
[72] Ibid at para 2: "Assistance to a state committing a crime would itself be an unlawful act, and is therefore properly prohibited".
[73] Article 27 and Commentary at para 102.

commission of aggression, and a state may be allowed to argue that they were merely engaged in making a profit.

International crimes, almost by definition, imply the commission of wrongful acts of a particular gravity, and they tend to be of continuing duration. In such cases it would be nonsense to require proof of intention on the part of the providing state, or of specific knowledge that the aid or assistance would be used for the commission of the crime. This would apply especially in relation to the provision of arms and related materials. Even if such goods would not be used directly to commit the crime concerned, it could still allow the state committing the crime to divert other resources to that end.[74]

Although it is not intended that this article conduct an in-depth legal investigation of Indonesia's act as a crime, nevertheless it is worth noting that Indonesia's conduct appears to match three of the four categories established by the Commission. They are the crimes of aggression, denial of self-determination, and widespread breaches of basic human rights obligations, possibly even genocide.

Article 53(b) obliges every other state not to render aid and assistance to Indonesia. Applying this to Australia's conduct, the implementation of the Timor Gap Treaty would enable Indonesia, through the profits arising from the joint exploitation of oil resources, to finance its occupation of East Timor. For that reason Australia's conduct in concluding the Treaty may be said to amount to rendering aid or assistance to Indonesia in maintaining the situation created by the crime.

However, the position is not that simple and appears uncertain. First, the Commission has been unable to determine whether the Security Council, General Assembly, or the International Court of Justice is the organ competent to determine the existence of a crime. The Draft leaves it to each (injured) state to assess individually the situation and determine whether or not an international crime has been committed. As a consequence the Commission concluded:[75]

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[74] Though the same applies in relation to development aid, low interest grants etc. Compare Quigley, "Complicity in international law: a new direction in the law of state responsibility" (1986) 57 British Year Book of International Law 77, 122-123.

[75] See Article 51 and Commentary at para 4.

> As regards the obligations imposed on all States under article 53... these would arise for each State as and when it formed the view that a crime had been committed. Each State would bear responsibility for its own decision...

The logic here is clearly flawed. If this solution were adopted, the reaction of states to the existence of a crime would be varied and an absurd result would occur. For instance, some states would impose upon themselves the obligation not to render aid or assistance while others would not feel the same way, retaining for themselves an absolute freedom to act. In practice, it is doubtful whether many states would have the will to determine that another state had committed a crime. Allegations of this nature impede trading relationships, something that states do not like to jeopardise. If that happens and there is a fall-out between states, it is possible that less scrupulous states will step in to fill the gap. This highlights the practical difficulty of proving the commission of crimes by states, especially when the success of the notion hinges upon a collective determination that is binding on all states, not just some of them.

Secondly, the idea of a separate category of wrongful acts called international crimes is fraught with controversy. Doubts exist as to whether these moves constitute a codification of international law or its progressive development. Under the rules adopted so far by the Commission, however, a plausible argument may be made that Australia has breached its obligation to abstain from rendering aid and assistance to Indonesia when it invaded and occupied East Timor.

V. Recognition of the Situation Created by Indonesia

The next question is whether Australia has an obligation not to recognise Indonesian sovereignty over East Timor.

Portugal has argued that an obligation not to recognise Indonesia's claim to sovereignty over East Timor flows from the rules on self-determination, the status of East Timor as a non-self-governing territory, and decisions taken by the Security Council.[76] Portugal specifically has not requested a finding

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[76] Especially the Memorial of Portugal at 53-64, 191-193 and its Reply at 99-102, 135-154.

on the obligation not to recognise the acquisition of territory through the illegal use of force, although it maintains that Australia has committed a major wrongful act in this respect.[77]

Australia, on the other hand, has claimed that issues of recognition are not regulated by international law.[78] An obligation to this effect may ensue only if the Security Council has adopted a binding decision demanding that states refrain from recognising the situation created by Indonesia. According to Australia, this is not the case. Therefore, the following discussion will be restricted to recognition in cases of acquisition of territory by the use of force.

Any examination of the international rules on non-recognition must begin with the well-known maxim *ex injuria jus non oritur*,[79] which means that no right, or perhaps no law, shall spring from a wrong. As a general principle of law it may be of wide application.[80] The principle certainly applies to Indonesia's invasion and occupation of East Timor. These two acts were, and continued to be, wrongful under international law. Consequently, Indonesia cannot successfully claim that it has title over the territory of East Timor. Similarly, it cannot successfully claim that in 1976 the East Timorese had chosen integration into Indonesia since the rules on self-determination clearly state that the choice must be a free one.

The situation is less clear in relation to Australia's position. The problem is that *ex injuria jus non oritur* is not of unrestricted application. It is generally accepted that those states directly concerned in any particular situation may, either beforehand or afterwards,[81] agree to condone a violation of international law. This has been the position under the laws of treaties and state responsibility until relatively recent times. However,

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[77] For example, the Oral Pleading of Portugal, 13 February 1995, Basic Documents 392.
[78] For example, the Oral Pleading of Australia, 8 February 1995, Basic Documents 388.
[79] Referred to in the Oral Pleading of Portugal, 2 February 1995, Basic Documents 381.
[80] Article 38(1)(c) of the Statute of the International Court of Justice.
[81] On consent, see Article 29 and Commentary in [1979] Yearbook of the International Law Commission, Volume II, Part Two at 109-115. Consent is not admissible in relation to conduct inconsistent with a peremptory norm. If a state decides not to exercise its rights this will lead to a waiver of right, or set in motion processes of acquiescence and estoppel. On the latter, see Jennings R, The Acquisition of Territory in International Law (1963, Manchester University Press, Manchester) 36-51; Zimmer G, Gewaltsame territo-riale Veränderungen und ihre völkerrechtliche Legitimation (1971, Duncker & Humblot, Berlin) 27-39.

although the development and acceptance of the concept of *jus cogens*[82] has undermined the position to an extent, it continues to be the legal position in a general sense.

It does not appear that the Draft on State Responsibility includes a general limitation on the freedom of an injured state not to pursue its claim against a state committing a wrongful act. Similarly, it does not include a general obligation on third states (meaning states that are not injured states under Article 40), or indeed other injured states, to abstain from recognising a situation brought about through the commission of a wrongful act. On this point, Special Rapporteur Crawford observes:[83]

> As to article 53(b), however, the obligation not to recognize the legality of unlawful situations is not limited by international law to international crimes.

However, it remains to be seen if the Commission will extend the presently accepted rules on non-recognition to other situations.

Within the context of international crimes committed by a state, the Commission has proposed that an obligation of non-recognition be imposed on all other states. As shown earlier, this obligation will arise when an international crime is committed and Indonesia's actions qualify as international crimes. This brings into operation the obligation not to recognise the situation created by the criminal act or acts pursuant to Article 53(a). When this is applied to Australia, its *de jure* recognition of Indonesian sovereignty over East Timor, consolidated through the conclusion of the Timor Gap Treaty, is a breach of that obligation.

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[82] Note the challenge to the Timor Gap Treaty in the High Court of Australia in Horta and Others v Commonwealth, 18 August 1994, Basic Documents 364-369; (1994) 181 Commonwealth Law Reports 183. This case may be found at www.austlii.edu.au/au/cases /cth/high_ct/181clt183.html.

[83] Crawford J, First Report on State Responsibility, Addendum 3, A/CN4/490/Add3, 26 May 1998 at para 84. The text of the Addendum is available at www.law.cam.ac.uk/rcil/ ILCSR/Statresp.htm#Crawford Report. See the Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971] International Court of Justice Reports 16, 54-56; Quigley, "Complicity in international law: a new direction in the law of state responsibility" (1986) 57 British Year Book of International Law 77, 99.

The Commission's position on non-recognition in relation to situations arising from a criminal act accords with customary international law when applied to the acquisition of territory by force. Even before World War II there was a tendency towards the development of that obligation. For example, in response to Japan's actions in Manchuria, the United States adopted what became known as the Stimson doctrine.[84] The United States sent a note[85] to Japan stressing that it would not recognise, among others, any situation, treaty, or agreement that was brought about by means contrary to the 1919 Covenant of the League of Nations[86] and the 1928 General Pact for the Renunciation of War.[87]

While there may be doubt whether the United States acted out of a sense of legal obligation, later developments grafted upon the United Nations Charter have placed beyond doubt the existence of an obligation of non-recognition under customary international law in such circumstances.[88] Most important in this respect is the Declaration on Principles of International Law, which stipulates that no acquisition of territory by the use of force shall be recognised.

Another possible basis for the obligation of non-recognition by states may be a Security Council decision. When considering Resolutions 384 and 389, the absence of a specific demand in the resolutions to refrain from recognising Indonesian authority over East Timor is to be noted. However,

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[84] In 1931 Japan invaded Manchuria, a Chinese province, and re-named it Manchukuo. For further discussion see Harris DJ, Cases and Materials on International Law (1998, 5th edition, Sweet and Maxwell, London) 109.

[85] For the text see McMahon M, Conquest and Modern International Law, The Legal Limitations on the Acquisition of Territory by Conquest (1940, Catholic University of America Press, Washington) 154-155.

[86] For the text see (1919) 13 American Journal of International Law (Supplement) 128-140.

[87] This agreement is sometimes known as the Briand-Kellogg Pact of Paris. For the text see Renunciation of War (1928) 22 American Journal of International Law (Supplement) 171-173.

[88] Note para 10 of the Declaration on Principles of International Law under the heading "States shall refrain in their international relations from the threat or use of force"; Article 5(3) on the Definition of Aggression, General Assembly Resolution 3314 (XXIX), 14 December 1974; Security Council Resolution 662, 9 August 1990 at paras 1-3. See generally Lauterpacht H, Recognition in International Law (1947, Cambridge University Press, Cambridge) 409-435; Ziehen, U, Vollendete Tatsachen bei Verletzungen der territorialen Unversehrtheid, Eine völkerrechtliche Untersuchung (1962, Holzner-Verlag, Würzburg) 156-173.

it may be argued the resolutions imply a duty of non-recognition since they call upon all states to respect the territorial integrity of East Timor.[89] Although that may be so, it remains that the resolutions are not binding upon members of the United Nations because they are not "decisions" within the meaning of Article 25 of the Charter.

Under Article 25, United Nations members agree to accept and carry out "decisions" of the Security Council. It is generally accepted that the Council can only make decisions under Articles 39, 41-42 and 94(2) of the Charter.[90] When interpreting Resolutions 384 and 389, account must be had to a threat to the peace, breach of the peace or act of aggression under Article 39, but these references are not to be found in those two resolutions.

It is generally accepted also that obligations may ensue when the Security Council "demands" a state to act in a certain way, stipulates that states "shall" apply certain measures, or "decides" on a particular issue. On the other hand, with regard to East Timor, the Security Council merely "called upon" states to respect its territorial integrity. In this context therefore, Resolutions 384 and 389 have not extended obligations of non-recognition to Indonesia's occupation of East Timor.[91]

VI. CONCLUSION

This article opened with Ursula Le Guin's statement that "[o]nly one thing in the world can resist an evil-hearted State. And that is another State." For a very long time Australia did not take a stand against Indonesia. On the contrary, Australia aligned itself with Indonesia and supported the latter's continuing efforts to establish a *fait accompli* in East Timor.

This conclusion may seem harsh especially when it is not easy to establish Australia's legal responsibility. For example, Australia cannot be said to have infringed the East Timorese right of self-determination because the obligations corresponding to that right rest with Indonesia (and Portugal).

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[89] Note Chinkin, "Australia and East Timor in international law" in CIIR and IPJET, International Law and the Question of East Timor, 1995 at 269-289, 279.

[90] Compare Malanczuk P, Humanitarian Intervention and the Legitimacy of the Use of Force (1993, Het Spinhuis, Amsterdam) 15 and endnote 186.

[91] Compare Chinkin, "East Timor moves into the World Court" (1993) 4 European Journal of International Law 206, 212.

Further, although it is an attractive proposition that the right of self-determination constitutes a right *erga omnes,* legally, there appears to be no merit to it.

The same may be said of Australian complicity. To say that it exists, it has to be established, but it is not easy to show. Can it really be said that the conclusion of the Timor Gap Treaty amounts to aid and assistance to Indonesia in the commission of an internationally wrongful act? Proof of such intention will be difficult to establish.

Perhaps the stronger argument lies in the commission of international crimes. However, the theory on the existence of international crimes seems far from being accepted under international law at present.[92] It is a topic that requires an inquiry into the most sensitive and controversial subjects of inter-state and international relations.

On the issue of non-recognition, international law presents no ambiguity when territory is acquired by force. The prohibition of the use of force against the territorial integrity of a state under Article 2(4) of the United Nations Charter is clear. In this context, Australia has breached that obligation.

There may be several reasons for Australia's motives regarding its original policy on East Timor. Indonesia seems to be the only state in the region that could threaten Australia.[93] A deal with Indonesia on the continental shelf of East Timor minimises the risks of any military confrontation in relation to the exploitation of that shelf or fishing in the area. Contrast the British-Icelandic cod wars and the tensions between Greece and Turkey over the Aegean Sea. Another reason is an economic one, because it makes good sense that Australia aligns itself with an Asian state in order to gain access to more Asian markets.

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[92] Special Rapporteur James Crawford had recommended that the topic of international crimes be deleted from the draft since it required separate treatment: see First Report, Addendum 3 at paras 100-101.

[93] In 1995, the two states signed another agreement known as the Agreement between the Government of Australia and the Government of the Republic of Indonesia on Maintaining Security [1996] Australian Treaty Series No1 at http//:www.austliiedu.au/do/disp.pl/au/other/dfat/treaties/1996/13.html?query=indonesia. Refer to the Decision by the Government of the Republic of Indonesia to Abrogate the Agreement between the Government of Indonesia and the Government of Australia on Maintaining Security, 16 September 1999 at http//:www.deplu.go.id/policy/releases/1999/ pr43b-16sept99.

Some may argue that Australia's sense of guilt is another factor in the change in policy[94] especially when the government's East Timor policy has been unpopular with the general public. The shift in policy has seen Australia redeem itself both at home and abroad and this has been achieved to some extent by the Australian-led intervention in East Timor. Albeit a bit tardy in nature, without Australia's initiative and contribution, it is doubtful if INTERFET would be present in East Timor today.

This brings us to the catalyst behind the Australian government's shift in policy in January 1999. From one of the most-staunch supporters of Indonesian sovereignty over East Timor in 1975, Australia has turned into a champion of East Timorese self-determination today. In 1975, the Australian Labor Party was in government and it moved quickly to recognise Indonesian sovereignty.[95] In 1998, it did an about turn in its policy and reversed its position on East Timor.[96] The opportunity arose for Australia to do this when Vice-President BJ Habibie replaced President Suharto as President. This became a real opportunity for Australia to act because President Habibie has been known to claim a commitment to reforms on human rights and democracy.

But this is not the end. The issue is what will become of the 1989 Timor Gap Treaty and the 1997 Delimitation Treaty. Have they been terminated? It appears that re-negotiation will have to occur and Australia may not get as good a deal as it did the first time round. There is now another factor, an East Timorese claim for substantial development aid from its developed neighbour.[97] In this respect, Australia will probably be quite receptive to the claims.

One should not lose sight of the fact that Indonesia is the main malefactor in what occurred in East Timor. It has been alleged that it has committed

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[94] For example see Harrison, "Australia's sense of guilt", 17 September 1999 at http//: www.news2.thls.bbc.co.uk/hi/english/world/from_our_own_correspondentnewsid_44900 0/449425.stm.

[95] At present, the Liberal Party is in government in Australia.

[96] Refer Foreign Policy objective 12 and resolution 1 on East Timor, chapter XIV, ALP Platform 1998, 19-22 January 1998, the texts of which are at http//:www.alp.org.au/ policy/plat1_1.html. See also Inbaraj, "Opposition vows shift on East Timor policy", 29 September 1998 at http//:www.oneworld.org/ips2/sept98/03_30_002.html.

[97] The list of contributions is found at http//:www.dfat.com/Timor199.htm, including the comments of Hartcher especially: "Australia pays a price for East Timor's independence", Australian Financial Review, 29 February 1999.

atrocious illegal acts against the East Timorese but that does not relieve other states and the United Nations from their international responsibility as well. Unfortunately, decisions on the enforcement of international law are too often subordinated to political considerations and economic interests. If any lesson is to be learnt from this experience, it should lead to a change in the way international relations and international law operates in the twenty-first century.