

CASE CONCERNING EAST TIMOR (PORTUGAL *v.* AUSTRALIA)

Judgment of 30 June 1995

In its Judgment in the case concerning East Timor (Portugal *v.* Australia), the Court, by 14 votes to 2, found that it could not exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36, paragraph 2, of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.

Those who voted *IN FAVOUR* were: President Bedjaoui; Vice-President Schwebel; Judges Oda, Sir Robert Jennings, Guillaume, Shahabuddeen, Aguilar Mawdsley, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin; Judge *ad hoc* Sir Ninian Stephen.

AGAINST: Judge Weeramantry; Judge *ad hoc* Skubiszewski.

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Judges Oda, Shahabuddeen, Ranjeva, and Vereshchetin appended separate opinions to the Judgment of the Court.

Judge Weeramantry and Judge *ad hoc* Skubiszewski appended dissenting opinions to the Judgment of the Court.

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Procedural history (paras. 1-10)

In its Judgment, the Court recalls that on 22 February 1991 Portugal instituted proceedings against Australia concerning "certain activities of Australia with respect to East Timor". According to the Application Australia had, by its conduct, "failed to observe . . . the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] . . . and . . . the right of the people of East Timor to self-determination and the related rights". In consequence, according to the Application, Australia

had "incurred international responsibility vis-à-vis both the people of East Timor and Portugal". As the basis for the jurisdiction of the Court, the Application refers to the declarations by which the two States have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute. In its Counter-Memorial, Australia raised questions concerning the jurisdiction of the Court and the admissibility of the Application. In the course of a meeting held by the President of the Court, the Parties agreed that these questions were inextricably linked to the merits and that they should therefore be heard and determined within the framework of the merits. The written proceedings having been completed in July 1993, hearings were held between 30 January and 16 February 1995. The Judgment then sets out the final submissions which were presented by both Parties in the course of the oral proceedings.

Historical background (paras. 11-18)

The Court then gives a short description of the history of the involvement of Portugal and Indonesia in the Territory of East Timor and of a number of Security Council and General Assembly resolutions concerning the question of East Timor. It further describes the negotiations between Australia and Indonesia leading to the Treaty of 11 December 1989, which created a "Zone of Cooperation . . . in an area between the Indonesian Province of East Timor and Northern Australia".

Summary of the contentions of the Parties (paras. 19-20)

The Court then summarizes the contentions of both Parties.

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Australia's objection that there exists in reality no dispute between the Parties
(paras. 21-22)

The Court goes on to consider Australia's objection that there is in reality no dispute between itself and Portugal. Australia contends that the case as presented by Portugal is artificially limited to the question of the lawfulness of Australia's conduct, and that the true respondent is Indonesia, not Australia. Australia maintains that it is being sued in place of Indonesia. In this connection, it points out that Portugal and Australia have accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of its Statute, but that Indonesia has not.

The Court finds in this respect that for the purpose of verifying the existence of a legal dispute in the present case, it is not relevant whether the "real dispute" is between Portugal and Indonesia rather than Portugal and Australia. Portugal has, rightly or wrongly, formulated complaints of fact and law against Australia which the latter has denied. By virtue of this denial, there is a legal dispute.

Australia's objection that the Court is required to determine the rights and obligations of Indonesia
(paras. 23-35)

The Court then considers Australia's principal objection, to the effect that Portugal's Application would require the Court to determine the rights and obligations of Indonesia. Australia contends that the jurisdiction conferred upon the Court by the Parties' declarations under Article 36, paragraph 2, of the Statute would not enable the Court to act if, in order to do so, the Court were required to rule on the lawfulness of Indonesia's entry into and continuing presence in East Timor, on the validity of the 1989 Treaty between Australia and Indonesia, or on the rights and obligations of Indonesia under that Treaty, even if the Court did not have to determine its validity. In support of its argument, it refers to the Court's Judgment in the case of *Monetary Gold Removed from Rome in 1943*. Portugal agrees that if its Application required the Court to decide any of these questions, the Court could not entertain it. The Parties disagree, however, as to whether the Court is required to decide any of these questions in order to resolve the dispute referred to it.

Portugal contends first that its Application is concerned exclusively with the objective conduct of Australia, which consists in having negotiated, concluded and initiated performance of the 1989 Treaty with Indonesia, and that this question is perfectly separable from any question relating to the lawfulness of the conduct of Indonesia.

Having carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia, the Court concludes that Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.

The Court rejects Portugal's additional argument that the rights which Australia allegedly breached were rights *erga omnes* and that accordingly Portugal could require it, indi-

vidually, to respect them regardless of whether or not another State had conducted itself in a similarly unlawful manner.

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter of the United Nations and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the Charter and in the jurisprudence of the Court; it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.

The Court goes on to consider another argument of Portugal which, the Court observes, rests on the premise that the United Nations resolutions, and in particular those of the Security Council, can be read as imposing an obligation on States not to recognize any authority on the part of Indonesia over East Timor and, where the latter is concerned, to deal only with Portugal. Portugal maintains that those resolutions would constitute "givens" on the content of which the Court would not have to decide *de novo*.

The Court takes note of the fact that, for the two Parties, the Territory of East Timor remains a Non-Self-Governing Territory and its people has the right to self-determination, and that the express reference to Portugal as the "administering Power" in a number of the above-mentioned resolutions is not at issue between them. The Court finds, however, that it cannot be inferred from the sole fact that a number of resolutions of the General Assembly and the Security Council refer to Portugal as the administering Power of East Timor that they intended to establish an obligation on third States to treat exclusively with Portugal as regards the continental shelf of East Timor. Without prejudice to the question whether the resolutions under discussion could be binding in nature, the Court considers as a result that they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.

It follows from this that the Court would necessarily have to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power, East Timor's status as a Non-Self-Governing Territory and the right of the people of the Territory to self-determination and to permanent sovereignty over its wealth and natural resources. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (*Monetary Gold Removed from Rome in 1943, I.C.J. Reports 1954, p. 32*).

Conclusions
(paras. 36-37)

The Court accordingly finds that it is not required to consider Australia's other objections and that it cannot rule on Portugal's claims on the merits, whatever the importance of the questions raised by those claims and of the rules of international law which they bring into play.

The Court recalls in any event that it has taken note in the Judgment that, for the two Parties, the Territory of East Timor remains a Non-Self-Governing Territory and its people has the right to self-determination.

Separate opinion of Judge Oda

Judge Oda, while agreeing that Portugal's Application should be dismissed, as the Court lacks jurisdiction to entertain it, considers that its dismissal should not have been based upon the absence of Indonesia's consent, as in the Court's Judgment, but upon the *sole* consideration that Portugal lacked *locus standi*.

After examining Portugal's complaint, Judge Oda concludes that Portugal "has given an incorrect definition of the dispute and seems to have overlooked the difference between the *opposability* to any State of its rights and duties as the administering Power or of the rights of the people of East Timor and *the more basic question* of whether Portugal is the State entitled to assert these rights and duties". He further points out that the right of the people of East Timor to self-determination and the related rights have not been challenged by Australia and, in any event, cannot be made an issue in the present case. That case relates in Judge Oda's view *solely* to the title to the continental shelf which Portugal claims to possess as a coastal State.

Judge Oda goes on to note that in the area of the "Timor Gap" Australia has not asserted a new claim to any seabed area intruding into the area of any State or of the people of the Territory of East Timor, nor has it acquired any new seabed area from any State or from that people. The continental shelves of Australia and of the opposite State overlap somewhere in the middle of the "Timor Gap", and Australia should and did negotiate the question of that overlapping with the coastal State lying opposite to it across the Timor Sea.

The central question in the present case is *whether Portugal or Indonesia*, as a State lying opposite to Australia, was entitled to the continental shelf in the "Timor Gap".

From a survey of events in relation to the delimitation of the continental shelf in the relevant areas, it appears that since the 1970s Indonesia claimed the status of a coastal State for East Timor and, as such, negotiated with Australia. If Portugal had also claimed that status, it could and should have initiated a dispute over the corresponding title to the continental shelf *with Indonesia*, but not with Australia. *Not unless and until* such time as Portugal had been established as having the status of the coastal State entitled to the corresponding continental shelf could any issue concerning the seabed area of the "Timor Gap" have been the subject-matter of a dispute *between Portugal and Australia*. Had that been the case, the treaty between Australia and Indonesia would certainly have been null and void from the outset. The reliance of the Judgment on the principle of the required consent of the third party to the Court's jurisdiction (as exemplified in the *Monetary Gold* case) accordingly seems to be irrelevant.

A further historical survey shows that, in Judge Oda's view, "while the military intervention of Indonesia in East Timor and the integration of East Timor into Indonesia in the mid-1970s were not approved by the United Nations, there has not been any reason to assume that Portugal has, since the late 1970s and up to the present time, been entrusted with the rights and responsibilities of an administering Power for the Non-Self-Governing Territory of East Timor. Few States in the international community have in the recent past regarded, or at present regard, Portugal as a State located in East Timor

or would maintain that as such it may lay claim to the continental shelf off the coast of East Timor". Portugal therefore lacks standing as an Applicant State in this proceeding which relates to the continental shelf extending southward into the Timor Sea from the coast of East Timor in the "Timor Gap".

Separate opinion of Judge Shahabuddeen

In his separate opinion, Judge Shahabuddeen added that the judgment requested by Portugal would not only involve the determination of a question of the international responsibility of an absent State; it would involve the determination of its rights under a Treaty to which it is a party, as well as the determination of the validity of the Treaty itself.

Separate opinion of Judge Ranjeva

Judge Ranjeva wholly approves of the Court for recalling that the right of peoples to self-determination is one of the essential principles of contemporary international law, possessing the characteristic of an absolute right *erga omnes*, and for upholding Australia's first objection to the effect that Portugal's Application would oblige the Court to rule on the rights and obligations of Indonesia. According to Judge Ranjeva, the rights and obligations of Indonesia at issue concern releasing Australia from its obligations *vis-à-vis* Indonesia and depriving Indonesia of the benefit of the effects of the principle *pacta sunt servanda*, which it is entitled to expect from the 1989 Timor Gap Treaty, whose validity has not been disputed. The consensual nature of international jurisdiction prohibits the Court from adjudicating on the legal interests of a State which has not clearly expressed its consent to jurisdiction.

According to the analysis of the jurisprudence of the *Monetary Gold* case made by Judge Ranjeva in his separate opinion, a prior decision, in the sense understood in the Judgment of 1954, is essential when subjective rights are the object of that prior decision; he voices reservations regarding the transposition of this rule were the prior decision to concern a question of an objective right *erga omnes*. This question required additional explanation since *jus cogens* falls within the province of positive law.

Lastly, Judge Ranjeva enumerates a number of questions which remained open and unanswered by virtue of the methodological choice made by the Court, examples being the possibility of an interpretation limiting the domain of the Court's jurisdiction *ratione juris* solely to disputes involving subjective rights, the definition of the notion of the third parties falling within the residual category exterior to the circle of the Parties. For Judge Ranjeva, determining the framework for the development of international law is part of the Court's "scientific responsibility".

Separate opinion of Judge Vereshchetin

In his separate opinion, Judge Vereshchetin takes the view that since the right of the people of East Timor to self-determination lies at the core of the whole case, the Court should have had reliable evidence on how far the Application was supported by that people. The necessity for the Court to have this evidence was only reinforced by the fact that the other Party in the dispute sought to disclaim the alleged disregard of the legal rights and interests of the people of East Timor as well as the rights consequential to the status of Portugal as administering Power. However, neither in the written pleadings nor in the course of the oral arguments has the Court been provided with such evidence.

Although the Charter of the United Nations does not explicitly impose on the administering Power the duty to consult the people of a Non-Self-Governing Territory when the matter at issue directly concerns that people, in the view of Judge Vereshchetin the jurisprudence of the Court shows that such a duty does exist in international law at the present stage of its development and in the contemporary setting of the decolonization process. The above duty may be dispensed with only in exceptional cases, which cannot be held to apply in the present case.

The lack of any evidence as to the view of the people of East Timor, on whose behalf the Application has been filed, is one of the principal reasons leading to the inability of the Court to decide the dispute.

Dissenting opinion of Judge Weeramantry

Judge Weeramantry, in his opinion, expresses agreement with the Court's decision dismissing the objection that no real dispute exists between Australia and Portugal. He also agrees with the stress laid by the Court on the importance of self-determination as "one of the essential principles of contemporary international law".

However, he differs from the majority of the Court on the question whether the Court lacks jurisdiction on the ground that a decision against Australia would involve a decision concerning the rights of Indonesia, a third State, not before the Court.

The opinion analyses the *Monetary Gold* decision and the prior and subsequent jurisprudence on this matter, and concludes from this analysis that, having regard to the facts of this case, the *Monetary Gold* decision is not relevant inasmuch as the Court could determine the matter before it entirely on the basis of the obligations and actions of Australia alone, without any need to make an adjudication on the conduct of Indonesia. A central principle of State responsibility in international law is the individual responsibility of a State for its actions, quite apart from the complicity of another State in those actions.

The Respondent State's actions, in negotiating, concluding and initiating performance of the Timor Gap Treaty and taking internal legislative measures for its application, are thus justiciable on the basis of its unilateral conduct.

The rights of self-determination and permanent sovereignty over natural resources are rights *erga omnes* belonging to the people of East Timor, and therefore generate a corresponding duty upon all States, including the Respondent, to recognize and respect those rights. The act of being party to a treaty recognizing that East Timor (admittedly a Non-Self-Governing Territory and recognized as such by the United Nations) has been incorporated in another State, which treaty deals with a valuable non-renewable resource of the people of East Timor for an initial period of 40 years, without reference to them or their authorized representative, raises substantial doubts regarding the compatibility of these acts with the rights of the people of East Timor and the obligations of Australia. The Court could have proceeded to determine whether a course of action had been made out against Australia on such actions, without the need for any adjudication concerning Indonesia.

The opinion also holds in favour of the right of Portugal to maintain this Application as the administering Power over East Timor, recognized as such by the United Nations. The position and responsibilities of an administering Power

which continues to be so recognized by the United Nations are not lost by the mere circumstance of loss of physical control, for such a proposition would run contrary to the protective scheme embodied in the Charter of the United Nations for the care of Non-Self-Governing Territories.

Dissenting opinion of Judge Skubiszewski

In Judge Skubiszewski's view, the Court has jurisdiction in this case and the Portuguese claims are admissible. The requirements of judicial propriety are also met. The Court can render a decision on the merits.

In particular, even if the Court finds itself without jurisdiction to adjudicate on any issue relating to the Timor Gap Treaty, the Court could deal with the first submission of Portugal, i.e., with the status of East Timor, the applicability to that Territory of the principle of self-determination and some other basic principles of international law, and the position of Portugal as administering Power. This is so because the first submission can be separated from the remaining submissions which concern exclusively the specific issues of the Treaty. It is true that the Court refers to the status of the Territory and to self-determination, and in this respect Judge Skubiszewski concurs with the Court (as he also does in regard to the Court's rejection of the Australian objection that there is no dispute between the Parties). But Judge Skubiszewski thinks that the Court should have elaborated on these matters (as there are some unclear points) and included the result of such elaboration in the operative clause. By not doing so, the Court adopted a narrow view of its function.

The *Monetary Gold* rule does not exclude jurisdiction in this case. The premise for the application of the rule is lacking here: to decide on all the submissions of Portugal, the Court need not adjudicate on any powers, rights and duties of Indonesia. In this case the Court adopted an extensive interpretation of the *Monetary Gold* rule; this interpretation contrasts with its earlier practice. The Court has gone beyond the limit of the operation of *Monetary Gold*.

The Court can decide on the lawfulness of some unilateral acts of Australia leading to the conclusion of the Treaty. A decision thereon does not imply any adjudication on Indonesia, nor does it involve any finding on the validity of the Treaty (which the Court is not competent to make). The conduct of Australia can be assessed in the light of United Nations law and resolutions. Such assessment is not linked to any passing upon Indonesia's activities.

Portugal has the capacity to act before the Court in this case on behalf of East Timor and to vindicate the respect for its position as administering Power.

In discussing and defining the present status of the Territory (i.e., after annexation by Indonesia), the rule of non-recognition is relevant. In the instance of East Timor, recognition of annexation erodes self-determination. The position of Portugal as administering Power was questioned by Australia; the Court should have clarified this issue. It is within its jurisdiction.

Even if the Court's Judgment is legally correct (which it is not), the Court's function cannot be reduced to legal correctness alone. Otherwise the Court would restrict its function to the detriment of justice and of the basic constitutional rule that it is "the principal judicial organ of the United Nations". That restrictive approach is illustrated by the Judgment and it is cause for concern.