The Timor Gap: Who Decides Who Is in Control

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I. FACTS & PROCEDURAL HISTORY

East Timor lies just opposite Australia and includes the island of Atauro, the islet of Jaco, and Oe-Cusse in the Western part of Timor.1 Portugal colonized East Timor in the 16th Century and occupied the area until 1975.2 The Dutch controlled the Western part of the island which later became Indonesia.3 As part of the decolonization process, the United Nations named Portugal Administering Power over the non-self governing territory of East Timor.4 As such, Portugal was expected to protect the interests of East Timor and make regular statistical and informational reports on the country to the Secretary General of the United Nations;5 Portugal never fulfilled its duties toward East Timor and the United Nations.6 It continued to treat East Timor as an overseas province despite several Security Council resolutions condemning it for failing to implement the United Nations' decolonization policy.7

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* J.D. Candidate, University of Denver College of Law, 1999. I want to recognize the support of my family and friends, especially Mom and Jodi who took the time to proof-read this article. I also want to thank Martha Ertman for helping me with my writing.
3. Id.
6. Id.
7. Id. Oda, J. wrote:
In 1963, the Security Counsel...depreciated the attitudes of the Portuguese Government and its repeated violations of the principle of the Charter, urgently calling upon Portugal to implement the decolonization policy (resolutions 180 (1963) and 183 (1963)) and in 1965 once again passed a resolution deploring Portugal's failure to comply with
Finally, during the Carnation Rebellion of April 1974, Portuguese authorities abruptly abandoned East Timor after 400 years of colonization, never to return. Indonesia eventually restored order to the country by sending a 10,000 man army into East Timor in December of 1975, claiming one of East Timor’s leading political parties had requested annexation into Indonesia. Indonesia has remained in control of East Timor ever since.

Alleging that the people of East Timor wanted to join it, Indonesia annexed East Timor on July 17, 1976. The U.N. General Assembly and Security Council responded with resolutions calling on “all states to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination” and requesting that Indonesia remove its forces from the area without delay. The United Nations also applied for Portuguese assistance in preserving East Timor’s right to self-determination in its capacity as Administering Power of East Timor. Similar resolutions emerged periodically from the Security Council until 1976, and from the General Assembly until 1982. Despite this ongoing discussion of the plight of East Timor, the United Nations took no action.

Australia’s Minister of Foreign Affairs recognized Indonesia’s de facto incorporation of East Timor with a statement that Indonesia controlled “all major administrative cent[ers] of the territory.” Therefore, it would be “unrealistic to continue to refuse to recognize de facto that East Timor is part of Indonesia.” Nevertheless, Australia continued to protest the means through which Indonesia acquired control over East Timor.

the previous General Assembly and Security Counsel resolutions (resolution 218 (1965)). In 1972, the Security Counsel repeated its condemnation of the persistent refusal of Portugal to implement the earlier resolutions (resolutions 312 (1972) and 3222 (1972)).

8. Id. Interestingly, the Portuguese Constitution never acknowledged the right to self-determination of the people of East Timor’s until after the Carnation Rebellion. Id.


11. Id.


15. Id.

16. Id.

17. Id.
Australia and Indonesia entered into a continental shelf delineation agreement in 1970-71\(^{18}\) which omitted any reference to the Timor Gap.\(^{19}\) It was not until 1979 that Australia and Indonesia addressed the Timor Gap. The two countries made little progress until the Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia,\(^ {20}\) in which they decided to develop joint exploration and exploitation of the continental shelf.\(^ {21}\) This treaty created a zone of cooperation between East Timor and Northern Australia.\(^ {22}\) When Australia took internal steps to implement the treaty, Portugal, as Administrating Power, brought an application against Australia before the International Court of Justice (ICJ) challenging the treaties validity.\(^ {23}\)

II. THE INTERNATIONAL COURT OF JUSTICE AND THE CASE CONCERNING EAST TIMOR

The ICJ is open to all states.\(^ {24}\) All members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice, and non-members may elect to become parties to the Statute on conditions to be determined by the General Assembly upon recommendations of the Security Council.\(^ {25}\) In addition, states belonging to neither the U.N. nor the Statute of the ICJ may become parties before the Court by accepting the jurisdiction\(^ {26}\) of the court in accordance with the U.N. Charter, Statute and Rules of the Court, and agreeing to assume

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21. East Timor, 1995 I.C.J. at 98. The Zone of Cooperation encompasses a 61,000 square kilometer area with Indonesia and Australia jointly exploiting the Central Zone ‘A’ thought to be the most profitable. Exploration done in 1994-95 indicated that oil and gas wells in the area produce as many as seven thousand barrels of oil a day and the field may contain two-hundred million barrels of crude oil. Nikki Tait, *Oil Muddies Claims to Timor Sea: Nikki Tait on Implications of a Case Starting at the Hague*, THE FINANCIAL TIMES, Jan. 30, 1995, at 5.
23. Id. at 90.
24. Public organizations and legal or natural persons cannot be parties before the ICJ, but the Court can keep them informed about items of interest. GEORGE ELIAN, THE INTERNATIONAL COURT OF JUSTICE 52 (1971).
25. Id.
26. Jurisdiction has many meanings but it most often refers to the “powers exercised by a state over persons, property, or events.” MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 104 (6th ed., 1993). However, here we are concerned with the ability of the ICJ to hear the case and issue a judgment that binds Portugal and Australia.
and fulfill the same duties and conditions created by a decision of the ICJ as apply to U.N. members.\textsuperscript{27} Even members of the U.N. may submit disputes to other tribunals pursuant to past or future agreements, but if they resort to the ICJ for settlement of their disputes, they must comply with its decisions.\textsuperscript{28} A party wishing to enforce the Court's decisions may seek a recommendation of enforcement from the Security Council.\textsuperscript{29}

Because members of the U.N. refused to accept the principle of compulsory jurisdiction at the San Francisco Conference that created the United Nations, "a preliminary agreement, called a compromis, establishes the terms under which [a] dispute will be arbitrated by the Court."\textsuperscript{30} This rejection of compulsory jurisdiction results naturally from the states' desire to preserve their independence.\textsuperscript{31} However, parties sometimes make preliminary agreements to submit certain types of disputes to the ICJ by treaty provision.\textsuperscript{32} The Court has interpreted such provisions narrowly to preserve its prestige and to ensure that its decisions are complied with.\textsuperscript{33}

In 1995, the International Court of Justice considered whether it had jurisdiction to decide Portugal's case against Australia. Under international law states are independent and equal, so that no state may exercise jurisdiction over another without its consent.\textsuperscript{34} Similarly, ICJ jurisdiction in contentious proceedings requires consent by all parties directly affected by an action.\textsuperscript{35} Consent can take one of many forms.\textsuperscript{36} Normally, parties refer a case to the Court jointly, but nothing precludes each from doing so separately. Once proceedings have started, a defendant may accept jurisdiction explicitly in the form of an express statement or implicitly by defending the case on the merits without challenging the jurisdiction of the Court.\textsuperscript{37} In addition, states may exercise the option clause to accept compulsory jurisdiction of the ICJ in advance of a dispute.\textsuperscript{38} A recommendation by the Security Council or

\textsuperscript{27} Id. at 52.
\textsuperscript{28} Id. at 46.
\textsuperscript{29} Id.
\textsuperscript{30} ELYJ, supra note 24, at 53.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} AKEHURST, supra note 26, at 111.
\textsuperscript{35} Id. at 246.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Corfu Channel Case (U.K. v. Alb.) (Merits), 1949 I.C.J. 4, 15-17 (Apr. 9).
\textsuperscript{40} AKEHURST, supra note 26, at 247.
the ICJ itself will not bind states to the Court's jurisdiction. Furthermore, states accept compulsory jurisdiction only with respect to states who have accepted the same obligation. This prevents them from benefiting from a ruling by the ICJ without also being bound by it. Although Australia and Portugal previously accepted the compulsory jurisdiction of the ICJ, the Court concluded it could not exercise jurisdiction over the case because any decision made by the Court would inextricably affect the rights of Indonesia, a non-consenting third-party to the dispute.

On Feb. 22, 1991, the Portuguese Ambassador to the Netherlands filed an application to institute proceedings against Australia concerning certain activities with respect to East Timor. Portugal alleged that Australia had "failed to observe . . . [its] obligation to respect the duties and powers of [Portugal as] the administrating Power" of East Timor and the right of its people to self-determination. Accordingly, Portugal asked that the Court order appropriate reparations to Portugal and East Timor.

Portugal and Australia had already acceded to compulsory ICJ jurisdiction in accordance with the Statute of the International Court of Justice. However, Indonesia had not. The U.N. immediately com-

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42. Id.
44. Id. at 92.
45. Id.
46. Id. at 95.
47. East Timor, 1995 I.C.J. 90. Prior to addressing the merits of a case, the International Court of Justice considers preliminary issues such as: 1) jurisdiction, 2) nationality, and 3) the exhaustion of local remedies. These issues are usually dealt with separately, as in this case, before proceeding to the rest of the controversy. Akehurst has characterized jurisdiction as the real difficulty in achieving binding ICJ judgments. Reasons for this distrust include: 1) the unpredictability of decisions; 2) the impression that decisions are arbitrary due to the large number of dissents; 3) decisions are precedential; 4) perception that the Court changes the law; or 5) that it is too conservative; 6) blur between legitimate customary law and claims for change in existing law; and 7) concern for international reputation and relations. AKEHURST, supra note 26, at 248-52.
48. Id. Article 36, Paragraph 2 of the Statute of the International Court of Justice provides that:

2. The states party to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special
municated the substance of Portugal’s application to Australia and all other interested states entitled to appear before the Court.\textsuperscript{50} There were concerns about the possible impact of any decision on the rights of Indonesia who had not accepted ICJ jurisdiction.\textsuperscript{51}

In its counter-memorial filed on June 1, 1992, Australia questioned the Court’s jurisdiction as well as the admissibility of the Application itself.\textsuperscript{52} Because both parties felt these issues were inextricably linked to the merits of the case, Australia deferred its objection until consideration of the merits of the case pursuant to Article 31 of the Rules of the Court.\textsuperscript{53} Portugal filed a reply prior to Dec. 1, 1992. The ICJ accepted Australia’s rejoinder on July 5, 1993, following an extension of the deadline until July 1, 1993\textsuperscript{54} and discretionary review of the timeliness of the filing in accordance with its rules.\textsuperscript{55}

Next, each party to the proceedings took advantage of the ICJ statute provision allowing parties not already represented by the regular members of the court to appoint an ad hoc judge to sit on the court for the duration of the dispute.\textsuperscript{56} Portugal selected Mr. Antonio de Arruda

agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
the interpretation of a treaty;
any question of international law;
the existence of any fact which, if established, would constitute a breach of an international obligation;
the nature or extent of the reparation to be made for the breach of an international obligation.
3. . . .
4. Such declarations shall be deposited with the Secretary General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.
5. . . .
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

52. Id. at 91.
53. Id. at 92.
54. Id. at 93.
55. ICJ Rules, art. 44, para. 3.
56. “If the Court includes upon the Bench no judge of the nationality to the parties, each of these parties may proceed to choose a judge as provided in paragraph two of this article.” Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 933, 3 Bevans 1179, art. 31, para. 3. This practice is a survival of the traditional custom of appointing arbitrators and may be necessary to reassure litigants. AKEHURST, supra note 26, at 245.
Ferrer-Correria and Australia, Sir Ninian Martin Stephen.\textsuperscript{57} Unfortunately, Mr. Ferrera-Correria became unable to sit on the Court and notified the ICJ of that fact by a letter dated June 30, 1994.\textsuperscript{58} Portugal then appointed Mr. Krysztof Jan Skubiszewski to replace him on July 14, 1994.\textsuperscript{59}

During oral arguments, Portugal first asked the ICJ to recognize the rights of the people of East Timor to self-determination, territorial integrity and unity, and to sovereignty over its wealth and natural resources, and the duties, powers, and rights of Portugal as the Administering Power of East Timor.\textsuperscript{60} Then, Portugal argued that by negotiating the \textit{Treaty on the Zone of Cooperation} to the exclusion of Portugal, Australia infringed on East Timor's right to self-determination, territorial integrity and unity, and its permanent sovereignty over its natural wealth and resources. It impeded Portugal in its duties to the people of East Timor and to the international community and breached an international obligation to cooperate in good faith with the United Nations respecting its policy towards East Timor.\textsuperscript{61}

Portugal also wanted the ICJ to find that Australia ignored its duty to "harmonize" conflicting rights or claims over maritime areas by excluding Portugal from negotiations with respect to the exploration and exploitation of the continental shelf within the Timor Gap,.\textsuperscript{62} Finally, Portugal requested that the Court order Australia to pay reparations to the people of East Timor and to Portugal and to order Australia to refrain from implementing the treaty until East Timor exercised its right to self-determination.\textsuperscript{63} Specifically, Portugal wanted Australia to refrain from negotiating, signing, or ratifying any agreement with a State other than the Administering Power concerning the delimitation, exploration or exploitation of the continental shelf, or the exercise of jurisdiction over that shelf in the areas of the Timor Gap.\textsuperscript{64} Essentially, Portugal sought exclusive rights to negotiate with Australia on behalf of East Timor.

Australia responded with two arguments. First, it claimed the ICJ lacked jurisdiction to consider the claims or, alternatively, if the ICJ had jurisdiction the claims submitted for consideration were inadmissi-

\textsuperscript{57} East Timor, 1995 I.C.J. at 93.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 94. After consulting with both parties, the Court decided that the pleadings and attached documents should be made available to the public, in accordance with ICJ Rules, art. 53, paragraph 2, from the beginning of oral proceeding on Jan. 30, 1995. Public hearings commenced on Jan. 30, and lasted until Feb. 16.
\textsuperscript{61} Id.
\textsuperscript{62} East Timor, 1995 I.C.J. at 94.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
Then, it asserted its actions had in no way disregarded Portugal’s rights. No real dispute existed between Australia and Portugal to give Portugal standing to institute proceedings. Finally, Australia pointed out that any ruling on Portugal’s Application would require the Court to rule on the rights and obligations of an absent third party, Indonesia.

The Court concluded Indonesia’s interest in the Treaty on the Zone of Cooperation prevented it from addressing the merits of the case. By refusing to exercise jurisdiction over this dispute the International Court of Justice constructively abandoned the people of East Timor by failing to consult them and deferring any judgment as to who controls the Timor Gap. The Court was justifiably concerned with avoiding any threat to Indonesia’s sovereignty, yet, this concern unduly overshadowed East Timor’s right to self-determination; it ignored the erga omnes principle of self-determination. The Majority expressed great concern for the effect of any decision on Indonesia’s rights, yet, why should the Court grant Indonesia greater control of the destiny of East Timor than the people of East Timor themselves? Judge Vereshchotin properly felt that the majority ignored the rights of the most important third party to the dispute, the people of East Timor.

III. CONTINENTAL SHELF DELINEATION

Since Portugal’s dispute with Australia involves the exploitation of the continental shelf in the Timor Gap between East Timor and Australia, a simple overview of the law of the sea is advisable. International law divides the sea into three different zones: a) internal waters, b) territorial seas/waters, and the c) high seas. Each zone has its own rules. Internal waters consist of ports, harbors, rivers, lakes, and canals. Within its internal waters, a coastal state may apply and en-

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65. Id.
67. Id. at 99.
68. Id.
70. In most parts of the world, the seabed slopes gently away from the coast for quite a long distance before it plunges deeply into the great ocean depths. This gently sloping seabed, covered by shallow water, is called the continental shelf by geologists, and in prehistoric time was dry land. For the purpose of Truman’s proclamation, the continental shelf was defined as being those offshore areas of the seabed which were not more than 100 fathoms deep. AKEHURST, supra note 26, at 188.
71. Id. at 168.
72. Id. at 169.
force its own laws, and exclude foreign warships. Territorial waters extend from four to twelve miles beyond a state's internal waters. The coastal states exercise sovereignty over territorial waters subject only to the 'right of innocent passage' by foreign vessels. However, territorial waters never extend more than twelve miles beyond a recognized baseline roughly corresponding to the low-tide mark. The term 'high seas' covers all waters not included in either the internal or territorial waters of any state. On the high seas, all ships possess freedom of navigation, fishing, and lying cables and pipeline as well as free access to the airspace overhead. Vessels on the high seas generally lay beyond the jurisdiction of any but the flag-state.

A number of relatively recent innovations have blurred the distinctions between these three traditional classifications of the sea. Contiguous Zones emerged during the period between the two World Wars "as a means of rationalizing" conflicting state practices with regard to the high seas adjacent to territorial waters. Despite initial criticism, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides that "a coastal state may act to: [ ] prevent [and punish] infringement of its customs, fiscal, immigration, or sanitary regulations

73. Id. at 170. However, there are a number of exceptions to this general rule: The coastal state does not exercise exclusive jurisdiction. A vessel's flag state may try individuals for crimes committed while on board the ship; A coastal state should not interfere with a captain's disciplinary action over his crew; The flag-state generally deals with those matters not effecting the good order of the coastal state or its inhabitants; and A coastal state should not profit from the distress of foreign vessels by charging harbor duties and taxes in excess of the cost of services provided.

74. Id. at 171.

75. AKEHURST, supra note 26, at 171. The following rights attach to territorial seas: 1) the exclusive right to fish and exploit seabed resources; 2) sovereignty over the airspace over territorial waters; 3) the right of cabotage, or the internal transportation of goods and people; 4) the right to exclude belligerents; 5) the right to regulate navigation, health, customs, duties and immigration within its territorial waters; 6) the power to arrest occupants of merchant vessels; and concurrent jurisdiction, shared with the flag-ship, over crimes committed on merchant ships. Id. at 172.

76. Id. at 177-78.


78. Id. art. 2. Some of these freedoms can be restricted by Exclusive Fishing Zones or Exclusive Economic Zones. AKEHURST, supra note 26, at 181.


80. Id. at 179.
within its territory or territorial sea."\textsuperscript{81} Despite some variation, contiguous zones never extend beyond twelve miles from the territorial sea for a maximum of twenty-four miles from the baseline.\textsuperscript{82}

Prior to 1945, states shared access to the seabed and subsoil of the high seas.\textsuperscript{83} This changed when President Truman proclaimed that the United States had the exclusive right to resources contained in the continental shelf off the coasts of the United States.\textsuperscript{84} A number of states followed Truman's example and twenty had made their own continental shelf claims by 1958.\textsuperscript{85} The \textit{Convention on the Continental Shelf} recognizes "sovereign rights" over the natural resources\textsuperscript{86} of the continental shelf.\textsuperscript{87} The continental shelf encompasses the seabed and subsoil of areas adjacent to the territorial sea to a depth of 200 meters, or "where the depth of the superjacent waters admits of the exploitation of the natural resources."\textsuperscript{88} The coastal state has exclusive jurisdiction over the continental shelf even if it chooses not to explore or exploit its resources. No one else may do so without the express consent of the coastal state.\textsuperscript{89} Furthermore, these rights do not depend on occupation or an express proclamation of the right.\textsuperscript{90} Although a number of states never signed the \textit{Continental Shelf Treaty}, the ICJ recognized that it had become customary international law\textsuperscript{91} by 1969 when it decided the \textit{North Seas Continental Shelf Cases}.\textsuperscript{92}

\textsuperscript{82.} AKEHURST, supra note 26, at 179.
\textsuperscript{83.} Id. at 188.
\textsuperscript{84.} Policy of the United States with respect to the Natural Resources of the Subsoil and the Seabed of the Continental Shelf, White House Press Release of Sept. 29, 1945, 13 DEPT. OF STATE BULL. 485-86 (July-Dec. 1945).
\textsuperscript{85.} BARRY CARTER & PHILLIP TRIMBLE, INTERNATIONAL LAW 1025 (1995). At least one author has labeled the Continental Shelf Doctrine a classic case of the formation of a new rule of customary law, with the U.S. establishing a precedent and others acquiescing in continental shelf claims. AKEHURST, supra note 26, at 189.
\textsuperscript{86.} Natural resources are the "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species." Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311, art. 2.
\textsuperscript{87.} CARTER & TRIMBLE, supra note 85, at 1027.
\textsuperscript{89.} Id. art. 2.
\textsuperscript{90.} Id.
\textsuperscript{91.} Until recently, international law consisted of customary rules that had evolved after a long historical process culminating in their recognition by the international community. Customary rules crystallize from usages or practices which have evolved in roughly 3 circumstances: 1) diplomatic relations among states; 2) the practice of international organs; and 3) state laws, decisions of state courts, and state military or administrative practices that suggest wide acceptance of a general principal of law. J. Starke, \textit{Introduction to International Law}, 34-28, reprinted in CARTER & TRIMBLE, supra note 85, at 141-43.
The writers of the *Continental Shelf Treaty* anticipated disputes over maritime boundaries among neighboring states. Consequently, the treaty provides that:

Where the same continental shelf is adjacent to the territories of two or more states whose coasts are opposite each other, the boundary of the continental shelf appertaining to such states shall be determined by agreement between them. In the absence of agreement, and unless another boundary is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baseline from which the breadth of the territorial sea of each state is measured.93

Nonetheless, the median line is not binding customary law.94 Rather, states must negotiate in good faith to reach some type of equitable agreement on continental shelf delineation.95 However, the desire of Portugal and Australia to exercise control over the continental shelf of the Timor Gap conflicted with the people of East Timor's right to self-determination.

IV. SELF-DETERMINATION:96 THE RIGHT TO CONTROL ONE'S OWN DESTINY

Despite some uncertainty about its origins,97 legal scholars generally agree that President Wilson "elevate[d] the principle of self-determination to an international level"98 through his Fourteen Points, recognizing "that every people has a right to choose the sovereignty under which they shall live. . . ." 99 The League of Nations implicitly ac-

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95. Id.
cepted the principle of self-determination, thereby leading to its subsequent incorporation into the United Nations Charter. By the 1960’s and ‘70’s, ICJ advisory opinions, treaties and the charters of regional organizations expressed support for self-determination. Today, the international community considers the right to self-determination jus cogens, that imposes binding obligations on all nation states. All peoples possess an affirmative right to self-determination which is “seen as a prerequisite to any genuine enjoyment of any of the human rights.”

Nonetheless, confusion remains about the scope and character of self-determination. Some scholars feel the right extends only to colonies or areas subject to foreign control. This so called ‘external self-determination’ gives people subject to colonization or foreign occupation the right to govern their own affairs free from outside interference. Others disagree, saying that the right to self-determination belongs to all peoples, including minorities and indigenous people living within

101. The U.N. Charter calls on member states “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. . . .” U.N. CHARTER art. 1, para. 2. It also creates a trusteeship system designed to “promote the progressive development of the inhabitants of the trust territories toward self-government or independence, taking into account the freely expressed wishes of the peoples concerned,” and requiring members to become the administering powers and protect the interests of those countries whose people had not yet attained self-government. U.N. CHARTER art. 76.
105. Self-Determination has peremptory normative status (jus cogens) in international law and can be set aside only by a subsequent peremptory norm of contrary effect. Therefore, the right to self-determination of “all peoples” and nations overrides customary international law. Eztah, supra note 69, at 495.
106. Morris, supra note 98, at 204.
107. Id.
This broader definition known as 'internal self-determination', gives minorities and indigenous people control over their own destinies. While some people believe that the term includes the right to succeed, others advocate no more than the right to select a representative government using a legitimate political process. Although unclear in this opinion, the Majority appears to adopt the external self-determination position, possible out of fear of alienating its members with substantial minority populations. Since East Timor's relationship with Indonesia falls within the narrower category, a deeper look at external self-determination is warranted.

The U.N. Charter forbids nation states from interfering with the territorial integrity of other nation states. Similarly, external self-determination is the right of individuals to be independent and free from outside interference. The U.N. Declaration on the Granting of Independence to Colonial Countries and People, found the "subjection of peoples to alien subjugation, domination and exploitation" contrary to the U.N. Charter and "an impediment to the promotion of world peace and cooperation." Although external self-determination applies in both the colonization and foreign domination contexts, colonial claims rarely arise today. Instead, claims increasingly emerge from the foreign domination of one state over the other, as with the Indonesian occupation of East Timor.

Part of the increase in external self-determination claims may result from an expansion in the traditional definition of foreign domination to include militaristic domination, such as when the troops of one country are stationed in another; economic domination, when one or more countries economically dominate another; and cultural domination, where one culture dominates the other. In Self-Determination: Affirmative Right or Mere Rhetoric?, Halim Morris specifically mentions the Lebanese objection to the presence of Syrian and Israeli troops in their country, and American troops in Panama and Okinawa as forms of militaristic foreign domination. Various third world nations view

111. Morris, supra note 98, at 205.
113. U.N. Charter art. 2.
116. Morris, supra note 98, at 207.
117. Id.
118. Id.
119. Id.
economic domination by developed nations as a lack of economic self-determination. Moreover, various ethnic groups throughout the world have begun to assert a right to cultural self-determination in response to foreign domination centering on language and religion. Morris notes that these claims for external self-determination have been largely ignored by the international community. Indonesia’s 1975 invasion of East Timor was no exception. Despite hundreds of thousands of deaths attributed to the invasion, the outside world paid little attention to the area until November of 1991 when Indonesian forces killed an estimated two-hundred and seventy protestors in a cemetery in Dili.

V. THE ICJ DECISION

A. The Majority Opinion

1. Is the Dispute Really between Portugal and Australia?

The ICJ began its evaluation of Portugal’s application by addressing Australia’s contention that Indonesia was the true focus of the dispute over East Timor. Australia characterized the situation as a ploy by Portugal to “artificially limit[ ] . . . [the case]to the question of the lawfulness of [it’s] conduct” because Portugal and Australia had accepted the compulsory jurisdiction of the Court, and Indonesia had not. Furthermore, Australia insisted it had always recognized East Timor’s status as a non-self-governing territory, the corresponding right of its people to self-determination, and Portugal’s status as Administering Power under the authority of the United Nations. The real dispute lay between Portugal and Indonesia over who had authority to negotiate international agreements on behalf of East Timor.

At this point, the Court defined dispute as “a disagreement on a point of law or fact, a conflict of legal views or interests between parties.” The existence of a dispute requires: 1) that the “claim of one
party [be] positively opposed by the other," \(^\text{128}\) as a matter of objective determination. \(^\text{129}\) Here, the Court found the determinative factor not to be whether the "real dispute" implicated Indonesia rather than Australia, but whether Portugal had correctly alleged complaints of law and fact against Australia which were denied. \(^\text{130}\) Since Australia and Portugal clearly disagreed about whether Australia breached any obligation to Portugal in negotiating, concluding, and implementing Treaty on the Zone of Cooperation with Indonesia, the Court concluded that a legal dispute existed and dismissed Australia's objection. \(^\text{131}\)

Next, the Court considered whether a ruling on Portugal's application necessarily involved a determination of Indonesia's rights and obligations towards East Timor. Australia's argument relied on the ICJ's holding in Monetary Gold that it could not rule on a case where the rights of unrepresented third party formed the subject matter of the decision. \(^\text{132}\) Under this rational, any decision made with regard to Portugal's Application would necessarily imply a ruling on the lawfulness of Indonesia's entry and occupation of East Timor since 1974, the validity of the continental shelf treaty governing the Timor Gap, and consequently, Indonesia's obligations under that treaty, so that the consensual nature of ICJ jurisdiction prevented the Court from exercising jurisdiction over the case. \(^\text{133}\)

In contrast, Portugal insisted that the Court could limit its decision to the objective conduct of Australia in negotiating, concluding, and implementing its treaty with Indonesia. Portugal characterized the dispute as a distinct breach of Australia's obligation to deal with East Timor as a non-self-governing territory, including Portugal in its capacity as Administering Power. With the objective conduct of Australia as the only violation of international law, Portugal saw no reason to involve Indonesia in the controversy.

With these arguments in mind, the Majority reminded both parties

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131. Id.

132. Id.

133. Every member of the United Nations automatically becomes a party to the Statute of the International Court of Justice and has access to the court. However, a state does not grant the Court jurisdiction over any class of cases or any one dispute by becoming a party to the statute. To submit to the Court's jurisdiction, states must make declarations under Article 30 of the ICJ Statute. David M. Reilly & Sarita Ordonez, Effect of the Jurisprudence of the International Court of Justice on National Courts, 28 N.Y.U. J. INT'L L. & POL'Y 435, 438 (Fall 1995 -Winter 1996).
that the fundamental principles of the ICJ Statute require the consent of all parties affected by a dispute for the exercise of jurisdiction.\textsuperscript{134} The Court pointed out that Portugal's application assumed that its position as Administering Power gave it exclusive power to negotiate and conclude treaties on behalf of East Timor.\textsuperscript{135} However, Australia expressed a belief that Portugal lost that right with its withdrawal from East Timor.\textsuperscript{136} Australia concluded the \textit{Treaty on the Zone of Cooperation} understanding that the right to negotiate on behalf of East Timor had passed to Indonesia, in accordance with international law, when the latter occupied and later annexed East Timor in 1974.\textsuperscript{137} The Court decided it could not rule on Australia's behavior without a preliminary determination on Indonesia's authority to negotiate and adopt the treaty in 1989.\textsuperscript{138} Since this determination depended on the circumstances under which Indonesia had entered and occupied East Timor, the ICJ felt it could not consider the matter without Indonesia's consent.\textsuperscript{139}

Next, Portugal argued that Australia violated rights \textit{erga omnes}.\textsuperscript{140} Consequently, Portugal could enforce those rights on behalf of East Timor regardless of whether another state also acted unlawfully.\textsuperscript{141} The Court acknowledged self-determination as a right \textit{erga omnes} under the U. N. Charter and contemporary law, but distinguished it from the rule for consent to jurisdiction.\textsuperscript{142} Therefore, the ICJ refused to evaluate any case which passes judgment on an absent third party, even where rights \textit{erga omnes} might be at stake.\textsuperscript{143}

Finally, Portugal attempted to convince the Court that former General Assembly and Security Council resolutions provided conclusive proof of Portugal's status as its Administering Power of the non-self-governing territory of East Timor.\textsuperscript{144} Therefore, the Court need only in-

\begin{itemize}
\item \textsuperscript{135} East Timor, 1995 I.C.J. at 101.
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.} at 101-02.
\item \textsuperscript{138} \textit{Id.} at 102.
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} East Timor, 1995 I.C.J. at 102.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id.} at 103.
\end{itemize}
interpret these resolutions and could avoid ruling upon questions related to Indonesia's presence in East Timor.\textsuperscript{145} The judges found several flaws in this argument. First, it ignored the passage of time.\textsuperscript{146} Second, the U.N. Resolutions relied on by Portugal did not bind the international community.\textsuperscript{147} The Court was unprepared to read the resolutions as preventing other states from recognizing the authority of Indonesia over East Timor exclusively in favor of Portugal.\textsuperscript{148} As for Portugal and Australia, East Timor remained a non-self-governing territory.\textsuperscript{149} Furthermore, the U.N. General Assembly and Security Council took no action against Indonesia in response to Portugal's complaint at the conclusion of treaty negotiations in December of 1989.\textsuperscript{150} Consequently, the Court felt that it could not rely on the past U. N. resolutions as a basis for a decision.\textsuperscript{151} This left the original jurisdictional question unresolved.

Despite its ruling in this case, the ICJ carefully noted that some circumstances might not prevent the adjudication of matters affecting non-parties.\textsuperscript{152} The distinguishing factor appears to be whether a determination is a prerequisite to the controversy at issue. Here, the Majority felt the legality of Indonesia's actions would be the very subject matter of the dispute, precluding the ICJ from exercising jurisdiction.\textsuperscript{153}

\textbf{B. Judge Oda's Concurrence}\textsuperscript{154}

Judge Oda agreed that the ICJ lacked jurisdiction to rule on Portugal's application, but he perceived the true controversy as one between Portugal and Indonesia over who had the authority to negotiate the continental shelf treaties on behalf of East Timor.\textsuperscript{155} Until some determination of Portugal's authority to act on behalf of East Timor, the state lacked standing to sue Australia for breach of duties in relation to the \textit{Treaty on the Zone of Cooperation}.

\begin{footnotes}

\textsuperscript{145} East Timor, 1995 I.C.J. at 103.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 104.
\textsuperscript{150} East Timor, 1995 I.C.J. at 104.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 105.
\textsuperscript{154} Even though the ICJ decided 14-2 not to exercise jurisdiction over the \textit{Case Concerning East Timor}, the four concurring judges agreed with the outcome of the case but not the reasoning behind the Majority's decision. This makes the case less clearly decided than it initially appears. The four concurring opinions illustrate the diversity of views concerning the Timor Gap and Portugal's status as Administrative Power.
\textsuperscript{155} East Timor, 1995 I.C.J. at 107 (Oda, J., separate opinion).
\textsuperscript{156} Id.
\end{footnotes}
Furthermore, Oda found no evidence that Australia's actions threatened the East Timorian right to self-determination in any way.\textsuperscript{157} Australia merely sought to enter negotiations with a third party representative of East Timor regarding an existing claim to the seabed in the Timor Gap.\textsuperscript{158} As explained earlier continental shelf is a legal concept and they often overlap. Under customary international law, Australia was “entitled \textit{ipso jure} to its own continental shelf in the southern part of the Timor Sea --- but at the same time a State which has territorial sovereignty over East Timor and which lies opposite to Australia ... has title to the continental shelf off its coast in the northern part of the 'Timor Gap'."\textsuperscript{159} Australia negotiated with the country across the water, Indonesia, as provided for by the Law of the Sea\textsuperscript{160} and Continental Shelf Conventions.\textsuperscript{161}

In fact, Oda pointed to Portugal's failure to negotiate delineation of the Timor Gap during the initial continental shelf talks between Australia and Indonesia in 1970-71 as an indication that Portugal may have felt it lacked authority to negotiate on behalf of East Timor at that time.\textsuperscript{162} Oda did not dispute Portugal's control over East Timor from the 16th Century until the early 1970's.\textsuperscript{163} Yet, he argued that Portugal failed in its duties as Administering Power of East Timor.\textsuperscript{164} Following Portugal's abandonment of East Timor in 1974, few members of the international community regarded Portugal as the representative of East Timor.\textsuperscript{165} Consequently, anything lost by the people of East Timor in the \textit{Treaty on the Zone of Cooperation} belonged to Australia or the state across the water.\textsuperscript{166} If Portugal objected to the treaty, it should have challenged Indonesia who clearly claimed coastal state status on behalf of East Timor.\textsuperscript{167} Consequently, Portugal lacked standing to sue Australia until after the claims against Indonesia with regard to East Timor had been settled in its favor.\textsuperscript{168}

C. Judge Shahabuddeen's Concurrence

In his separate opinion, Judge Shahabuddeen discussed the con-
sent principle of jurisdiction.\textsuperscript{169} Although article 50 of the ICJ statute makes it clear that ICJ decisions bind only the parties to a dispute, this does not necessarily permit the Court to disregard the effect of its decisions on unconsenting third parties.\textsuperscript{170} The International Court of Justice lacks 'indispensable party' rules to safeguard absent third parties so \textit{Monetary Gold} precludes the Court from exercising jurisdiction without the consent of the third party.\textsuperscript{171} Since international cases rarely remain completely bilateral, \textit{Monetary Gold} sets the line between tolerable and intolerable exercise of jurisdiction, whether the legal interests of a third party "constitute the very subject matter of the dispute."\textsuperscript{172} \textit{Monetary Gold} has been distinguished but not overruled.\textsuperscript{173} For example, \textit{Corfu Channel} held that the conduct of a third party did not necessarily preclude the exercise of ICJ jurisdiction because the court could rule on Albania's conduct without making a legal determination about Yugoslavia's conduct.\textsuperscript{174} Although Judge Shahabuddeen insisted that the ICJ had a responsibility to exercise jurisdiction to the fullest possible extent, he concluded the Court could not exercise jurisdiction over Portugal's application.\textsuperscript{175}

The inherent conflict between Indonesia's negotiation of the continental shelf treaty on behalf of East Timor and Portugal's claim of exclusive authority to do so prevented the ICJ from separating the two issues.\textsuperscript{176} This concluded the matter except for Portugal's claim that U. N. resolutions had already conclusively determined the issue. Shahabuddeen disagreed saying that Portugal really wanted the Court to accept its rendition of those resolutions.\textsuperscript{177} In order to interpret the U. N. resolutions, the Court would have to investigate other matters, such as whether Indonesia engaged in international responsibility that disqualified it from acquiring treaty-making power for East Timor under general international law.\textsuperscript{178}

Even without addressing these issues, a ruling by the ICJ necessarily impacts Indonesia's rights and obligations under the \textit{Treaty on
the Zone of Cooperation without its consent.\textsuperscript{179} If Portugal successfully enjoined Australia from implementing the treaty, Indonesia would lose the concrete benefits of the treaty it negotiated for.\textsuperscript{180} The Central American Court of Justice (CACJ) refused to make this type of ruling in \textit{El Salvador v. Nicaragua} where El Salvador asked the ICJ to enjoin Nicaragua from fulfilling the \textit{Bryan-Chamorro Treaty}.\textsuperscript{181} The CACJ announced that invalidating the treaty would amount to the adjudication of the rights of another party without its consent to ICJ jurisdiction.\textsuperscript{182} Therefore, Shahabuddeen feels the Court could not find that Indonesia lacked capacity to enter into the treaty.\textsuperscript{183} The same concerns applied to Portugal’s contention that Australia disregarded the rights of the people of East Timor by negotiating with Indonesia.\textsuperscript{184} The impact of a ruling with regard to Australia on Indonesia precluded the ICJ from exercising its jurisdiction over Portugal’s application.\textsuperscript{185}

D. Judge Ranjeva’s Concurrence

In his opinion, Judge Ranjeva expressed disappointment with the Majority’s decision not to use the \textit{Case Concerning East Timor} to clarify its holding in \textit{Monetary Gold} and the impact of interested third parties\textsuperscript{186} He saw the \textit{Case Concerning East Timor} as the inverse of \textit{Monetary Gold} and urged the court to analyze the details of the doctrine to avoid future confusion.\textsuperscript{187} Portugal’s application assumes that its dispute with Australia involves an objective right \textit{erga omnes}, the right of the people of East Timor to self-determination.\textsuperscript{188} He wanted the majority to “ponder how far the analysis of the structure of the Court’s reasoning... justified a conclusion as to whether... it was valid to transpose the jurisprudence of \textit{Monetary Gold}.”\textsuperscript{189} Does the same principle apply to preliminary questions of objective law?\textsuperscript{190} He asserted that the majority’s use of \textit{Monetary Gold} without further explanation left too many unanswered questions.\textsuperscript{191}

Similarly he disagreed with the conclusion that the Court would

\begin{itemize}
\item 179. \textit{Id.}
\item 180. East Timor, 1995 I.C.J. at 124 (Shahabuddeen, J., separate opinion).
\item 182. East Timor, 1995 I.C.J. at 124 (Shahabuddeen, J., separate opinion).
\item 183. \textit{Id.}
\item 184. \textit{Id.} at 127-28.
\item 185. \textit{Id.} at 128.
\item 186. East Timor, 1995 I.C.J. 90, 129 (Ranjeva, J., separate opinion).
\item 187. \textit{Id.}
\item 188. \textit{Id.}
\item 189. \textit{Id.}
\item 190. \textit{Id.} at 132.
\item 191. East Timor, 1995 I.C.J. 90, 129 (Ranjeva, J., separate opinion).
\end{itemize}
have to adjudicate Indonesia's rights and duties in East Timor to address Portugal's claims.\textsuperscript{192} He attributed three objectives to Portugal: 1) the preservation of right of the People of East Timor to self-determination; 2) nullification of the\textit{Treaty on the Zone of Cooperation}; and 3) denying Indonesia the benefits of its treaty with Australia.\textsuperscript{193} Portugal's application involved both objective and subjective rights.\textsuperscript{194} The objective rights served as the justification for the subjective rights which were Portugal's ultimate goal.\textsuperscript{195} In order to nullify Australia's treaty obligations, the ICJ would have to adjudicate directly upon Indonesia's rights.\textsuperscript{196} Judge Ranjeva felt the majority should have offered the parties an appropriate legal framework for limiting the undesirable effects of such a situation and examined the scope of its prior decisions to avoid future misinterpretation.\textsuperscript{197}

\textbf{E. Judge Vereshchetin's Concurrence}

In Judge Vereshchetin's opinion, the Majority's decision ignored the rights of the most important third party to the case, the people of East Timor.\textsuperscript{198} He criticized his colleagues for failing to investigate East Timor's views on the treaty.\textsuperscript{199} He found this error especially critical where twenty years of neglect indicated that Portugal lacked the knowledge about the wishes of the people of East Timor to properly represent it.\textsuperscript{200} Moreover, the ICJ has a duty to ascertain the will of the protected people even under ordinary circumstances.\textsuperscript{201} Specifically, the Court should have considered whether Portugal truly represented the interests of East Timor.\textsuperscript{202} In this case, neither Portugal, nor Australia provided evidence on the views of the people of East Timor.\textsuperscript{203}

Although the U.N. General Assembly has occasionally dispensed with the requisite consultation of the inhabitants of a trust territory, the practice traditionally applies only to extremely small populations which do not constitute a 'people', or when special circumstances make it unnecessary.\textsuperscript{204} With East Timor, the General Assembly specifically commanded the Secretary General to "initiate consultation with all parties" in order to find a solution to the continental shelf problem in the

\textsuperscript{192} Id. at 132.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} East Timor, 1995 I.C.J. at 132 (Ranjeva, J., separate opinion).
\textsuperscript{197} Id. at 132-33.
\textsuperscript{198} East Timor, 1995 I.C.J. at 135 (Vereshchetin, J., separate opinion).
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 135-36.
\textsuperscript{201} Id. at 135.
\textsuperscript{202} Id. at 135-36.
\textsuperscript{203} East Timor, 1995 I.C.J. at 136 (Vereshchetin, J., separate opinion).
\textsuperscript{204} Western Sahara, 1975 I.C.J. 12, 33 (Oct. 16).
‘Timor Gap’ The U.N. Charter does not impose a consulting obligation on Administering Powers, but this does not mean that international law can never impose such a duty. In fact, the ICJ recognized the duty to consult inhabitants in the Western Sahara Advisory Opinion. Lack of consent from East Timor played an equally important role in preventing the ICJ from deciding this case, but the Majority's opinion ignored that aspect of the situation.

F. Judge Weeramantry's Dissent

Judge Weeramantry agreed that a controversy existed between Portugal and Australia and gave unqualified support to East Timor’s right of self-determination. He refused to accept that the jurisdictional question precluded a decision on Portugal's claim and felt the Majority stopped at threshold of the case. Instead, Weeramantry found the issues of the case so interconnected that the preliminary matters and merits of the case were inseparable. His dissent discussed five issues. First, whether Australia’s actions breached its duties and obligations toward East Timor as a non-self governing territory apart from those of Indonesia. Second, Portugal’s standing to institute proceedings on behalf of East Timor and Australia’s corresponding obligations toward it. Third, the nature of self-determination and sovereignty over natural resources and whether Australia respected those principles. Fourth, Australia's self-determination obligations and to what extent they apply to all nations. Finally, he considered whether Portugal's Application constituted a misuse of the ICJ's authority. Overall, he found Portugal's application was within the competence of the Court and despite the absence of a possible interested third party.

Weeramantry sees jurisdiction as a mixed question of law and

207. Western Sahara, 1975 I.C.J. at 33.
209. The two dissenting opinions criticized the Majority for refusing to exercise jurisdiction over the Case Concerning East Timor. Surprisingly, the two judges expressed contradictory reasoning for their objections, with one finding the procedure and merits inextricably intertwined and the other finding them easily separated. After looking at all of the opinions in this case it becomes clear that the concurring and dissenting opinion labels deals strictly with the jurisdictional question. The reasoning in the opinions defy easy categorization. It is necessary to read all of the opinions in this case to truly understand the complexity of the situation presented by Portugal’s objection to the Treaty Concerning the Zone of Cooperation.
211. Id.
212. Id.
213. Id.
the parties' situation plays a central role in the Court's decision whether to exercise jurisdiction. Consequently, he took judicial notice of several key facts: 1- although Portugal left East Timor in 1974, the U.N. considered Portugal, and not Indonesia, its Administering Power; 2- Australia never sought U.N. approval before entering the Treaty on the Zone of Cooperation and East Timor never consented to it; and 3- Australia and East Timor had never entered into a delimitation agreement. Then, he proceeded to discuss the merits of Concerning East Timor.

First, Weeramantry asks whether Australia breached its duties to East Timor apart from owed to Indonesia. He felt that East Timor's status as a non-self-governing territory made any adjudication as to Indonesia's rights unnecessary. As such, its resources uncontrovertibly belonged to the people of East Timor. Instead, the ICJ must consider whether any member states may:

a) enter into a treaty with another state, recognizing that the territory awaiting self-determination has been incorporated into another state as a province of that state; and b) to be a party to arrangements in that treaty which deal with the resources of that territory without the consent, either of the people of the territory, or their authorized representative.

The Court need not consider the lawfulness of Indonesia's conduct. If East Timor is a non-self-governing territory, every nation has a duty to recognize its right to self-determination as well as permanent sovereignty over its natural resources.

The judge discussed whether the ICJ had a duty to revisit questions previously resolved by U.N. resolutions and concluded the ICJ must defer to the decisions of other U.N. organs absent proof that they have exceeded their authority. Neither Portugal, nor Australia, presented evidence of such a problem in this case, so the Court had no reason to doubt the validity of existing U.N. resolutions regarding East Timor. Decreasing support for a position and the passage of time does not erode the validity of the resolution. Weeramantry rejected

**Notes:**
215. Id. at 152.
216. Id.
217. Id.
218. Id. at 153.
220. Id.
221. Id.
222. Id. at 154.
223. Id.
225. Id. at 155.
the Majority's concern with Indonesia's rights as an excuse for refusing to exercise jurisdiction, saying that ICJ rulings always effect third parties.226

This opinion also distinguished East Timor from Monetary Gold. Monetary Gold involved a dispute over gold belonging to Albania who was not before the Court. In contrast, there was no claim against a third party here.227 While resolution of the controversy over East Timor might effect the interest of Indonesia, it would not form the very subject matter of the dispute.228 If the Court were to interpret the interested third party concept so broadly, the ICJ would also be forced to join the many parties who dealt with Indonesia in connection with East Timor.229 This stretches Monetary Gold too far.230

In the international arena, the ICJ really serves as the last resort for the resolution of disputes.231 Consequently, Monetary Gold's Third Party Rule cannot be allowed to outweigh the Court's duty to decide cases.232 "[A]n international tribunal is master of its own jurisdiction" and cannot allow doubt to be its reason for declining a case.233 Such a rigid interpretation would paralyze the international justice system.234 The Court has a duty "to give the fullest decision it may in the circumstances."235 It is not enough that a third party is affected by a decision; the matter must be the very subject matter of the case.236 The Court must make a judicial determination of the responsibilities of a non-party state.237 Finally, joint wrongdoers face individual liability.238

Moreover, international Law offers a number of other safeguards to protect the rights of absent third parties.239 ICJ opinions bind only parties to a dispute,240 other states may intervene or institute their own proceedings,241 no stare decisis applies to international law, and each

226. Id.
227. Id. at 157.
228. Id.
230. Id.
231. Id. at 160.
232. Id. at 159.
233. Id.
235. Id. at 159 (citing Continental Shelf (Libya Arab/Malta)).
236. Id. at 168.
237. Id.
238. Id.
240. STATUTE OF THE COURT art. 59. Cf., Reilly & Oroñez, supra note 133, at 478 ("[I]t would be difficult to say an ICJ judgment rendered in a dispute between two states would have a binding effect only upon the parties. This is true despite Article 59 of the court's statute, especially where the decision involves a territorial dispute concerning...the continental shelf.").
241. STATUTE OF THE COURT art. 62.
state bears international responsibility for its own wrongdoing.242 Therefore, the Court cannot appropriately allow one state's non-acceptance of ICJ jurisdiction prevent states accepting its jurisdiction from settling their disputes.243

Next, Weeramantry explained the nature of rights erga omnes and self-determination. "An erga omnes right... is a series of separate rights singulums, including inter alia, a separate right erga singulum against Australia and a separate right erga singulum against Indonesia. These rights are in no way dependent upon the other."244 Making Indonesia a necessary party hampers the operation of the erga omnes doctrine.245 The U.N. Charter gives all states certain rights and responsibilities that all others must recognize and each must answer for its own failures.246 The Court could not allow Indonesia to protect those countries from treating it as Administrating Power by avoiding being brought before the Court.247 Portugal's Application dealt, not with the lawfulness of the Treaty on the Zone of Cooperation, but the lawfulness of Australia's conduct in making the treaty.248 Therefore, the invalidity of the treaty was not a precondition for an ICJ ruling that Australia acted unlawfully.249

Weeramantry similarly rejected Australia's argument that Portugal brought its application against the wrong party. He notes that any claim against Indonesia would question the legality of its occupation of East Timor.250 He concludes that the question here concerned whether Portugal made a supportable legal claim against Australia.251 The judge wanted the Court to expand its notion of the consent principle of jurisdiction and decide the case.252

Weeramantry also refused to accept that Indonesia had replaced Portugal as Administrative Power of East Timor. Permitting Indonesia to assume Portugal's position as Administering Power by occupying East Timor after the latter left would destroy the "sacred trust" created by the Charter. Weeramantry had three concerns with such an approach.253 Precedent does not support the idea that a loss of physical control amounts to a loss of Administering Power status. Administer-

243. Id. at 171.
244. Id. at 172.
245. Id.
247. Id.
248. Id. at 174.
249. Id.
250. Id. at 176.
252. Id. at 177.
253. Id. at 180.
ing Power means more than physical control. It creates a duty to protect the welfare of the people of the non-self-governing territory, to preserve their assets and their rights, and to conserve their right to permanent sovereignty over their natural resources. Consequently, Portugal remained Administering Power over East Timor even after it left in 1974.

The United Nations cannot act as a substitute for a displaced Administering Power. It lacks the resources to provide the particular attention envisioned by the Charter. It depends on its members to transmit information about its trust-territories to the U.N. Secretary General. Depriving Portugal of its Administering Power status because of its loss of control over East Timor would leave East Timor's people defenseless and voiceless precisely when those rights are threatened or violated.

Portugal's status was repeatedly recognized by the General Assembly and the Security Council and those resolutions remain in effect until rescinded or superseded by new resolutions. The Court cannot unilaterally take it upon itself to grant or withhold Administering Power status based on a bad colonial record. Portugal's poor colonial record remained irrelevant until the organs of the U.N. sought to act on it. The General Assembly had the authority to revoke Portugal's status as Administering Power and chose not to do so. Therefore, the ICJ could not take away Portugal's ability to intervene on East Timor's behalf by refusing it standing to appear before the Court. Such a ruling would defeat the purpose of the Charter's trusteeship.

Weeramantry similarly rejected Portugal's claims that Australia ignored East Timor's Right to self-determination and sovereignty over its natural resources? East Timor's right to self-determination and the principle of permanent sovereignty over natural resources form the core of the East Timor case. The United Nations, Portugal and Australia

254. Id.
255. Id. at 180-81.
257. Id.
258. Id.
259. Id.
260. Id. at 187.
262. Id. at 192.
263. Id. at 187.
264. Id. at 187-88. It was not as if the United Nations had simply overlooked East Timor. The Committee of 24, the General Assembly's organ overseeing decolonization, put East Timor on its agenda and referred to it in its committee report to the General Assembly year after year. Id. at 191.
266. Id.
267. Id. at 193.
unquestionably recognized East Timor's status as a non-self-governing territory possessing the right to self-determination. Yet, Australia argued that the U.N. Charter created no express obligations on states to promote self-determination in a territory over which they had no control. Instead, Solidarity required only that they assist in actions taken by the U.N. without an independent duty to of non-recognition of Indonesia. Furthermore, the international community had expressed no criticism of Indonesia or the other states which had dealt with Indonesia in relationship to East Timor. Consequently, the Treaty on the Zone of Cooperation had no impact on the people of East Timor's right of self-determination. Weeramantry disagreed.

He wrote of the central role self-determination plays in the structure of the U.N. and the concept's recognition by international conventions, customary law, and judicial decisions. The judge found the right to self-determination central to developing friendly relations among nation states. He reminded the reader that every member of the United Nations undertook "a solemn contractual... to promote conditions of economic progress and development, based on respect for the principle of self-determination." The U.N. expects Administering Powers to make the interests of the people living in the territory paramount, to account for their political aspirations, and to assist them in developing their own political institutions.

The U.N. has adopted a number of resolutions aimed at implementing self-determination at a practical level. For example, it adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples in 1960 and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in 1970. The ICJ's own decisions have also supported the right to self-determination. In the end, Weeramantry found Portugal's
claim that, by becoming party to an agreement recognizing East Timor’s incorporation into Indonesia concerning the exploitation of non-renewable resources before it could exercise its right to self-determination, Australia had violated the principle of self-determination.\textsuperscript{282}

Later in his opinion, Weeramantry referred to a fundamental inconsistency between East Timor’s right to self-determination and international recognition of Indonesia as its new Administering Power.\textsuperscript{283} He points out several differences between the power exercised by Indonesia and the authority of an Administrating Power. Portugal: 1) acted as a fiduciary; 2) under U.N. supervision; and 3) its authority was co-terminous with its fiduciary status.\textsuperscript{284} The judge concluded that the Court should find the Treaty on the Zone of Cooperation’s recognition of East Timor’s incorporation into Indonesia was incompatible with East Timor’s right to self-determination and Australia’s duties under international law.\textsuperscript{285}

In addressing the clash between the peremptory norm if Australia’s permanent sovereignty over its natural resources and the preemptory norm of East Timor’s right to sovereignty over its natural resources, Weeramantry said that Australia did not enjoy an absolute right to the resources in the Timor Gap.\textsuperscript{286} East Timor claims in the area qualified those of Australia since their coasts were separated by only 250 miles of ocean.\textsuperscript{287} Furthermore, the ICJ lacked competence to decide whether Australia and Indonesia had created an equitable division of resources from the standpoint of East Timor.\textsuperscript{288} Instead, the decision need only determine whether the Treaty on the Zone of Cooperation had been entered into without the consent of East Timor or Portugal, its Administering Power.\textsuperscript{289}

Finally, the Weeramantry concluded that “[w]here a territory had been acquired in a manner which leaves open the question whether legal sovereignty has been duly acquired, countries entering into treaty relations...have options stretching all the way from de facto recognition...[to] de jure recognition.”\textsuperscript{290} Australia’s treaty with Indonesia reflected one of the highest forms of de jure recognition, making its incompatible with its claims to respect East Timor’s rights to self-

\textsuperscript{282} East Timor, 1995 I.C.J. at 201 (Weeramantry, J., dissenting opinion). The Treaty on the Zone of Cooperation explicitly names East Timor an “Indonesian Province” and the people of East Timor receive no benefits under the treaty. \textit{Id.}
\textsuperscript{283} Id.
\textsuperscript{284} Id.
\textsuperscript{285} Id.
\textsuperscript{286} East Timor, 1995 I.C.J. at 203. (Weeramantry, J., dissenting opinion).
\textsuperscript{287} Id.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} East Timor, 1995 I.C.J. at 204. (Weeramantry, J., dissenting opinion).
determination and permanent sovereignty over its natural resources.\textsuperscript{291} Consequently, Australia breached its duty to abstain from any action which nullified or impaired territorial rights to self-determination.

The right of self-determination enjoyed by the people of East Timor and the corresponding duties placed on members of the international community emerge from many sources of international law, including treaties\textsuperscript{292} and custom. Australia is not exempt from those duties.\textsuperscript{293} Moreover, several Security Council resolutions demanded the collective support of its members in enforcing East Timor's right to self-determination.\textsuperscript{294} If East Timor had an erga omnes right to self-determination, a fact admitted by Australia, all U.N. members had a duty to respect that right.\textsuperscript{295} This required Australia to do more than obey specific directions and prohibitions from the United Nations. It was required to conform with the underlying principles of that right.\textsuperscript{296}

A number of the \textit{Treaty on the Zone of Cooperation} provisions violate the spirit of self-determination. The treaty expressly recognized East Timor as a province of Indonesia, with no evidence that the people of East Timor chose that status.\textsuperscript{297} It dealt with non-renewable resources arguably belonging to the territory and made no mention of East Timor's rights.\textsuperscript{298} In addition, the treaty created no method of repudiation to become effective when East Timor exercised its right to self-determination in spite of an initial term of 40 years.\textsuperscript{299} This created "a real possibility" that East Timor's natural resources would be exhausted before it gained control over them.\textsuperscript{300} The ICJ could not endorse such conduct.

At last, Weeramantry argued that unless the ICJ recognized a dispute in this case, the role of Administering Power would become empty.\textsuperscript{301} An Administering Power must commit to the "sacred trust" granted to it by the United Nations.\textsuperscript{302} If falters in its duties and fails to take legal action in response to threats to the non-self-governing territory it administers, it violates its basic obligations. Portugal must have access to the Court to fulfill its obligations to East Timor.\textsuperscript{303}

\begin{thebibliography}{99}
\bibitem{291} Id.
\bibitem{292} Weeramantry refers specifically to the U.N. Charter and the two International Human Rights Covenants of 1966.
\bibitem{293} East Timor, 1995 I.C.J. at 206. (Weeramantry, J., dissenting opinion).
\bibitem{294} Id.
\bibitem{295} Id.
\bibitem{296} Id. at 211.
\bibitem{297} Id. at 212.
\bibitem{298} East Timor, 1995 I.C.J. at 212. (Weeramantry, J., dissenting opinion).
\bibitem{299} Id.
\bibitem{300} Id.
\bibitem{301} Id. at 217.
\bibitem{302} East Timor, 1995 I.C.J. at 217. (Weeramantry, J., dissenting opinion).
\bibitem{303} Id.
\end{thebibliography}
Weeramantry urged his colleagues to entertain Portugal's application and enforce East Timor's erga omnes rights to self-determination and sovereignty over its natural resources.  

G. Judge ad hoc Skubiszewski's Dissent

Although Judge Skubiszewski agreed with the Majority's rejection of Australia's claim that no dispute existed between Portugal and Australia, he objected to its decision not to exercise jurisdiction because any decision with regard to East Timor necessarily implicated Indonesia's interests. In his perspective, the Court could have separated Australia's responsibilities toward Portugal and East Timor from the rights and obligations of Indonesia. In fact, his opinion suggested that the ICJ shirked its responsibilities by refusing to decide the case, saying it should refuse to exercise jurisdiction over a case sparingly. The Court could have addressed the request to reaffirm the rights of the people of East Timor to self-determination, territorial integrity, and permanent sovereignty over its wealth and natural resources, and Portugal's duties, powers and rights as the Administering Power over East Timor without overextending itself. Ruling on the rights of Portugal and the people of East Timor need not indicate an implicit legitimization of Indonesia's annexation of East Timor. Instead, the Court could have resolved the initial claims without moving onto Portugal's other claims.

Under this analysis, the legal interests of Indonesia would not "form the very subject matter of the decision", and would not serve as "a prerequisite" for determining the case between Portugal and Australia. "The claims submitted by Portugal [were] distinct from the alleged rights, duties, and powers of Indonesia. There [ought to be] no

304. Id. at 220.
305. East Timor, 1995 I.C.J. at 226 (Skubiszewski, J., dissenting opinion).
306. Id.
307. Id. at 237.
308. The right to self-determination is the right of a person living in a territory to determine the political and legal status of that territory - for example, by setting up a state of their own or choosing to become part of another state. Few non-self governing territories existed prior to the end of World War II. Those that it existed were created by treaty. The situation changed after 1945 with the emergence of the United Nations. The concept applies to 3 types of trust territories: 1) Mandated Territories - prior German and Turkish colonies administered by the Allies after World War I; 2) Trust Territories - Former colonies after World War II, only one island in Japan remains; and 3) Non-self Governing Territories such as East Timor.
310. Id.
311. East Timor, 1995 I.C.J. at 239 (Skubiszewski, J., dissenting opinion).
difficulty in separating the subject matter of the present case from ... a theoretical case between Portugal and Indonesia." 314 Although the effect of both cases might be the same, "the rights and duties of Indonesia and Australia [were] not mutually interdependent." 315 The Court could not claim an absolute bar on jurisdiction because of possible side effects on third countries. 316 The ICJ Statute adequately protected Indonesia's interests with regard to East Timor. 317 Consequently, the Court could properly address Portugal's first claim against Australia, 318 especially because several U.N. Resolutions supported Portugal's status as Administering Power and the United Nations had never revoked that power. 319

Judge Skubiszewski also found Australia's recognition of East Timor's right to self-determination inconsistent with its negotiation and adoption of the Treaty on the Zone of Cooperation with Indonesia. 320 He objected to Australia's treatment of Indonesia as a direct replacement for Portugal. In his view, Portugal possessed a stronger claim on East Timor because of its (previous?) status as Administering power. 321 The rights of the East Timor people depended on the efforts of all states "to promote... the realization of the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding... implementation." 322 He dismissed the fact that Australia had to negotiate with Indonesia or lose its rights in the area, and condemned its negotiations with Indonesia. 323 Essentially, Australia should have respected Portugal's status as Administering Power of East Timor until the United Nations declared otherwise. 324 Portugal's loss of territorial control had no effect on its status as Administering Power. 325

314. Id. at 249.
315. Id.
316. Id. at 245.
317. Id.
319. Id. at 247-48.
320. Id. at 261.
321. Id.
322. The Declaration on Principles of International Law Concerning Friendly Relations—which is widely regarded as customary international law—expressly makes the territorial integrity of a state contingent on its possession of a consensual representative government. ... [Therefore,] the legitimacy of a state government is no longer merely a concern of domestic jurisdiction.
Ezra, supra note 69, at 510.
324. Id. at 270-71.
325. Id. at 277.
VI. GAUGING THE EFFECTS OF THE COURT’S OPINION

The ICJ’s decision not to exercise jurisdiction in the Case Concerning East Timor reflects the historical limits placed on the right to self-determination by sovereignty and enforcement issues. States jealously guard their sovereignty, making jurisdiction an extremely important issue. The Court must worry about the threat to its credibility when it makes decisions which no one can enforce. International law considers humanitarian intervention as a clear “exception to the otherwise ‘absolute’ right of a state to govern free from the interference of any foreign state(s).” One scholar attempted to explain the Majority’s decision not to hear the case as a deferral to General Assembly’s resolutions granting Portugal status as Administering Power and its inaction in the face of the Treaty on the Zone of Cooperation. He claimed that decision in East Timor “implicitly invited the political organs [of the U.N.] to revisit the issue of East Timor.” The ICJ has waited long enough for the United Nations to act.

The U.N. Charter urges its members to undertake responsibility for administering non-self governing “territories whose people have not yet attained a full measure of self government,” to recognize that the interests of their inhabitants “are paramount, and to accept as a sacred trust the obligation to promote to the utmost...the well-being of the inhabitants of these territories.” Yet, the Court’s decision not to exercise

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327. ICJ decisions do not bind all members of the United Nations. Reilly & Orodonez, supra note 133, at 436. As mentioned previously, the ICJ may exercise jurisdiction over a party if it has accepted jurisdiction under the Optional Clause of the U.N. Charter, art. 36 (2). Furthermore, states can make explicit reservations on the exercise of jurisdiction, which have reciprocal application on the opposing party. Id.

328. Antonio F. Perez, The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice, 18 MICH. J. INT’L L. 399, 405 (1997). The author presents a theory that the ICJ uses an arsenal of techniques and devices to refrain from acting prematurely and condemning itself to irrelevancy. Id.

329. Reppas, supra note 326, at 463.

330. Perez, supra note 328, at 423.

331. Id. at 424.


333. U.N. CHARTER, art. 73. This provision applies to all colonies and territories which
jurisdiction abandoned the people of East Timor to the power struggle between Portugal and Indonesia. This is directly contrary to the aspirational quality of the United Nations. If the right to external self-determination has risen to the level of customary law, the Court has a duty to see that the international community respects that right.

The United Nations' Charter created trust territories to protect precisely those who find themselves in situations similar to that of East Timor. Under the non-self governing territory provision, the U.N. expects an Administering Power:

   to ensure, with due respect for the culture of the people concerned, their political, economic, social, and educational advancement, their just treatment and their protection against abuses;

   to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

   to further international peace and security;

   to promote constructive measure of development... [and]

   to transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require... information... relating to economic, social, and educational conditions in the territories for which they are respectively responsible...

are geographically separate and distinct ethnically and/or culturally from the country exercising administering power, particularly those territories in a subordinate position. AKEHURST, supra note 26, at 293.

334. Ved Nanda has argued that "severe deprivation of human rights often leaves no alternative to territorial separation" which ought to allow succession. Nanda, Claims to Succeed, supra note 97 at 280. The people of East Timor deserve the same level of protection from Portugal.

335. The Permanent Court of International Justice, the ancestor of the ICJ has been described as an instrument "for securing peace as far as this aim can be achieved through law." HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 3 (1985). The international community hoped to encourage nations to bring their disputes to the court instead of resorting to force. Reilly & Ordonez, supra note 133, at 436.

336. As of 1995, various aspects of international law licensed 185 state to represent, and some say coerce, the 5,000 nations in their control. Paul Brietzke, Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict, 14 WIS. INT'L L.J. 69, 70 (1995).

337. U.N. Charter, art. 73.
Under this criterion, Portugal failed in its duty as Administering Power of East Timor.

For example, the General Assembly criticized Portugal on a number of occasions for its failure to submit reports on the conditions in East Timor to the Secretary General;\footnote{East Timor, 1995 I.C.J. at 114 (Oda, J., separate opinion).} the Security Council issued several resolutions condemning it for its failure to implement the United Nations' decolonization.\footnote{Security Council Resolutions 180 (1963); 183 (1963); 218 (1965); 312 (1972); and 322 (1972).} Nevertheless, Portugal continued to treat East Timor as an overseas province and neglected to recognize its right to self-determination until it fled during the Carnation Rebellion in East Timor after 400 years of colonization.\footnote{East Timor, 1995 I.C.J. at 115 (Oda, J., separate opinion).} Indonesia finally restored order to the country by sending its army into East Timor in December 1975.\footnote{Id.} Indonesia later annexed East Timor, allegedly at the request of one of its leading political parties.\footnote{Id.}

Consequently, after Indonesia's military intervention and the subsequent integration of East Timor into Indonesia during the mid-70's, few states regarded Portugal as the Administering Power of East Timor.\footnote{Id.} Given the role of custom\footnote{Id. at 118.} in the development of international law, it should not be surprising that states such as Australia considered Indonesia to be East Timor's Administering Power and negotiated treaties on that basis.\footnote{East Timor, 1995 I.C.J. at 110 (Oda, J., separate opinion).}

It seems inadequate for an aspirational body such as the International Court of Justice to use the compulsory jurisdiction argument to avoid addressing the needs of East Timor, especially where the fundamental rights of individuals belonging to a non-self governing territory which the United Nations has pledged to protect are at stake.\footnote{I.C.J. Stat. art. 73.} The ICJ or other U.N. organizations ought to step in when an Administering Power is not fulfilling its responsibilities to its trust territory. The Majority's position gives the U.N. and its organs no authority to oversee the cultural, social, and economic well-being of non-self-governing terri-

\footnote{Until recently, international law consisted of customary rules that had evolved after a long historical process culminating in their recognition by the international community. Customary rules crystallize from usages or practices which have evolved in roughly 3 circumstances: 1) diplomatic relations among states; 2) the practice of international organs; and 3) state laws, decisions of state courts, and state military or administrative practices that suggest wide acceptance of a general principal of law. J. Starke, \textit{Introduction to International Law}, 34-28, \textit{reprinted in} CARTER & TRIMBLE, \textit{supra} note 78, at 141-43.
\footnote{East Timor, 1995 I.C.J. at 110 (Oda, J., separate opinion).}
\footnote{I.C.J. Stat. art. 73.}
territories once an Administering Power has been appointed.\textsuperscript{347} Surely the writers of the U.N. Charter never expected the international community to abandon a non-self governing territory to the neglect of an irresponsible Administering Power indefinitely.\textsuperscript{348}

Whether the International Court of Justice had any choice but to dismiss the case for lack of jurisdiction remains uncertain. Part of the problem resulted from the uncertainty about who should be looking out for East Timor's interests. Although the U.N. continues to consider Portugal the Administering Power over the territory, its position was weakened by Indonesia's occupation of the territory following the Carnation Rebellion. Indonesia began dealing with other nations on behalf of East Timor and the international community acquiesced in that behavior.

However, it would be equally problematic to blindly recognize Indonesia as the new Administering Power.\textsuperscript{349} The international community certainly wishes to avoid an implied authorization of rule by conquest.\textsuperscript{350} Instead, it must consult with representatives of the people of East Timor to ascertain their wishes and take action to facilitate their exercise of self-determination. The ICJ's decision succumbs to the pressure to preserve the status quo.\textsuperscript{351}

\textbf{VII. CONCLUSION}

In the \textit{Case Concerning East Timor}, the International Court of Jus-

\begin{itemize}
  \item \textsuperscript{348} As Judge Weeramantry notes in his dissent, Portugal faced international liability if it failed to take action to protect East Timor's rights. East Timor, 1995 I.C.J. at 188 (Weeramantry, J., separate opinion). This indicates that the United Nations continued to exercise authority over its Administering Powers. Which international organization is more suited to perform this duty than the International Court of Justice.
  \item \textsuperscript{349} A recent article in the Bangkok Post illustrates the horrors inflicted on the people of East Timor during Indonesia's 'annexation' in the 70's.
  \item \textsuperscript{350} In one of the most underreported events in recent history, 60,000 people were killed in the initial days of fighting. Another 140,000 died in subsequent guerrilla warfare and the accompanying famine, disease and extra-judicial killings. If Portuguese estimates of the pre-invasion population are accurate, nearly one in three Timorese died as a direct result of Indonesia's forced integration.
  \item \textsuperscript{351} The Charter of the United Nations prohibits "the threat or use of force against the territorial integrity or political independence of any state, or any other manner incompatible with the Purposes of the United Nations." U.N. Charter art. 2, para. 5.
  \item \textsuperscript{350} "Thus, although the judgments support the notion of legal obligations owed \textit{erga omnes}, the strong rhetorical weight of sovereign autonomy" makes the international obligations of self-determination little more than an illusion. Fitzgerald, \textit{supra} note 347, at 37.
\end{itemize}
The practice recognized a dispute between Portugal and Australia over the non-self-governing territory of East Timor, but failed to reach the merits of the case. Both the Majority and Shahabuddeen felt that the consensual nature of the ICJ's jurisdiction precluded it from addressing East Timor's situation because any decision would impact the validity of the Treaty on the Zone of Cooperation between Australia and Indonesia. Vereshchetin criticized the Court for its failure to consider the most important third party, the people of East Timor, but agreed that the ICJ lacked jurisdiction over the case.

Both dissenting judges felt the jurisdictional issues should not prevent the ICJ from hearing the case. Weeramantry found the procedural issues and the merits of the case so intertwined that they could not be separated. Consequently, he urged the Court to consider the merits of East Timor. Judge ad hoc Skubiszewski, on the other hand, felt that Portugal had successfully restricted its claims against Australia in such a way that a ruling by the ICJ would not implicate Indonesia's interests.

The Majority's emphasis on the third party rights of Indonesia while ignoring those of the people of East Timor reflects the inconsistency in the way international law treats nations and non-self-governing territories. Does the International Court of Justice really want to send the message that the rights of a nation such as Indonesia outweigh those of non-self governing territories such as East Timor?