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Judging the East Timor Dispute: Self-Determination at the International Court of Justice

By Gerry J. Simpson*

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This Article is an expanded and modified version of a paper given at the International Platform of Jurists for East Timor/Catholic Institute of International Relations Conference on East Timor held at the Law Society in London in December 1992. That paper will be available as part of a collection distributed in Europe by the Catholic Institute of International Relations. The author would like to thank Karyn Anderson for her very valuable research assistance on this project. Alistair Iles and Mark Champion offered advice on infelicities of expression and thought which appeared in earlier drafts. Those that remain are, of course, my responsibility. Funding for this project was generously donated by Melbourne University’s Special Initiatives Program and the Australian Research Council.
There is a body of international jurisprudence. When a case is presented to an international tribunal, be it our own tribunal or any ad hoc arbitration tribunal, the judge, the members of this tribunal, draw constantly from the international jurisprudence, which while not complete, is certainly very substantial.¹

Horseplay and disease
are killing me by degrees
while the law looks the other way.²

I. INTRODUCTION³

Timor is an island 600 kilometers off the northwest tip of Australia and approximately 2,200 kilometers from Jakarta. It lies at the eastern end of the Sunda Archipelago.⁴ In 1893 the island was divided between the Netherlands and Portugal, with Holland incorporating West Timor as part of the Dutch East Indies. West Timor became part of the independent state of Indonesia when Indonesia gained its independence from the Dutch in 1949. East Timor remained a colony of Portugal until 1975 when the Portuguese withdrew from the island. In 1975 Indonesia invaded East Timor⁵ and began an occupation marked by brutality and terror and accompanied by a systematic degradation

¹. GARRY STURGESS & PHILIP CHUBB, JUDGING THE WORLD 458 (1988) (quoting Guy De Lacharriere, Vice-President, International Court of Justice (1985-87)).
⁴. East Timor consists of the eastern portion of the island as well as the enclave of Oe-cussi, the Atauro Island, and the Jaco Islet. It totals approximately 19,000 square kilometers.
of East Timorese cultural life. The United Nations Security Council passed two resolutions condemning the invasion in 1976, and the General Assembly passed a series of progressively diluted resolutions between 1976 and 1982. Since then, international law and the world community have, until recently, steadfastly looked the other way. This has occurred in the face of the repressive practices of the Indonesian military. Meanwhile, the efforts of East Timorese representatives...

6. Figures vary but it is thought that between 100,000 and 200,000 East Timorese have lost their lives as a consequence of the Indonesian occupation. See generally Human Rights in East Timor and the Question of the Use of U.S. Equipment by the Indonesian Armed Forces: Hearings Before the Subcomm. on Int'l Organizations and on Asian and Pacific Aff. of the House Comm. on Int'l Relations, 95th Cong., 1st Sess. § 1 (1977) (see especially Testimony of Shepard Forman); Roger S. Clark, Does the Genocide Convention Go Far Enough? Some Thoughts on the Nature of Criminal Genocide in the Context of Indonesia's Invasion of East Timor, 8 OHIO N.U. L. REV. 321 (1981); S. Sidell, The United States and the Genocide in East Timor, 11 J. CONTEMP. ASIA 44 (1981). It is clear that the people of East Timor have been denied the exercise of the most fundamental of human rights under Indonesian rule.


10. The reasons for this neglect are not difficult to fathom. The United States had just been defeated by the Vietcong in Southeast Asia and regarded the Indonesians as potential allies in the region. Fretlin, the main East Timorese resistance force, was organized along Marxist lines and was therefore viewed with great suspicion by the Americans. The Australian position is set out in the infamous telex sent in 1975 by the then Australian Ambassador to Indonesia, Richard Woolcott, where he stated:

[W]e are all aware of the Australian Defense interest in the Portuguese Timor situation... but I wonder whether the Department has ascertained the interest of the Minister of the Department of Minerals and Energy in the Timor situation. It would seem to me that this Department might well have an interest in closing the present gap in the agreed sea border and this could be much more readily negotiated with Indonesia than with Portugal or independent Portuguese Timor.

Quoted in Pat Walsh, Timor Gap: Oil Poured on Bloodied Waters, 90 ARENA 12, 14 (1990) (emphasis added). It has even been suggested that the Australians were prepared to offer Australia generous terms on boundary limitation in the Timor Gap in exchange for recognition of the Indonesian invasion. See Michael Richardson, AUSTR. FIN. REV., Oct. 19, 1976, at A1.
at the United Nations and the hopeless but tenacious resistance of a small band of guerrillas in the hills of East Timor remain virtually unnoticed.\footnote{11} Three recent events have transformed this situation. First, on November 12, 1991, a group of East Timorese youths gathered at the Santa Cruz cemetery in Dili to mourn a young Timorese killed in a skirmish with the Indonesian authorities the previous month. Indonesian troops opened fire on the crowd killing hundreds.\footnote{12} This was not the first occasion on which force had been used against civilians in East Timor, but it was the first time such an incident had been filmed.\footnote{13} The name “Dili” was thus to take its place alongside other late twentieth century outrages like Tiananmen Square and Sharpeville.\footnote{14} The second event occurred just over a year later with the capture of East Timorese resistance leader Xanana Gusmao by the Indonesian authorities. While apparently a success for the Indonesian intelligence, Gusmao’s capture brought in its wake increased media focus on East Timor and a trial that has proved damaging to Indonesia’s credibility and public image.\footnote{15} These circumstances provide some-

\footnote{11} For a discussion of the work of the East Timorese delegation at the United Nations see Ramos-Horta, supra note 3. In recent years, Portugal and Indonesia have had periodic discussions over the question of East Timor, but despite the encouragement of the United Nations, these have been marked by intransigence and inflexibility. These discussions have not involved East Timorese representatives. The most recent of these meetings took place on April 21, 1993 in Rome. Few details are available of the meeting, though there are reports that the two sides agreed on “confidence building measures.” See Rome Talks, Missing Peace, June 1993, at 4.

\footnote{12} See, e.g., 15 Minutes to Death, Melbourne Age, Nov. 16, 1991, at 1, 9. Casualty figures vary. The Indonesian military initially put the figure at 19, but this was later revised to 50 by an official inquiry conducted by Indonesian authorities. See Conclusions of the Inquiry into The Dili Killings, Melbourne Age, Dec. 28, 1991, at 8. Witnesses estimate that upwards of 180 were killed that day, and there were reports of mass killings of eyewitnesses subsequent to the shootings. See Interparliamentary Human Rights Program, Joint Letter from Members of the United States Congress and the Japanese Diet (1992) (released by International Secretariat of the Congressional Human Rights Foundation, on file with author). Accounts of the killing are contained in Tapol Bull., Dec. 1991, Timor Link (London), Feb. 1992, and Inside Indonesia [Inside Indon.], Dec. 1991.

\footnote{13} Yorkshire Television’s First Tuesday documentary team was in Dili at the time of the massacre. See Max Stahl, Timor Lacks Ally among the Mighty, Independent, Jan. 15, 1992, at 12.

\footnote{14} Canada and the Netherlands suspended their aid shortly after the massacre. See Suharto Scoffs at Dili Sanctions, Melbourne Age, Dec. 13, 1991, at 3.

\footnote{15} See generally A Leading Asian Colonialist, Wash. Post, Dec. 5, 1992, at A22. The most recent available information indicates that following a finding of guilt and a life sentence Mr. Gusmao had begun a hunger strike. See Margaret Coles, U.K. Lied about Timor Jail Visits, Guardian, Aug. 13, 1993, at 10. The Red Cross is currently attempting to gain
thing of a context for a third development that forms the subject matter of this Article. Briefly, the law will at last be forced to address the East Timorese issue directly. In late 1994 the International Court of Justice (I.C.J. or “Court”) will deliver a judgment in a dispute between Portugal and Australia that has a direct bearing on the future of East Timor. Portugal brought this case to the Court on February 22, 1991, claiming that Australia had infringed certain norms of international law and breached Portugal’s rights under the U.N. Charter and customary international law. Specifically, Portugal has asserted that Australia, in entering into the Timor Gap Treaty with Indonesia, has infringed East Timor’s right to self-determination and permanent sovereignty over its natural resources, and has infringed Portugal’s rights as the Administering Power of the territory of East Timor. This Article will provide an analysis and evaluation of these Portuguese claims and will consider possible Australian defenses. The Article will also locate this dispute in the debate about the role and functional limits of judicial dispute resolution in international law.

II. SOME PRELIMINARY REMARKS ABOUT THE CASE

In the Case Concerning East Timor (Port. v. Aust.), the I.C.J. will be obliged to consider certain embryonic norms of international
law as well as those principles and rules that have been clarified through long periods of state practice and judicial affirmation. The Court will be confronted by a range of issues from the technically min-
ute to the politically inflammatory. In their decision-making, the judges must weave a path that is partly defined by the Court's previous jurisprudence but also driven by a compulsion to satisfy certain goals of world order. The manner in which these policy issues are handled will determine the degree of success achieved by the Court in enhancing its own standing, resolving the dispute, and construing the law. Before considering these policy issues and embarking on the sub-
stantive questions, some preliminary remarks should be made. First, most of the discussion here will concern the substantive features of the case rather than the procedural matters facing the Court. Questions of admissibility, jurisdiction, and standing are considered briefly but do not form the substance of this Article. The merits of the case are the predominant concern of this Article. 20

Second, for those unfamiliar with the workings of the I.C.J. and international law generally, it should be noted that the Court is not bound by precedent. Under article 59 of the Statute of the I.C.J., no doctrine of stare decisis operates and the Court is likely to look more closely at customary international law than its own jurisprudence. Nevertheless, the Court has in the past often adopted its own decisions and no radical departures from previously enunciated rules and principles should be anticipated.

The third point concerns the paucity of judicial decision-making in many of those general areas of law at the frontier of international law. These are the areas of law that remain, in Judge Lachariere's words, "incomplete." 21 The Court will be determining some legal issues for the first time, including for example, the specific rights and duties of third parties towards groups possessing the right to self-de-
termination and the effect of unilateral recognition on prima facie illegal situations. Other areas of the law, however, have developed quite dramatically since the I.C.J. last considered them. Since Western Sa-
bara in 1975, 22 which coincided with U.N. resolutions supporting East Timor's right to self-determination, major upheavals in Eastern Eu-

20. Australia has made no preliminary objections to the hearings, preferring to raise its procedural concerns at the substantive phase (presumably) in order to expedite the process.
21. STURGESS & CHUBB, supra note 1, at 458.
ple of self-determination. It is inevitable, too, that by the time the
question of trusteeship rights is considered in *East Timor*, it will have
already been discussed at some length by the Court in the forthcoming
case, *Certain Phosphate Lands*. Indeed, some of the Australian argu-
ments in that case resemble the position it will adopt here in the
*East Timor* case. This is one of the small compensations in being a
regular defendant before the Court.

Australia’s two appearances as a defendant state at the I.C.J. may
strike some observers as peculiar given Australia’s apparent commit-
ment to the rule of law in international affairs. However, what these
cases and other I.C.J. decisions (delivered and pending) point to is an
expanded role for the Court in international legal dispute resolution.
Increasingly, the Court is being asked to develop international law as
well as restate it. In order to accomplish this, it has taken a more
activist, nonconsensualist approach to adjudication. The slide from
legal concreteness has been accompanied by the adoption of mediat-
ing and arbitral strategies. With this general expansion has come a
debate about the Court’s functional and political limits. The following
section discusses the ongoing debate about this role and attempts to
situate the *East Timor* case in this debate.

**III. INTERNATIONAL POLITICS AND THE INTERNATIONAL COURT: A FUNCTIONAL DILEMMA**

The I.C.J.’s jurisdiction over states is dependent on states con-
senting to that jurisdiction either through acceptance of the optional
clause of the Statute of the I.C.J. (article 36(2)) or under particular

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treaty obligations. In theory, the Court's jurisdiction extends to any aspect of international law. In practice, however, political factors have often determined what matters are deemed justiciable by the Court. There is a feeling at large among international lawyers and diplomats that some issues are simply too political for resolution at the I.C.J. These observers argue that the credibility of the Court is threatened by the possibility of nonenforcement or judicial partiality in such cases. Worse, they argue, states may simply withdraw from the Court's jurisdiction in sensitive cases. An infamous example of this was the Reagan administration's decision that the U.S. government's much-touted commitment to the rule of law did not extend as far as a continuing appearance at the Court in the Nicaragua dispute after the Court had found against the United States at the jurisdictional phase.

These arguments all boil down to a fear that the Court could become unworkably politicized by accepting jurisdiction in cases with great political or strategic implications. It is fair to say that most of the Court's obvious successes have been in relatively settled areas such as disputes between states over issues including the limits of the continental shelf or the precise location of territorial boundaries. The Court's irregular forays into contentious political disputes have

27. See, e.g., Iranian Application, I.C.J. Communiqué, No. 92/26, (Nov. 2, 1992). The application was made under the 1955 Treaty of Amity between Iran and the United States. This treaty vests jurisdiction in the I.C.J. should any disputes arise under the treaty. The Court also has jurisdiction by special agreement under article 36(1) of the I.C.J. Statute.

28. The U.S. State Department explained its decision to withdraw acceptance of the I.C.J.'s compulsory jurisdiction in the following terms: "Nicaragua sought to bring before the Court political and security disputes that were never previously considered part of the Court's mandate to resolve. In our view the Court's decision ... that Nicaragua's claims were justiciable could not be supported as a matter of law." Abraham D. Soifer, Legal Adviser Soifer Statement, DEP'T STATE BULL., Jan. 1986, at 67, 68.


30. See generally, Soifer, supra note 28.


32. The two examples most frequently cited are the decisions in Military and Paramilitary Activities In and Against Nicaragua, 1984 I.C.J. 392, and the Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20). In these cases the national interests of two major powers, the United States and France, were at stake. Nicaragua concerned a use of force or act of intervention by the United States, while Nuclear Tests involved French nuclear testing in the South Pacific. These cases raised questions about the prudence of international adjudication over such sensitive matters.

33. Of course, these often are perceived by the parties as capable of resolution by the I.C.J. This was a perception absent in Nicaragua and Nuclear Tests.

34. I mean here matters involving the vital national interests of states or conflicts that are symptomatic of deeper ideological rifts. These can be contrasted with what might be
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often been attended by sharp academic criticism\(^{35}\) (Nicaragua, Teheran Hostages\(^{26}\)), withdrawal of jurisdiction (Nicaragua, Nuclear Tests\(^{37}\)), or a loss of confidence in the Court among significant elements of the world community (South West Africa).\(^{38}\)

In some ways, this argument about function and politics encapsulates the Australian position in East Timor. The Portuguese application was described by the Australian Department of Foreign Affairs and Trade in Canberra as "regrettable, misconceived and having no basis in international law."\(^{29}\) In short, it was an embarrassment to all concerned. Dr. J.P. Fonteyne, an international law academic at the Australian National University, adopted a variant of this argument in a recently published article.\(^{40}\) In fact, the latter part of an otherwise closely-argued assessment of East Timor is devoted entirely to distinguishing the moral and political issues involved in East Timor from the legal questions raised by the case itself. On Fonteyne's reading, Portugal has a formidable political grievance, while the East Timorese possess exemplary moral rights. However, curiously, from a legal perspective, the Portuguese application is doomed to fail.\(^{41}\)

Those who believe that law should reflect political and moral imperatives will be dismayed at this contrived separation between law and morality. Furthermore, this formalistic distinction cannot be maintained in the face of both the increasing tendency to ensure that international law reflects the prevailing social and political currents in the new world order and the continuing legalization of human rights standards. Prominent among these human rights standards, of course, is the right to self-determination. However one conceives of the dispute in moral or political terms, the East Timorese, as is demonstrated elsewhere, certainly do possess a legal right to self-determination.\(^{42}\)

called neighborly disputes such as those in the Gulf of Maine Area, 184 I.C.J. 246, and North Sea Continental Shelf, 1969 I.C.J. 3.

35. For an example of this criticism, see Editorial Comment, Has The International Court Exceeded Its Jurisdiction?, 50 Am. J. Int'l L. 128 (1986).


39. Dep't of Foreign Aff. and Trade (Austl.), Portugal's Action in the International Court of Justice against Australia: Background, Aug. 1991 (on file with author).


41. Id. at 178-79.

42. See discussion infra subpart IV(B).
In any event, states themselves are coming to regard the Court as an ideal forum for dispute resolution even in instances where national security interests are at stake. There are a record number of cases on the Court's docket, and two recent applications illustrate the point well. The Iranian government, already involved in the Airbus dispute with the United States, has recently brought an application regarding the U.S. destruction of Iranian oil production complexes during the Iran-Iraq war. Another application is from Hungary and concerns Slovakia's proposed diversion of the Danube. Finally, there is a trend at the I.C.J. towards greater admissibility of political cases exemplified by the Nicaragua decisions.

These applications and the wider trends identified above are indicative of a need for the I.C.J. to divest itself of the functional or political limits within which it is, spuriously, regarded as operating. As far as East Timor is concerned, in this era at least, the Court is unlikely to eschew the opportunity to determine the complex legal issues alive in the case simply because there is a strong political element involved.

IV. SUBSTANTIVE QUESTIONS OF LAW

Self-determination is unquestionably a political issue. Perhaps because of this it has lacked a definitive meaning in international law for some years now. This lack of definitiveness has in turn threatened the principle with obsolescence. Although the I.C.J. has invoked the principle in some of its decisions, the Court has failed to arrest the principle's slide into legal indeterminacy.

The I.C.J. has considered the issue of self-determination on several occasions in the last twenty-five years. As noted above, while the Court is not bound by precedent, by virtue of article 59 of its Statute,

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44. Iranian Application, supra note 27.
47. The most pressing political elements are Indonesia's control over the territory and resources at issue and East Timor's enormous strategic significance in Southeast Asia (especially for Australia).
it is likely to draw on its previous jurisprudence in this matter. The three major elements of the analysis here concern respectively the existence of the right to self-determination, the potential beneficiaries of the right in international law, and the duties of third parties towards a group claiming the right to self-determination.

A. The Existence of a Right to Self-Determination

The question of whether the right to self-determination exists in international law is well-settled. The I.C.J. can refer confidently to its previous decisions as well as to numerous U.N. declarations and human rights treaties confirming the existence of a right to self-determination. In the Namibia Advisory Opinion, where the I.C.J. first considered the issue, the Court found that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all Nations.” This position was subsequently fortified in Western Sahara, where Judge Dillard recognized that “a norm of international law has emerged applicable to the decolonization of those non-self-governing territories which are under the aegis of the United Nations.”

Unfortunately, in the very case in which the I.C.J. discussed self-determination at greatest length, it arguably failed to advance the law. The most quoted phrase from the case is Judge Dillard’s reminder that “it is for the people to decide the territory and not the territory the

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48. Closely associated with this second point is the legal relationship between a trust territory and an administering power no longer in physical possession of the territory. This is a matter of procedure rather than substance in that it goes to the standing of Portugal to bring the case on behalf of East Timor.


51. Id. at 31.

52. Western Sahara, 1975 I.C.J. at 121 (separate opinion of Judge Dillard).
people. The epigrammatic appeal of this phrase is not matched by its utility. Any attempt to apply it to a concrete situation reveals its limitations immediately. It is unclear just how one would go about applying this formula in Krajina or Bosnia. In Toynbee’s pithy phrase, “this is the statement of the problem not the solution.”

In a more recent case, Frontier Dispute, the I.C.J. again had cause to consider self-determination and, in particular, the relationship of self-determination to the right of states to their territorial integrity. In doing so, the Court reaffirmed the existence of a principle of self-determination at international law, but again declined to suggest limits on the exercise of such a right.

It is clear from these cases, reinforcing as they do a multitude of U.N. instruments, that arguments concerning the status of the principle have been laid to rest. This is confirmed by the weight of state practice during the period of decolonization when a billion people were liberated under the banner of self-determination. However, if its status is secure, the same cannot be said of the scope or potential application of the principle. Particularly problematic is its relationship to other principles of international law with which it may come into conflict, such as the norm requiring the maintenance of states’ territorial integrity.

However, the most complex issue of all, and one that must be addressed next in relation to East Timor, can be encapsulated in one of the most frequently asked questions in international law: Who is entitled to exercise the right to self-determination?

B. Beneficiaries of the Right to Self-Determination

The question of beneficiaries or legitimate claimants to the right of self-determination has been a thorny one for the international community since Woodrow Wilson coined the term during the post-World War I reconstruction of Europe. The application of the principle has been notoriously selective and occasionally ill-fated (Yugoslavia was one of Wilson’s early “successes”). Somewhat prophetically, Wilson’s Secretary of State Robert Lansing described self-determination as a principle “loaded with dynamite.”

53. Id. at 122.
56. See discussion infra subpart IV(B)(1).
Self-determination entered its most dynamic phase in the 1960s and 1970s when it became associated exclusively with the process of decolonization.\(^{58}\) As colonial empires crumbled, the right to self-determination ascended the normative scale in international law to the point where it was ascribed peremptory status by the international community.\(^{59}\) However, when it became apparent that self-determination had become the favorite slogan of every self-respecting national liberation movement, the specter of disintegration and secession was raised. The problem of definition has dogged self-determination ever since.\(^{60}\) The apparent absurdity of denying self-determination to the Biafrans while invoking it for the Palestinians has never been confronted. The most recent wave of self-determination claims (successful and unsuccessful) from South Ossetia to Slovenia and Quebec to Kazakhstan has served to reveal the ambiguity of the ideal as a legal norm. Successive attempts to delimit the application of the principle have in effect been exercises in damage control. Lansing's dynamite has threatened to explode our very notions of state sovereignty.

Given all this confusion it is fortunate for the I.C.J. that the question of applicability in this case can be confined to East Timor itself. The right claimed here is sui generis. There are complications, but these can be considered in glorious isolation from revolutionary chaos elsewhere in the world. A decision here may have few implications for secessionist claims in Europe or the rest of Asia. In common with most self-determination movements, but with significantly greater legal justification, the East Timorese regard themselves as exceptional. In contrast to those of Slovenia, Quebec, Bougainville, and countless other secessionist entities, East Timor's right to self-determination has been confirmed by the United Nations both as part of the trusteeship process (it remains on the Decolonization Committee's list) and in General Assembly resolutions passed following the Indonesian invasion.\(^{61}\) In addition to this, the Security Council passed two


\(^{59}\) See Lauri Hannakainen, Peremptory Norms in International Law 381-84 (1988).

\(^{60}\) For a critical analysis of these efforts, see Cass, supra note 23, at 21-22.

\(^{61}\) G.A. Res. 3485, supra note 8; G.A. Res. 34/40, supra note 8; G.A. Res. 37/30, supra note 8.
resolutions on the Indonesian invasion re-asserting East Timor's right to self-determination.\textsuperscript{62}

This is simply to say that the I.C.J. need not be constrained in its decision-making by the possible implications for secession generally. A decision here will have a somewhat limited application to the question of self-determination generally. The right to self-determination from colonial rule is a norm of \textit{jus cogens} in international law. Its existence is undisputed. Indeed, the problems associated with self-determination are related to the extension of the principle beyond the colonial context. Within the colonial context, its applicability has been relatively incontrovertible. On the face of it, the East Timorese issue falls squarely within this context. East Timor has been classified as a non-self-governing territory by the United Nations.\textsuperscript{63} Regardless of ambiguities in other areas of the law, one facet of the principle is universally accepted, namely that non-self-governing peoples are entitled to a right of self-determination.

The questions that need to be addressed by the I.C.J. then become: Is this right qualified in any way by special circumstances (for example, the passage of time or the existence of other countervailing principles of international law), and what is the nature of the correlative duty to this right of self-determination?

These problems in turn raise a number of procedural and historical questions. For example, does a right of self-determination, once declared by the United Nations, continue indefinitely? Does the original colonial state retain its rights as the administering power? Have the East Timorese already exercised their right to self-determination and chosen integration with Indonesia, as the Indonesians claim? To further complicate matters, some writers have argued that East Timor is merely a colonial enclave and that the Indonesians possess a right to reabsorb a small area of territory that is geographically contiguous to it.\textsuperscript{64} Finally, there is the principle of \textit{uti posseditis}.\textsuperscript{65} Does it have any application to the present situation?

In discussing some of these issues I will propose three ways of conceptualizing the East Timorese right to self-determination. In


\textsuperscript{63} G.A. Res. 1542, \textit{supra} note 5.

\textsuperscript{64} See Fonteyne, \textit{supra} note 40, at 176; \textit{contra} James Crawford, \textit{The Creation of States in International Law} 377-85 (1979) (East Timor is excluded from this category of enclaves).

\textsuperscript{65} See Frontier Dispute, 1986 I.C.J. 556-67. The meaning of this term and the implications of the doctrine are explained below.
what might be termed the classic colonial paradigm where a people seeks self-determination from a European imperial power, the right to self-determination is unconditional. It is evident that East Timor fell squarely into this category in 1975. Nevertheless, the waters in the East Timor case have been muddied by the replacement of the classic colonial ruler (Portugal) with the regional imperium (Indonesia). This raises several possibilities.

First, it could be concluded that East Timor’s legal status could not have undergone a change simply by virtue of its occupation by a different alien power and that it remains a colony in the most restrictive and legally compelling sense. In this view, East Timor possesses a right to self-determination that parallels that of Nigeria, Algeria, and Mozambique during the 1950s and 1960s.

Alternatively, it might be argued that East Timor is no longer subject to “colonial rule” since Indonesia is not a colonial empire. In legal terms, this would constitute a denial that East Timor was subject to “alien subjugation, domination and exploitation.” Accordingly, East Timor would simply no longer possess a right to self-determination from colonial rule under customary international law (lex lata), and that what in fact the East Timorese are claiming is a right to secede from the Indonesian state. It is contends that this right is at best a right de lege ferenda and is unlikely to be accepted by the I.C.J. given the absence of supporting state practice and the frequently explicit condemnation of secession within the international community.

Finally, there is the intermediate position arguing that East Timor retains a legitimate right or claim to self-determination, but that this right must now be qualified by competing principles of international law, notably Indonesia’s claim to its territorial integrity.

To return to the first position, the contention that East Timor’s legal situation remains unchanged regardless of Indonesia’s occupation is a powerful one. The United Nations and Security Council have passed numerous resolutions affirming East Timor’s right to self-de-

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66. The classic statement of this type of self-determination can be found in the Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, supra note 49.

67. The most famous example of this attitude can be found in a speech given by the then Secretary-General of the United Nations, U. Thant, during the Biafran crisis in Nigeria in the late 1960s. See M.G. Kaladharan Nayar, Self-determination Beyond the Colonial Context: Biafra in Retrospect, 10 Tex. Int’l L.J. 321, 330-31 (1975).
termination and condemning the Indonesian invasion. East Timor continues to be regarded as a non-self-governing territory in the United Nations, and Portugal is regarded as the administering power for the purposes of Chapter XI of the U.N. Charter. Nevertheless, the international community's attitude has been modified over the years. While only a few states have recognized the Indonesian annexation (Australia for one), many more states have tacitly recognized Indonesia's sovereignty over East Timor. Whether these examples of realpolitik have been converted into a state practice possessing juridical significance is open to question. In addition, the most recent U.N. General Assembly resolution affirming East Timor's right to self-determination was in 1982. It has been argued that this indicates a weakening of resolve on the issue and perhaps a recognition by the international community that other principles of international law have intervened with the passage of time. None of these arguments is particularly compelling, but they serve to illustrate the complexities of the issue.

Whatever is decided on the above questions, it would seem incontrovertible that East Timor possesses a right to self-determination of some description and that this has legal implications greater than those of a political claim to secession. The United Nations has never accepted that East Timor is a secessionist dispute falling exclusively within Indonesia's domestic jurisdiction under article 2(7) of the U.N. Charter. Therefore, the second argument outlined above must necessarily fail.

This leaves the third possibility that East Timor's right to self-determination has in some way been qualified by other principles of international law. Judge Petren, in a separate opinion in Western Sahara, stated that "a veritable law of decolonization is in the course of taking shape . . . . But, in certain specific cases, one must equally

68. See generally G.A. Res. 3485, supra note 8; G.A. Res. 34/40, supra note 8; G.A. Res. 37/30, supra note 8; S.C. Res. 384, supra note 7; S.C. Res. 389, supra note 7.
69. Most of the recognizing states have been motivated by economic self-interest (the need to trade with Indonesia) or by the fear that their minorities might also agitate for secession.
70. G.A. Res. 37/30, supra note 8.
71. See discussion infra subparts IV(B)(1), (2), (3).
72. It is probably the case that if the U.N. system is to operate in a meaningful way, then there must be some method of distinguishing the two types of secession/self-determination.
take into account the principle of the national unity and integrity of States.”

The three most likely, though still improbable, counterweights to the East Timorese right to self-determination are: Indonesia’s right to territorial integrity (or a variation of the principle of uti posseditis); the proposition that East Timor represents an enclave at international law; and the argument that East Timor belongs to Indonesia by virtue of certain historical ties.

1. Indonesia’s Territorial Integrity and the Principle of Uti Posseditis

Without doubt, the right of states to territorial integrity represents one of the fundamental norms of international law. However, there are two conceptually discrete principles at work here. First, there is the standard doctrine of state sovereignty enunciated at article 2(4) and 2(7) of the United Nations Charter. Each state within the international legal system is entitled to an area of exclusive or reserve

73. Western Sahara, 1975 I.CJ. 110 (separate opinion of Judge Petren).

74. The Indonesians also make two further arguments. First, they assert that the East Timorese have already exercised self-determination and that the integration of East Timor with Indonesia was in fact an expression of popular self-determination. Ali Alatas, the present Indonesian foreign minister, argued this position forcefully at an address he gave to the Press Club in Washington D.C. in 1992, where he stated:

Although the Indonesian people welcomed the expressed desire of the East Timorese people for integration, the Government declared that it would not accede to it until after a proper exercise of the right of self-determination had been conducted. Hence, a provisional People’s Assembly of East Timor was formed... In the capital city of Dili on May 31, 1976, this Assembly, in a public session... formally cast its vote to choose independence through integration with the Republic of Indonesia.

Ali Alatas, East Timor: De-Bunking The Myths Around a Process of Decolonization, INDONESIAN NEWS, Mar. 20, 1992, at 1, 4. President Suharto himself has been quoted as saying “It’s the East Timorese themselves who chose to be independent together with Indonesia, hence we could not reject their plea.” Subrato: Timor Sought to Join Us, MELBOURNE AGE, Feb. 18, 1992, at 9 (emphasis added). Professor Roger Clark comprehensively disposes of these arguments on the basis of historical evidence and U.N. practice and requirements in relation to acts of decolonization. Clark, supra note 9, at 12-18. Second, the Indonesians argue that East Timor is part of Indonesia by virtue of its close proximity to the Indonesian archipelago. This argument, sometimes called the right to retrocession, has virtually never been accepted by the United Nations or the world community, whether it be raised by the Argentines in defense of their invasion of the Falklands in 1982, or Iraq in support of its claim to Kuwait in 1990. It is worth noting here that after the Dili massacre Indonesian President Suharto made the remarkable claim that Indonesia never wanted East Timor in the first place. Subrato: Timor Sought to Join Us, supra.

75. See, e.g., U.N. CHARTER art. 2, para. 4; Declaration on Friendly Relations, supra note 49.
jurisdiction under article 2(7), and under article 2(4) no use of force is permitted “against the territorial integrity or political independence” of a state.

This specific right to the fruits of statehood is merely the statement of a broader policy that informs the international legal system. International law is an inherently conservative system of rules dedicated to maintaining stability in the international order. The commitment to the maintenance of borders and territorial stability is native to the Charter system.\(^7\) Hence, the ambivalence towards the principle of self-determination. The need to preserve the integrity of states has proved a powerful counteracting force against the revolutionary and secessionist urges of individual groups. Whatever the moral or political claims of post-colonial self-determination movements, the law has been resolute in its rejection of them. The names make for a tragic and familiar litany to international lawyers working in this area: Kurdistan, Tibet, Aceh, Southern Sudan, Biafra. In the particular case of Biafra, the position of the international community was clarified in 1970 by U. Thant, the United Nations Secretary-General at the time, who warned:

As far as the question of secession is . . . concerned, the United Nations’ attitude is unequivocal [sic]. As an international organization, the United Nations has never accepted and does not accept and I do not believe it will ever accept the principle of secession of a part of its Member State.\(^7\)

This attitude was reflected in the prevarication surrounding the recognition of the republics of the former Union of Soviet Socialist Republics and Yugoslavia. Nevertheless, new states have been recognized. Arguably, a new right to self-determination has arisen outside the colonial context, one that can be applied to entities as diverse as Slovenia, Georgia, and Eritrea.\(^7\) East Timor’s right to self-determination, of course, belongs to a different category from that of the unsuccessful Biafran secession and the successful Slovenian independence movement. In particular, its relationship to Indonesia’s territorial integrity is more complicated.

The I.C.J. has constantly reaffirmed the normative preeminence of the right to territorial integrity in international law, most notably in

\(^7\) This explains the commitment shown by states towards I.C.J. adjudication in matters concerning border disputes and continental shelf delimitation.

\(^7\) Nayar, supra note 67, at 330.

\(^7\) See generally Cass, supra note 23, at 22-23.
the *Nicaragua* decision. The relationship of territorial integrity to the principle of self-determination has also been explored. It is clear that the right to self-determination in the colonial context cannot be derogated from on the basis of a need to preserve territorial integrity. For example, it is absurd to suggest that Angola had no right to self-determination in 1970 on the grounds that its exercise would fracture Portugal’s territorial sovereignty.

However, Indonesia’s claim to territorial integrity now may be much stronger than was Portugal’s in 1970 simply by virtue of its proximity to East Timor and the fact that Indonesia is not a European power. Indonesia does not possess the typical indicia of a colonial power and so is often not recognized as such. Portugal was a classic metropole, geographically distant and practicing the form of exploitative colonialism distinctive to European powers. Indonesia, on the other hand, is often regarded as a champion of self-assertion in the developing world and a pathological enemy of imperialism. This has resulted in a marked reluctance to describe Indonesia using the unflattering dialect of anti-colonialism.

Nevertheless, I would suggest that the principle of *uti posseditis*, often associated with, and occasionally mistakenly thought to be synonymous with the principle of territorial integrity, in fact directs the I.C.J. to declare Indonesia’s territorial integrity irrelevant in this particular case. *Ut posseditis* is the principle, articulated by the I.C.J. in *Frontier Dispute*, whereby states become independent within existing colonial boundaries. It is often used as an argument for preserving the integrity of the newly independent colonial unit from further acts of self-determination, as in the case of the attempted secession of Krajina from Croatia or, most notoriously, Biafra from Nigeria.

However, and this is the significant point for our purposes, the principle yields a duty correlative to this right. Newly created states are protected from secession, in return for, as Rosalyn Higgins puts it, “forfeiting any historical claims they might aspire to regarding territories now held within the old colonial boundaries of others.”

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82. See Rosalyn Higgins, *The Evolution of the Right to Self-Determination: Commentary on Professor Franck’s Paper,* in *Proceedings of the Second Amsterdam Interna-
So, while *uti posseditis* may be an ally to Indonesia in its arguments against Aceh or Ambonese independence, it is wholly at odds with its absorption of East Timor into the Indonesian state. The principle already affirmed by the I.C.J. in *Frontier Dispute* bars Indonesia, a former Dutch colony, from laying claim to territories within the former Portuguese empire.

2. **Enclaves in International Law**

The arguments relating to enclaves and historical ties possess more ingenuity than they do merit. Some international lawyers contend that certain colonial entities are so small and insignificant that the United Nations will sanction their incorporation into a larger, usually contiguous, state. The examples offered in support of this view are India’s absorption of Goa and the Moroccan incorporation of Ifni. In neither case, however, did the United Nations expressly condemn these actions. Contrast this with East Timor where both the Security Council and the General Assembly made it clear that East Timor is not an enclave but instead contains a people entitled to a right to self-determination. To suggest that East Timor belongs in this historically obscure category is to engage in academic sophistry.

3. **Historical Ties**

Much the same can be said for historical ties. In *Western Sahara*, the I.C.J. investigated the existence of historical ties, but even after having found such ties the Court did not think they were of much

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83. There is a further argument to the effect that East Timor is too small to be an independent state and furthermore lacks economic viability. The first limb of this argument is based on an erroneous reading of the *Montevideo Convention on the Rights and Duties of States* (1933), which establishes a definition of statehood that includes “the capacity to enter into relations with other states” (article 1(d)). Provided that East Timor has independence and an effective government, it will, according to principles of customary international law, possess sufficient capacity to meet the requirements of statehood. The absence of recognition in 1975 after the Declaration of Independence by the East Timorese Fretlin Government was a product of the perception that the Timorese lacked a government in effective control of the territory. In any event, East Timor is larger and more economically viable—especially if the hydrocarbon reserves in the Timor Gap are taken into account—than many existing states, e.g., Nauru (pop. 100,000), Micronesia, and San Marino.

84. See Fonteyne, supra note 40, at 176.

85. The claims of the Indonesian government in this regard are outlined in Clark, supra note 9, at 20-21.

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relevance to Western Sahara’s right to self-determination. In *East Timor*, the I.C.J. is likely to go a step further and find that East Timor’s historical ties to Indonesia are not only irrelevant but also negligible.\(^{87}\) Ultimately, it appears that East Timor’s right to self-determination is unassailable.

C. The Duties of Third Parties Toward Peoples Claiming a Right to Self-Determination

Complications arise when the consequences of the right to self-determination are considered. In particular, what are the rights and duties of the relevant parties in this case, namely Portugal and Australia, and what is the likely impact of the absent third party, Indonesia, on the proceedings?

Some of these issues relate to procedure and therefore fall outside the scope of this Article. However, I will consider these briefly in order to provide some sort of context for the substantive discussions elsewhere and also because these touch on the status of self-determination. First, there is the question of standing. Briefly, Portugal must satisfy the Court that it has an actionable interest in this case. In other words, Portugal must show that it has suffered some violation of its rights as the administering power in East Timor or that it has a legal interest independent of this relationship. The challenge confronting Portugal here is to convince the Court that either Portugal’s status as administering power has survived almost two decades of Indonesian rule or that any state within the world community can bring this action on behalf of the East Timorese on the basis that the principle of self-determination is a right *erga omnes*.\(^{88}\) The I.C.J.’s jurisprudence on both these issues is far from decisive. However, in the first instance, the I.C.J. may simply accept the United Nations’ determination that Portugal remains the administering power. This was the view taken by the Court in the *South West Africa* cases, where South Africa was considered the mandate power despite its claims to the

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87. The absence of these ties is well-documented in TAYLOR, supra note 3.
88. A right *erga omnes* is one that is opposable to the entire international community. Portugal argues on this basis that each member of that community has a right to bring an action when such an obligation is not met and that such rights are opposable to any individual member of the world community breaching that duty. See Portuguese Application, supra note 16, at 4; see also Barcelona Traction Power and Light Co. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).
contrary and its physical and illegal occupation of Namibia in a capacity other than that of an administering power.\textsuperscript{89}

The jurisprudence of the Court is more ambiguous in the case of a legal interest existing \textit{erga omnes}. Is there an \textit{actio popularis} in international law? Again the \textit{South West Africa} cases are a fruitful but not dispositive source of jurisprudence. The majority in the 1962 \textit{South West Africa} case (Admissibility Phase) accepted that such an interest might exist. This view suffered a reversal in the 1966 decision, where the Court held that “although a right [\textit{actio popularis}] of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present.”\textsuperscript{90} However, in \textit{Barcelona Traction} the majority referred to the existence in international law of obligations \textit{erga omnes}.\textsuperscript{91} More recent practice and comment on this issue suggests that if such an action does exist then it can be founded on the principle of self-determination.\textsuperscript{92}

Second, the International Court’s competence to hear the case depends on the notoriously complex question of absent or indispensable third parties.\textsuperscript{93} Generally, the Court, in common with most judicial bodies, will not determine the merits of a case where such a determination will compromise the rights and obligations of a third party not present at the proceedings. Indonesia is the absent third party here. Again, previous decisions of the Court provide only limited guidance, though there is an increasing tendency to allow such cases to proceed on the merits.\textsuperscript{94} The question really becomes this: Do Indonesia’s legal interests “form the very subject matter of the


\textsuperscript{90} \textit{South West Africa}, 1966 I.C.J. 47, ¶ 88.

\textsuperscript{91} \textit{Barcelona Traction}, 1970 I.C.J. 32.


\textsuperscript{93} The reason that Australia and not Indonesia is the defendant in this case is that Australia has accepted the compulsory jurisdiction of the Court under article 36(2) of the statute of the I.C.J. Indonesia has not made such a declaration and thus cannot be brought to the Court. See Christine Chinkin, Third Parties and International Litigation 55 (May 1991) (paper delivered at International Law Seminar in Canberra, on file with author); see also Iain Scobbie, The Presence of an Absent Third: Procedural Aspects of the East Timor Case (Nov. 1992) (paper delivered at the Catholic Institute for International Relations and the International Platform of Jurists for East Timor conference in London, on file with author).

deciding that is applied for?" Applying the reasoning of the Court in *Certain Phosphate Lands* to *East Timor*, one is tempted to conclude that a majority of the Court is likely to come to the conclusion that Indonesia's interests do not prevent the Court from deciding the case.\(^9\)

Assuming, then, that Portugal establishes both standing and competence and satisfies the Court that the East Timorese right to self-determination has not been qualified out of existence, it will still be left with the problem of showing that Australia has failed to meet its duties and responsibilities to the East Timorese, Portugal, or both. In this matter, at least, the Court will be breaking relatively new ground. Portugal asserts that Australia, by entering into the Timor Gap Treaty and recognizing Indonesian sovereignty over East Timor, has breached at least three separate duties. First, Australia has failed to observe its obligations towards Portugal as administering power over East Timor. In contravention of this obligation it has entered into a treaty with Indonesia over resources administered by Portugal.\(^7\) Second, Australia has ignored its duty to withhold recognition of illegal situations by recognizing Indonesia's illegal annexation of East Timor. Third, Australia has failed to respect the East Timorese right to self-determination.

First, assuming that the Court accepts Portugal's continuing status as the administering power, then Australia would appear to have breached a fundamental norm of international law and, indeed, international relations by negotiating a treaty with the wrong party.\(^9\) Second, it has both breached Portugal's rights and failed to meet its own obligations by recognizing Indonesia's illegal occupation of East Timor. This duty of non-recognition of territory acquired by force is enshrined in international law in the 1970 Declaration on Friendly Relations and in the 1974 United Nations General Assembly Resolution


96. *See id.* at 3-9. The majority held that Australia's rights and duties as joint administering power over Nauru could be determined in the absence of the other joint-administering powers, New Zealand and the United Kingdom. *Id.* at 9. The position of New Zealand and the United Kingdom is much closer to that of Australia in this case than is Indonesia's to that of Australia in the East Timor dispute.

97. Portugal also argues in its application that Australia "contravened a general obligation to negotiate with the competent State on matters of common interest and the specific obligation to negotiate with that State on questions relating to the maritime areas of direct concern to East Timor." *See Portuguese Application*, supra note 16, at 3.

98. *Id.* § 5.
on Aggression. The I.C.J. itself restated that obligation in the *Namibia Advisory Opinion*, in which it found that states were under an obligation not to recognize South Africa's illegal occupation of Namibia.

Finally, Australia has breached its duty not to prejudice or impede the exercise of a right to self-determination. This is a right Australia was obliged to promote and respect according to several U.N. Security Council resolutions and a number of U.N. instruments on the right to self-determination. Instead, Australia has entered into a treaty that will have the effect of denying a unit of self-determination the economic means necessary to exercise self-determination.

The balance of customary international law, then, clearly favors the Portuguese position. Australia's actions, while perhaps defensible as a policy in furtherance of national self-interest, remain at odds with international law. The prohibition on the use of force and the right to self-determination are foundational doctrines of the international legal regime. Australia's disregard for these principles, indirect as it may have been, nevertheless contributes to the weakening of these principles and undermines the efficacy of the rule of law in international affairs. The I.C.J., dedicated as it must be to the maintenance of legality in the international order, is unlikely to be convinced by


102. If the right to self-determination does not create obligations for third parties, one wonders what force the principle has? Apart from the arguments on the basis of a breach of U.N. Charter, article 2, paragraph 4, there were also suggestions that Kuwait's right to self-determination gave rise to a duty on the part of the international community to come to its aid militarily. If this is the case, then surely one must infer that even a minimalist reading of the right demands of third party states that they do nothing to infringe or impede exercise of that right.

103. The Australians argue that by recognizing Indonesia's sovereign authority over East Timor they can better advance the interests of the East Timorese in "a more constructive and effective manner than would otherwise have been the case." Letter from the Hon. Stephen Martin on behalf of Australian Foreign Minister, Gareth Evans, to Gerry J. Simpson, Law Faculty, Univ. of Melbourne (May 25, 1992) (on file with author). As far as the Timor Gap Treaty is concerned, Australia has argued that the conclusion of the treaty brings Indonesia and Australia into closer relations with each other and places Australia in a better position to influence Indonesian policy on East Timor. It further argues that Australia has important security interests in maintaining well-defined sea boundaries and has an economic duty to the Australian people to exploit resources that will benefit the population. See Australian Government Responses to Frequently Raised Issues Regarding East Timor, May 5, 1992 (on file with author).

104. See, *e.g.*, U.N. CHARTER art. 2, para. 4.
arguments derived from political expediency or the claim to exercise unfettered sovereign authority. Indeed, of all the obstacles facing Portugal in this case, it is the substantive barriers that pose the fewest difficulties. Success in the procedural arguments relating to standing and competence provide grounds for some optimism when the Court comes to consider these substantive issues.

V. CONCLUSION

Realistically, even if this optimism is converted into an I.C.J. judgment that finds favor in Lisbon, such a judgment alone is unlikely to transform the lives of the residents of Dili, the capital of East Timor. The Court’s capacity to modify the strategic interests of the major world powers is negligible.¹⁰⁵ Eighteen years have elapsed since the Court handed down its Western Sahara decision, confirming the rights of the Western Saharan people to self-determination, and still there is little prospect of resolution there.

Nevertheless, a defeat for Portugal in this case will be potentially traumatic for the East Timorese. Indonesia is likely to seize on such an outcome as a vindication of its policies in East Timor over the past eighteen years. This will occur regardless of whether the Court decides the case on the procedural issues or on the merits. Conversely, a judgment that affirms East Timor’s right to self-determination will provide the East Timorese with an immense fillip in their struggle for independence and should add significant judicial weight to those elements of world public opinion supporting liberty for East Timor. At present, East Timorese cultural life is dying by degrees.¹⁰⁶ A positive outcome in this case, coupled with heightened awareness of the plight of the East Timorese people affected by the events described at the beginning of this Article, could signal the salvation of East Timorese national and cultural identity. The Court may at the same time find itself instrumental in reviving the moribund principle of self-determination in international law.

¹⁰⁵. However, the Court no doubt can cause those states acute embarrassment.
¹⁰⁶. Apart from the overt consequences of repression, there is also the problem of population transfer and “ethnic dilution.” It is estimated that by late 1991 there were approximately 100,000 non-indigenous persons in East Timor out of a total population of 755,950. See Herb Feith, East Timor: The Opening Up, the Crackdown and the Possibility of a Durable Settlement, in INDONESIAN ASSESSMENT 1992: POLITICAL PERSPECTIVES IN THE 1990s 65 (Harold Crouch & Hal Hill eds., 1992).