

EAST TIMOR'S TORTURED MARCH TO STATEHOOD: A TALE OF LEGAL EXCLUSION & THE VAGARIES OF REALPOLITIK

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I. INTRODUCTION

Portuguese presence in Timor dates back to the fifteenth century. It officially became a Portuguese colony in the eighteenth century. Timor was a vestigial appendage of the Portuguese empire largely neglected and used mainly as a place to exile Portuguese political dissidents. In the course of the eighteenth century, the Dutch aggressively sought to create the Dutch East Indies by colonizing the Timor Island and the surrounding archipelago. Repeated attacks led the Portuguese to move the capital of their Timor colony from Lifau to Dili (East Timor's present day capital). After decades of hostility, in the nineteenth century, Portugal and the Netherlands signed the Treaty of Lisbon which formally ceded the western part of the Timor Island to the Dutch with the Portuguese retaining the eastern part. By the twentieth century, East Timor's status as a colony of Portugal, its strong independent socio-political identity, and its physical separateness was well established.

In the course of World War II, Japan occupied the Indonesian Archipelago, but Australian and Dutch troops were deployed to East Timor to maintain a foothold. A year long war with Australian and Dutch troops for the control of East Timor ensued. With the Allied Powers rapidly subduing the Axis Powers, Indonesian nationalists under Sukharno with the help of indigenous army units created by the departing Japanese declared independence on 17 August 1945 proclaiming the Republic of Indonesia. With the Netherlands still tottering on its feet

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after being freed from German occupation, the Republicans rapidly gained control of vast areas of the Archipelago. However, the Dutch were not giving up easily and were determined to foreclose Indonesia's declared independence and regain its vast colony. This resulted in dozens of military skirmishes and two major military campaigns with the Republicans. However, Republican determination and control of vast territory forced the reluctant Dutch four years later to assent to Indonesian independence on 27 December 1949.

Meanwhile, East Timor had been handed back to the Portuguese and the Indonesian Republicans occupied with wrestling with the Dutch for control of West Irian and New Guinea (which the Dutch tenuously held) left East Timor alone and in fact Sukharno acknowledged it as a Portuguese colony. The status quo was to remain so until 1974 when the Portuguese fascist regime fell. The new democratic regime in Lisbon wasted no time in encouraging East Timorese independence. A new Portuguese governor arrived in East Timor with the primary role of overseeing East Timor's transition to independence. Political parties were formed with three dominant ones emerging—Timorese Democratic Union (UDT), Revolutionary Front of Independent East Timor (Freitlin) and Timorese Popular Association (Apodeti).

In local elections in 1975, UDT and Freitlin emerged as the two largest parties and formed an alliance to campaign for independence. However the Indonesian government was unhappy with the Marxist leaning Freitlin and concerned that it would act as an inspiration for some of its trouble-some independent minded provinces particularly Aceh and West Irian. On the other hand, the other chief regional player—Australia—saw East Timor as an unviable state that would only serve to undermine stability in the region. In any case it was more interested in robust ties with the Indonesian government in charge of a vast, resource-rich archipelago.

The dice was cast and it was only a matter of time before East Timor found itself cut adrift. The powder keg was ignited on November 28, 1975 when Freitlin made a unilateral declaration of independence in the face of a UDT engineered coup supported by Indonesia aimed to curb Freitlin's growing popularity. Nine days later despite the marginal economic value of East Timor in proportion to Indonesia's extant possessions,¹ Indonesian military forces invaded and subdued East Timor in the face of international condemnation.

Without effective local opposition, Indonesia absorbed and annexed East Timor in 1976 as its twenty-seventh province, but the integration remained controversial at the international level. It was never recognized by the United Nations (UN) which following the invasion called on Indonesia to withdraw from East Timor and to respect the East Timorese's right to self-determination² with the UN naming Portugal the Administrator of the territory. In addition the UN called upon Portugal to stop the violence and to effect an act of free choice in their former colony.³ Recognition of Portugal's interest in East Timor was an attempt to move protection of East Timor from theory to action despite Portugal's physical abandonment of the colony and disclaimer of responsibility. The supposed right of self-determination, well established in international legal theory and possessed by the people of East Timor in 1975⁴ was however functionally irrelevant to the Indonesians when they swept through the Island to begin more than three decades of oppressive rule. The Indonesian action was certainly abetted by major powers in the West through their indifference. The indifference was the result of prevailing realpolitik, a factor that was to dominate East Timor's quest for self-determination leading J.

¹ Thomas D Grant, 'East Timor, The U.N. System, And Enforcing Non-Recognition In International Law', (2000) 33 *Vanderbilt Journal of Transnational Law* 273, 297.

² See G.A. Res. 3485, U.N. GAOR, 30th Sess., Supp. No. 34, at 118, U.N. Doc. A/10634 (1975); G.A. Res. 34/40, U.N. GAOR, 34th Sess., Supp. No. 46, at 206, U.N. Doc. A/34/46 (1979); and G.A. Res 37/30, U.N. GAOR, 37th Sess., Supp. No. 51, at 227, U.N. Doc. A/37/51 (1982); see also S.C. Res. 384, U.N. SCOR, 30th Sess., 1869th mtg., at 10, U.N. Doc. S/INF/31 (1975); and S.C. Res. 389, U.N. SCOR, 31st Sess., 1914th mtg., at 18, U.N. Doc. S/INF/32 (1976) [East Timorese Resolutions].

³ Ibid.

⁴ Ibid.

C. Beauvais to note that: 'East Timor's accession to statehood bears an international significance disproportionate to its tiny size and severe poverty.'⁵

In the course of the next three decades and in the face of heavy-handed tactics by Indonesian forces keen to wipe out a guerrilla resistance and effectively "pacify" East Timorese battle raged killing thousands. Indonesian police forces regularly detained and tortured innocent civilians and brutally suppressed peaceful protests.⁶ Massive violence committed by Indonesian backed militia forces on East Timor increasingly hardened the international community's support for East Timor's independence. The turning point was the Dili Massacre in 1991 in which over 250 unarmed youth were mowed down by Indonesian military personnel at the Santa Cruz Cemetery. This Chapter has as its modest aim an exploration of the nexus of the principle of self-determination and the geopolitics that contributed to East Timor's tortured march to independence. In particular the Chapter will seek to examine the tenets of self-determination and its practical dynamics which yielded little protection to the aspirations of the East Timorese.

II. SELF-DETERMINATION: A LEGAL RIGHT ON A SLIPPERY SLOPE

There is some uncertainty about the origins of the principle of self-determination. Some scholars trace the concept to the time of the Greek city states,⁷ while others attribute the principle of self-determination to the French and American revolutions.⁸ However the

⁵ Joel C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-Building in East Timor', (2001) 33 *New York University Journal of International Law and Politics* 1101, 1102.

⁶ See Peter Carey, 'East Timor: Third World Colonialism and the Struggle for National Identity' (1996) 293/294 *Conflict Studies* 1 (1996) (describing effects of Indonesian invasion); Barbedo de Magalhães, 'East Timor: A People Shattered By Lies and Silence', (July 17, 1996) <<http://www.uc.pt/timor/silence.htm>> sec. 1; 'East Timor Independence Issue Raised', *Boston Globe*, 28 January 1999, at A10, available at <http://www.boston.com/dailyglobe2/028/nation/East_Timor_independence_issue_raised+.shtml>.

⁷ See James Falkowski, 'Secessionary Self-Determination: A Jeffersonian Perspective', (1991) 9 *Boston University of International Law Journal* 209, 212.

⁸ See Claudia Saladin, 'Self-Determination, Minority Rights and Constitutional Accommodation: The Example of the Czech and Slovak Federal Republic', (1991) 13 *Michigan Journal of International Law* 172, 173.

maturation of the principle dates to the twentieth century in the immediate aftermath of World War I which redrew the map of Europe.⁹ There is little controversy that in the aftermath of World War I, US President Wilson “elevated the principle of self-determination to an international level”¹⁰ through his Fourteen Points, recognizing “that every people has a right to choose the sovereignty under which they shall live...”¹¹ The idea underlying “respect for the...self-determination of peoples,”¹² by drawing international borders around them, was a hope that it would be possible to create inherently peaceful nations. The League of Nations implicitly accepted the principle of self-determination through articulation of a mandate system that granted States guardianship rather than sovereignty over territories. Subsequently after World War II the principle was explicitly incorporated into the United Nations Charter under its trusteeship system.¹³

In the post-World War II period, the principle of self-determination was invoked by colonial territories in the process of separating from their colonizers. This fell solidly in the external spectrum of the principle of self-determination considering that inhabitants of colonised territories constituted separate communities from their overlords and were internally “made up of individuals freely associated on the basis of a social contract” prepared to determine their own future in the international community. Despite the UN Charter’s explicit recognition of the principle of self-determination, controversy erupted with some scholars

⁹Antonio Cassese *A Self-Determination of Peoples: A Legal Reappraisal* (1995) pp 14-27.

¹⁰ Halim Morris, ‘Self-Determination: An Affirmative Right or Mere Rhetoric?’, (1997) 4 *ILSA Journal of International & Comparative Law* 201, 203 (1997).

¹¹ President Woodrow Wilson, ‘Address before the League to Enforce Peace’ (27 May 1916), reprinted in 53 *Congressional Records* 8854 (29 May 1916).

¹² U.N. Charter, art. 1, para. 2.

¹³ 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.

feeling the right extends only to colonies or areas subject to foreign control.¹⁴ 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.¹⁵ Others disagreed, saying that the right to self-determination belongs to all peoples, including minorities and indigenous people living within existing countries.

The two dimensions regarding self-determination mentioned above led to a cleavage of the principle of self determination into two spectrums in international law: internal and external.¹⁶ Internal self-determination “regulates relations between rulers and ruled within the community which inhabits a defined territory.”¹⁷ External self-determination “regulates relations between a self-defined community and the outside world.”¹⁸ Against this backdrop the principle of self-determination acquired a dichotomous role—a vehicle for justice that satisfies the aspirations for independence for colonial and oppressed peoples but also a threat to the extant world order’s preservation of the approved political and legal order in the case of statehood for national minorities in light of the *uti posseditis* principle that militates against fragmentation of sovereignty.¹⁹ In essence there is and continues to be a significant tension underlying United Nations doctrines concerning self-determination, and international concern over the secession of ethnic minorities from existing sovereign states.

¹⁴ See Sam Blay, ‘Self-Determination: A Reassessment in the Post Communist Era’, (1994) *Denver Journal of International Law & Policy* 275; Gregory H. Fox, ‘Self-Determination in the Post Cold War Era: A New International Focus?’ (1995) 16 *Michigan Journal of International Law* 733.

¹⁵ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1990) 49.

¹⁶ See Kamal S. Shehadi, ‘Ethnic Self-Determination and the Break-up of States’, *The Adelphi Papers*, No. 283, December 1993, 4.

¹⁷ See Kamal S. Shehadi, ‘Ethnic Self-Determination and the Break-up of States’, *The Adelphi Papers*, No. 283, December 1993, 4.

¹⁸ See Kamal S. Shehadi, Kamal S. Shehadi, ‘Ethnic Self-Determination and the Break-up of States’, *The Adelphi Papers*, No. 283, December 1993, 4.

¹⁹ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995), 165-204.

Commencing in 1960 against the backdrop of numerous colonial territories increasing casting off the shackles of colonisation or agitating for independence, the evolution and maturation of the principle of self-determination in international law was cemented by three General Assembly resolutions. On December 14, 1960, the General Assembly adopted Resolution 1514 (XV)—Declaration on the Granting of Independence to Colonial Countries and Peoples—was adopted by a vote of ninety to none with nine abstentions.²⁰ The resolution stated that all people have the right to self-determination and with decolonization considered fundamental, it called on administering powers of trust and non-self-governing territories to take immediate steps to transfer without reservation all powers to the peoples of such territories “in accordance with their freely expressed will and desire.”²¹ The resolution did not stop at rhetoric, Article 6 provided that member states “continue to wage a vigorous and sustained campaign against activities and practices of foreign economic, financial and other interests operating in colonial Territories which are detrimental to the interests of the population.”²² A day after the adoption of Resolution 1514, the General Assembly reaffirmed the General Assembly’s proclamation spelled out in Resolution 1514 by outlining principles for determining whether a territory was a non-self-governing territory.²³ A decade after Resolutions 1514 and 1541, the principle of self-determination within territories was entrenched and cemented as a principle of international law with the passage of in the General Assembly Resolution 2625 (XXV) entitled Declaration on Principles of International Law

²⁰ See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (14 December 1960) proclaiming the need to solemnly bring to a speedy and unconditional end colonialism in all its forms and manifestations.

²¹ See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (14 December 1960).

²² Sue Rabitt Roff, *The Contemporary International Law of Territorial Rights of Nations and Peoples*, in John R. Jacobson ed., *The Territorial Rights of Nations and Peoples* (1989) 5.

²³ Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter, G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc A/4684 (1960).

Concerning Friendly Relations and Cooperation Among States.²⁴ The enumerated goals of the Declaration on Principles included the need to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.”²⁵

In the author’s opinion however, the three resolutions passed by General Assembly articulating the principle of self-determination seemed biased towards the then prevalent climate—decolonization—with a seeming underlying philosophy and assumption that colonial western powers were the main danger to self-determination thus an implicit inclination towards “external” self-determination. This dynamic inevitably sidelined “internal” self-determination which gives minorities and indigenous people control over their own destinies. East Timor would soon provide a novel scenario that would subsequently hobble its ability to derive the benefits of the three explicit resolutions. This is primarily owing to the confusion revolving around the scope and character of self-determination and in particular the cleavage identified above between “internal” and “external” self-determination.²⁶

In the case of East Timor, its right to self-determination as a Portuguese colony was clear-cut especially considering that it had held the status of a non-self-governing territory according to the UN²⁷ and Portugal was recognized as the administering power.²⁸ However Portugal’s

²⁴ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970) [Declaration on Principles].

²⁵ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970).

²⁶ Edward A. Laing, ‘The Norm of Self-Determination, 1941-1991’, (1992) 22 *California Western International Law Journal* 209, 248.

²⁷ See G.A. Res. 1542, U.N. GAOR, 15th Sess., Supp. No. 16, at 30, U.N. Doc. A/4684 (1960) (naming Timor and dependencies as Portuguese territory); G.A. Res. 36/50, at para. 3 (naming Portugal administering authority); East Timor, 1995 I.C.J. at 90 (declaring East Timor remains non-self-governing territory).

²⁸ S.C. Res. 384, above note 2 (referring to Portugal as administering power of East Timor); G.A. Res. 3485, above note 2 (recognizing Portugal’s responsibilities as administering power over East Timor); S.C. Res. 389, above note 2 (calling on Indonesian withdrawal from Timor).

abandonment of East Timor and the subsequent invasion and annexation by Indonesia in 1975 muddied the clear-cut path to external self-determination since Portugal was rendered neither a physical occupier nor governor of East Timor since 1975 when that role had been usurped by Indonesia's invasion and proclamation of sovereignty over East Timor and its subsequent entrenchment of control and authority. Essentially then, The East Timorese were undefinable in either of the two recognized spectrums mentioned above in defining a "people" in the context of nationalism and self-determination: ethnic and territorial.²⁹ Bolstering Indonesia's sovereignty claim was the reality that the inhabitants of East Timor were culturally indistinct from the inhabitants of West Timor, and not a culture specific to the artificial territorial boundaries imposed by Dutch and Portuguese authorities.³⁰ This served to undermine the protective mechanisms of international law available to East Timor.

Indonesia in the face of international opposition (but with tacit support of the West) claimed that no process of self-determination was required in the territory, apart from that already coordinated by the Indonesian government and its forces of occupation. Self-determination of the East Timorese, Indonesia claimed, was achieved through incorporation of their territory into Indonesia.³¹ Indonesia persisted in this claim, even though the advent of Indonesian rule in East Timor was condemned as an illegal use of force³² and the continuation of that rule was criticized as a violation of the rights of the inhabitants of the territory.³³ However the

²⁹ See Kamal S. Shehadi, 'Ethnic Self-Determination and the Break-up of States', *The Adelphi Papers*, No. 283, December 1993, 4-5.

³⁰ Robert Cribb & Colin Brown, *Modern Indonesia: A History Since 1945* (1995) 5.

³¹ See Ali Alatas, 'East Timor: De-Bunking the Myths Around a Process of Decolonization', *Indon. News*, 20 March 1992, at 1, 4, cited in Gerry J. Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Postcolonial Age', (1996) 32 *Stanford Journal of International Law* 255 (1996) at 339 n.74.

³² See G.A. Res. 3485, U.N. GAOR, 30th Sess., Supp. No. 34, paras. 4-5, U.N. Doc. A/10034 (1976) ("strongly deplor[ing] the military intervention of the armed forces of Indonesia in Portuguese Timor" and "[c]all[ing] upon the Government of Indonesia to desist from further violations of the territorial integrity of Portuguese Timor and to withdraw without delay its armed forces from the Territory in order to enable the people of the Territory freely to exercise their right to self-determination and independence"); S.C. Res. 384, U.N. SCOR, 30th Sess., 1869th mtg. (1976).

³³ See Situation of Human Rights in East Timor, U.N. Commission on Human Rights, Res. 1997/63, U.N. Doc. E/CN.4/RES/1997/63 (1997). See also G.A. Res. 35/27, U.N. GAOR, 35th Sess., Supp. 48, para. 4, U.N. Doc.

annexation of East Timor through use of force added another dimension to the issue of East Timor self-determination. The Chapter now turns to discuss this.

The Nexus of ‘Aggressive’ Use of Force and Self-Determination

In the aftermath of Indonesia’s invasion of East Timor, General Assembly and Security Council resolutions repeatedly called upon member states not to recognize Indonesia’s claim and to respect the territorial integrity of East Timor. Commencing in 1975, UN General Assembly Resolution 3485 (XXX) affirmed Portugal as the “administering Power” for East Timor,³⁴ (the first of eight UN General Assembly Resolutions to call for Indonesian withdrawal from the territory³⁵). The UN Security Council shared the same view of the General Assembly with Resolution 384 of December 22, 1975 also calling for “all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination.”³⁶ The following year, Security Council Resolution 389 unanimously condemned the Indonesian invasion.³⁷

Despite a raft of UN resolutions that were critical of Indonesian action, condemnation of the occupation became progressively weaker over the years mainly because Western powers saw Indonesia as a bulwark against communist and as a result maintained a studious policy of silence which extended to Indonesia’s own bloody domestic purge of thousand of suspected communists and sympathisers. Abandoned by the Portuguese and its claims for self-determination largely deemed by major Western powers as subordinate to geopolitics, East

A/35/48 (1981) (expressing “deepest concern at the continued suffering of the people of East Timor as a result of the situation still prevailing in the Territory”); G.A. Res. 37/30, U.N. GAOR, 37th Sess., Supp. 51, at 228, U.N. Doc. A/37/51 (1983) (expressing concern “at the humanitarian situation prevailing in the Territory”).

³⁴ G.A. Res. 3485, above note 2.

³⁵ See East Timorese Resolutions, above note 2; For a crisp incisive analysis of East Timor’s march to statehood, see Roger S. Clark, “The “Decolonisation” of East Timor and the United Nations Norms on Self-Determination and Aggression, in *International Law and the Question of East Timor*’ 65 (Catholic Inst. for Int’l Relations & Int’l Platform of Jurists for East Timor eds., 1995).

³⁶ S.C. Res. 384, above note 2, para. 1.

³⁷ See S.C. Res. 389, U.N. SCOR, 31st Sess., 1914th mtg. (1997).

Timorese resistance movements took to arms and were to maintain a guerrilla campaign against the Indonesian army throughout the long occupation during which much of the civilian population lived in an atmosphere of repression and violence.³⁸

In the face of Indonesia's continued assertion of sovereignty over East Timor the matter of the use of force which had delivered East Timor to Indonesian continued to be a thorny issue. Indonesia's military occupation remained politically and legally unacceptable with the repressive rule of Indonesia increasingly hardening international sentiment. Politically this was clear from the UN resolutions calling upon all member states to respect the territorial integrity of East Timor by denying recognition to Indonesia.³⁹ In addition through the long occupation, East Timor continued to feature annually on the United Nations General Assembly agenda as well as in the list of non-self-governing territories within the meaning of Chapter XI of the UN Charter.⁴⁰ On the legal front, In the Case Concerning East Timor, the ICJ effectively stated that if a non-self-governing territory is entitled to the right of self-determination, that right is not extinguished due to forcible intervention by a third party, by the passage of time, or by failed attempts at decolonization.⁴¹ The strongest statement was offered by Judge Weeramantry in his dissenting opinion. He stated that the Friendly Relations Doctrine, contained in the annex to UN Resolution 2625 (XXV), mandates that *no territorial acquisition resulting from the threat or use of force shall be recognized as legal*.⁴² In effect, if the use of force is not recognized as legal, any consequences flowing from the illegal use of force would also necessarily be illegal.

³⁸ The most prominent resistance organization was Fretilin, along with its military wing, Falantil.

³⁹ See for example United Nations Resolutions 348 (1975) and 389 (1976), above note 2; see also United Nations Resolution 3485 (1975), above note 2, where the General Assembly called upon all countries to respect East Timor's territorial integrity.

⁴⁰ East Timor had been declared a non-self-governing territory. See G.A. Res. 1542, U.N. GAOR, 15th Sess., Supp. No. 16, para. 1, U.N. Doc. A/4684 (1961).

⁴¹ See Case Concerning East Timor (Portugal v. Australia) (Judgment), 1995 I.C.J. 90 (June 30) 90, 97 (holding East Timor remains non-self-governing territory with right to self-determination).

⁴² Declaration on Principles, above note 24, at 125.

As noted in this section, the political and legal dimensions of Indonesia's invasion and its continued denial of East Timor's right to self-determination under international law was clear-cut. However despite a flurry of subsequent resolutions calling for non-recognition passed by approval of the majority of states, East Timor continued to labour under the oppressive and bloody rule of Indonesia. While self-determination cannot be legitimately imposed by force, Indonesia's cultural ties and undeniable geographic proximity to the territory of East Timor made integration the most sensible political outcome in the eyes of onlookers reducing East Timor to a pawn in a complex game of political and economic chess. The Chapter now turns to consider this in greater detail.

III. SELF-DETERMINATION IN THE SHADOW OF REALPOLITIK

While international realpolitik played a key role in the seeming tacit acquiescence of Indonesia's invasion of East Timor, regional geopolitics sealed its fate for close to three decades. Effective control of the territory served as a basis for international acceptance of Indonesia's actions.⁴³ Though the international community widely held the view that Indonesia held East Timor illegally,⁴⁴ few concrete measures were taken to sanction the delinquency. With the Cold War in full force and Communism advancing steadily in Indochina,⁴⁵ "Western nations served their best interests at that time by supporting Indonesian annexation of East Timor, rather than allowing East Timor to fall prey to even the most remote possibility of Communist or Marxist control."⁴⁶ Western support and the adoption of a policy of silence bolstered Indonesia's confidence with the government publicly announcing

⁴³ See Sevinc Carlson, *Indonesia's Oil* (1977); see also Natalie S. Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case', (1996) 21 *Yale Journal of International Law* 305.

⁴⁴ See Clark, above note 35, at 71 n.29.

⁴⁵ See Carey, 'East Timor: Third World Colonialism and the Struggle for National Identity', above note 6; Barbedo de Magalhães, *East Timor: A People Shattered by Lies and Silence* (July 17, 1996) <<http://www.uc.pt/timor/silence.htm>> at sec. 2.

⁴⁶ Julie M. Sforza, 'The Timor Gap Dispute: The Validity Of The Timor Gap Treaty, Self-Determination, And Decolonization', (1999) 22 *Suffolk Transnational Law Review* 481, 488.

that it would not tolerate the possibility of East Timor's independence.⁴⁷ Western support was not limited to silent approval, but backed up with a supply of planes and war equipment to fight Timorese resistance to Indonesian annexation. In the poisonous political climate created by Soviet expansionism, Indonesia now had a perfect excuse both for the military invasion and subsequent annexation in the name of regional stability and defence of the free world.⁴⁸ It was not lost on observers that Indonesia commenced a full-blown invasion of East Timor the day after then United States President Gerald Ford and his Secretary of State Henry Kissinger met with Suharto in Indonesia.⁴⁹

Prevailing realpolitik created fertile ground for States in the region to adopt a hard-nosed pragmatic approach that neutered the illegality of the situation. Considering the size of Indonesia, and its wealth of resources, economics pushed the law to the backseat. This meant that "no countries in the region were prepared to accept any shifts in the balance of power or a breaking of economic ties with Indonesia over the fate of East Timor."⁵⁰ The East Timorese quest for the right to self-determination was effectively subsumed by the dictates of politics and economics considering Indonesia's physical control of East Timor provided Western investors and regional neighbours with the excuse to continue to deal economically with Indonesia. The influence of realpolitik is symptomatic in Robert Pringle's observation regarding the United States' position. Writing four years after the annexation of East Timor, he noted that despite the existence of acrimonious debate between human rights and regional bureaus in the State Department, human rights considerations had not had any specific negative impact on dealings with Indonesia.⁵¹

⁴⁷ See Barbedo, 'East Timor: A People Shattered by Lies and Silence', above note 6 at sec. 5.

⁴⁸ *Ibid.*, at sec. 2.

⁴⁹ See Carey, 'East Timor: Third World Colonialism and the Struggle for National Identity', above note 6 at 5

⁵⁰ Stephanie A. Paulk, 'Determination of Self in A Decolonized Territory: The Dutch, The Indonesians, and The East Timorese', (2001) 15 *Emory International Law Review* 267, 288.

⁵¹ See Robert Pringle, *Indonesia and the Philippines* (1980) 116.

The fate of East Timor was further sealed with the decision by Australia, a key regional power to warm up to Indonesia's occupation of East Timor in a self-serving measure driven by economic considerations. Though Australia had voted in favour of General Assembly Resolution 3485 of December 12, 1975, it abstained from the vote on Resolution 31/53 of December 1, 1976 and Resolution 32/34 of November 28, 1977. With General Assembly Resolution 33/39 of December 13, 1978, Australia shifted further from its earlier participation in the censure of Indonesian conduct. Australia voted against Resolution 33/39, and in connection with its vote, the Australian Department of Foreign Affairs stated, "The text of the Resolution did not reflect a realistic appreciation of the situation in East Timor and no practical purpose was served by the Resolution."⁵²

At the beginning of 1978 Australia granted Indonesia de facto recognition,⁵³ and in August of 1985, about ten years after Indonesia's invasion, Australia's then Prime Minister, Bob Hawke, formally recognized Indonesian sovereignty over East Timor.⁵⁴ In justifying the move, Hawke's comments were clearly based on practical rather than legal considerations. In his words it was a reality with which Australia had to come to terms with. He went on to note that accordingly, the Australian Government had decided despite being "critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognize de facto that East Timor [was] part of Indonesia."⁵⁵ This recognition made Australia the only country to officially recognize Indonesia's sovereignty over East Timor.⁵⁶ With all this initiatives, Australia was positioning itself for a more sinister national interest issue—the

⁵² Australian Department of Foreign Affairs, *Annual Report 1978* (1979) 30, quoted in Christine M. Chinkin, 'East Timor Moves to the World Court', (1993) 4 *European Journal of International Law* 206, 207 n.5 (1993).

⁵³ See *Portugal v. Australia*, above note 58, at 97 (quoting the then Australian Minister for Foreign Affairs).

⁵⁴ See 'Key Dates in Australia Indonesia Relations', AAP Newsfeed, May 21, 1998, available in LEXIS, Intlaw Library, News File [Key Dates].

⁵⁵ See *Case Concerning East Timor*, above note 41 at 97.

⁵⁶ 'Background to the Timor Gap Treaty', AAP Newsfeed, August 20, 1998, available in LEXIS, Intlaw Library, News File [Background].

resources in the Timor Gap. By the end of 1989, the government of Australia had concluded a maritime delimitation treaty with Indonesia entitled Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia.⁵⁷ Under the bilateral treaty, the two countries agreed on seabed boundaries between Australia and East Timor and established a Zone of Cooperation for joint exploration and exploitation of the oil and gas resources in the waters.⁵⁸ Two years later the “Timor Gap Treaty” between Australia and Indonesia came into force.⁵⁹

After many years of indifference, the recognition of Indonesia’s sovereignty over East Timor by Australia and the joint initiatives to exploit resources in the Timor Gap goaded Portugal the former colonial power which had abandoned East Timor to a more proactive action. In the same year that the Timor Gap Treaty came into force, Portugal viewing the treaty as a delict instituted proceedings against Australia and Indonesia before the International Court of Justice (ICJ).⁶⁰ The proceedings claimed in part that Australia, by entering into the Timor Gap Treaty with Indonesia, infringed East Timor’s right to self-determination and permanent sovereignty over its natural resources, and infringed upon Portugal’s rights as the administering power of the territory.⁶¹ The Chapter now turns to consider these proceedings.

⁵⁷ Thomas D Grant, ‘East Timor, The U.N. System, And Enforcing Non-Recognition In International Law’, (2000) 33 *Vanderbilt Journal of Transnational Law* 273, 299.

⁵⁸ Michael Shane French-Merrill, ‘The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached its International Obligations in Ratifying the Timor Gap Treaty’, (2000) 8 *Cardozo Journal of International & Comparative Law* 285, 288-89; Jim Aubrey, ‘Canberra: Jakarta’s Trojan Horse in East Timor’, in Paul Hainsworth & Stephen McCloskey eds., *The East Timor Question: The Struggle for Independence from Indonesia* (2000) 133, 142.

⁵⁹ Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, 11 December 1989, Australia-Indonesia, 1991 *Australia treaty Series* No. 9. In his dissenting opinion in Case Concerning East Timor (Portugal v. Australia), 1995 I.C.J. 90 (June 30).

⁶⁰ For initial motions in the case, see Case Concerning East Timor (Portugal v. Australia) (Initial Motions), 1993 I.C.J. 32 (May 19); Case Concerning East Timor (Portugal v. Australia), 1992 I.C.J. 228 (June 19); Case Concerning East Timor (Portugal v. Australia), 1991 I.C.J. 9 (May 3).

⁶¹ See Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, Australia-Indonesia, 29 I.L.M. 475 (1990); East Timor, 1995 I.C.J. 90 at 98; G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/ 5217 (1962) [G.A. Res. 1803].

IV. THE JUDICIAL DIMENSION: THE ICJ GETS BLIND-SIDED BY REALPOLITIK

The Portuguese proceedings commenced before the ICJ in 1991 sought a declaration from the Court that Portugal's status with respect to East Timor and the rights of the people of East Timor to self-determination, territorial integrity and unity, and permanent sovereignty over its wealth and natural resources opposed Australia's treaty with Indonesia on the Timor Gap.⁶² Four years later, on June 30, 1995, the ICJ ruled in a 14-2 decision that it could not exercise jurisdiction over the case because it would require the Court to determine the lawfulness of Indonesia's presence in and occupation of East Timor, as well as Indonesia's treaty-making power over East Timor.⁶³ In light of Indonesia's failure to submit to the Court's jurisdiction the ICJ declined to exercise jurisdiction based on the absence of Indonesia, a necessary party, whose legal interest would have been implicated upon adjudication on the merits. The majority decided it was unable to adjudicate the issue since the violations Australia allegedly perpetrated by entering into the treaty with Indonesia were linked with the question of the legitimacy of Indonesia's signing of the Timor Gap Treaty.⁶⁴

Though the ICJ did not decide the issue, disturbingly the majority of judges supported the notion that "Indonesia had manifested its sovereignty and was, through *animus occupandi*, the sovereign power of East Timor."⁶⁵ The ICJ majority went further by embracing the argument advanced by Australia that Portugal no longer exclusively controlled East Timor and that the

⁶² See Case Concerning East Timor (Judgment), above note 41 at 92.

⁶³ See Case Concerning East Timor (Judgment), *ibid.*, 100; see also Bello & Bekker, 'Treaty of 1989 Between Australia and Indonesia Concerning the Gap-Existence of Legal Dispute Between Portugal and Australia-Objections to Jurisdiction-Effect of Court Ruling on Absent Third Parties—Right to Determination as Right Erga Omnes—Status of East Timor as Non-Self-Governing Territory', (1996) 90 *American Journal of International Law* 94.

⁶⁴ See Brian F. Fitzgerald, 'Portugal v. Australia: Deploying the Missiles of Sovereign Autonomy and Sovereign Community', 37 *Harvard International Law Journal* 260, 264.

⁶⁵ French-Merrill, 'The Role of the United Nations and Recognition in Sovereignty Determinations' above note 58 at 292.

power over East Timor had passed, under general international law, to Indonesia.⁶⁶ In the words of Michael S Merrill-French:

The crux of Australia's argument, therefore, was that sovereignty is a factual determination. By invading East Timor and occupying all the political and economic centers of the island for over 20 years, Indonesia had exercised enough dominion to be regarded as the sovereign power of East Timor. Australia, while not approving the means by which this sovereignty was brought about, declared that it would be unreasonable not to consider Indonesia as the sovereign power given the facts of the situation.⁶⁷

However, it was the dissenting opinions by Judges Weeramantry and Skubiszewski which grappled with the hard legal issues. The judges asserted that recognition of the territorial changes effectuated by Indonesia's invasion was an international delict arguing that Australia violated a general duty to the international community by recognizing Indonesia's claim of sovereignty.⁶⁸ Their major criticism was that no nation outside of Australia recognized Indonesia's illegal annexation. Since the Indonesian invasion violated international law, depriving the East Timorese of the right of self-determination, Indonesia could not be regarded as sovereign of East Timor as a matter of law. Their net conclusion was that Australia violated obligations due to the international community by recognizing Indonesia's actions. Judge Skubiszewski further noted that in light of Australia's membership in the UN and the corresponding duty to respect Portugal's claim as administering power in East Timor, as well as the right of the East Timorese to self-determination, it had breached its duties under international law.

Three years after the ICJ judgment, the political machine that had been slowly coming to life finally clinched a break-through. In August 1998, the Indonesian and Portuguese governments

⁶⁶ Case Concerning East Timor (Judgment), above note 41 at 101-03.

⁶⁷ French-Merrill, 'The Role of the United Nations and Recognition in Sovereignty Determinations' above note 58 at 293.

⁶⁸ Case Concerning East Timor (Judgment), above note 41 at 172.

agreed in UN brokered talks to work towards autonomy for East Timor.⁶⁹ This was followed four months later on January 5, 1999 by Australia's recognition of the right of the East Timorese to self-determination.⁷⁰ Five months later, Indonesia and Portugal signed an agreement requesting the UN to conduct a ballot in East Timor enabling the East Timorese to choose between autonomy and independence.⁷¹ On August 30, 1999, after UN-brokered negotiations between Indonesia and Portugal,⁷² a popular referendum on East Timor's future status was held under the auspices of the UN Mission to East Timor (UNAMET)⁷³ with an overwhelming majority voting for independence from Indonesia. On May 20, 2002, "After more than four centuries of Portuguese colonial rule, followed by twenty-four years of brutal occupation by Indonesia, and finally a two-year period of UN interim administration, the people of East Timor celebrated their long-awaited independence."⁷⁴

V. CONCLUSION

Despite some debate regarding the principle of self-determination, the author avers that authority from most of the sources of international law supports the conclusion that self-

⁶⁹ Report of the Secretary-General, U.N. GAOR, 53d Sess., U.N. Doc. A/53/349 (1998); Human Rights Watch, World Report (1999).

⁷⁰ Jim Aubrey, Canberra: Jakarta's Trojan Horse in East Timor, in *The East Timor Question: The Struggle for Independence from Indonesia* 133, 142 (Paul Hainsworth & Stephen McCloskey eds., 2000), 146.

⁷¹ See generally Agreement Between Indonesia and Portugal on the Question of East Timor, U.N. SCOR, 53d Sess., Annex I, at 4, U.N. Doc. S/1999/513 (1999); Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding the Modalities for the Popular Consultation Through a Direct Ballot, U.N. SCOR 53d Sess., Annex II, at 24, U.N. Doc. S/1999/513 (1999); Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding Security Arrangements, U.N. SCOR, 53d Sess., Annex III at 29, U.N. Doc. S/1999/513 (1999).

⁷² Alexander Downer, 'East Timor—Looking Back on 1999', (2000) 54 *Australia Journal of International Affairs* 5, 5-6 (2000); James Cotton, 'The Emergence of an Independent East Timor: National and Regional Challenges', (2000) 22 *Contemporary Southeast Asia* 1, 2-6.

⁷³ UNAMET was authorized on 11 June 1999, under U.N. Security Council Resolution 1246. U.N. S.C., 4013th mtg., U.N. Doc. S/RES/1246 (1999), available at <http://0-www.un.org.library.newcastle.edu.au:80/Docs/scres/1999/99sc1246.htm>. For an account of the challenges faced by the mission, see Martin, above note 4, at 21-54. See also Report of the Secretary-General on the Question of East Timor, U.N. S.C., U.N. Doc. S/1999/803 (July 20, 1999); Report of the Secretary-General on the Question of East Timor, U.N. S.C., U.N. Doc. S/1999/862 (Aug. 9, 1999) [SG Report of Aug. 9, 1999].

⁷⁴ Joel C. Beauvais, 'Benevolent Despotism: A Critique Of U.N. State-Building In East Timor', (2001) 33 *New York University Journal of International Law and Politics* 1101, 1102.

determination is a norm of *jus cogens* imposing binding obligations on all nation states.⁷⁵ Considering that self-determination is a norm of customary international,⁷⁶ the East Timorese should be seen in many ways as a people betrayed by the international community in light of the realpolitik factors identified above. As M. S. French-Merill notes “Indonesia’s illegal use of force and its interference with the self-determination of the East Timorese were regarded as violations of general international law as well as violations of UN resolutions. As a consequence, the United Nations called upon member states not to recognize the Indonesian annexation.”⁷⁷

The schism between external and internal self-determination is a worry but should be shorn of geopolitics. While the principle of *uti posseditis* has a real role in international law, it should not be a basis for inaction and deliberate subversion. When the Wilsonian principles elevated the matter to the international law agenda and the UN Charter outlawed aggressive use of force the hope was that brute force was no longer an accepted avenue to neither acquire territory by force nor snuff out the aspirations of a people to self-determination. East Timor as the latest entrant into the community of nations despite its small size and poverty should be a lesson and a reminder that self-determination is a right that should be both adequately protected and safeguarded where the circumstances call for.

⁷⁵ Halim Morris, ‘Self-Determination: An Affirmative Right or Mere Rhetoric?’, (1997) 4 *ILSA Journal of International & Comparative Law* 201, 204.

⁷⁶ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1994) 114-28; 113; J Klabbers & R Lefeber ‘Africa: Lost Between Self-Determination and Uti Possiditis’ in C Brolmann *Peoples and Minorities in International Law* (1993) 39-41; Manfred Lachs, ‘The law in and of the United Nations’ (1960-61) 1 *Indian Journal of International Law* 429.

⁷⁷ French-Merrill, ‘The Role of the United Nations and Recognition in Sovereignty Determinations’, above note 58 at 300.