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SYMPOSIUM

TIMOR GAP: THE LEGALITY OF THE "TREATY ON THE ZONE OF COOPERATION IN AN AREA BETWEEN THE INDONESIAN PROVINCE OF EAST TIMOR AND NORTHERN AUSTRALIA"

Roger S. Clark†

I. DAY OF INFAMY IN EAST TIMOR

On December 7, 1975, the thirty-fourth anniversary of the day of infamy at Pearl Harbor, Indonesian forces invaded the territory of East Timor, a Portuguese colony for some four and a half centuries. Following the 1974 Portuguese revolution, East Timor, like other Portuguese non-self-governing territories, had been moving through a process of self-determination. Portuguese authorities evacuated the territory in August 1975 during civil disorders, condoned, if not fomented by, the Indonesians. FRETILIN,¹ a popular group which aimed at independence for the territory after a short transitional period, gained the upper hand in the struggle. On November 28, 1975, FRETILIN declared independence, in hope that this would strengthen their

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¹ Frente Revolucionaria de Timor Leste Independente.

hand in dealing with Indonesian border incursions. A full-scale Indonesian invasion followed. One might have thought that this constituted a plain breach of the norms of the United Nations Charter concerning the illegal use of force and self-determination.² Indeed, at the United Nations, the General Assembly and the Security Council both adopted resolutions³ deploring the Indonesian actions, reaffirming the right of the Timorese to self-determination, and calling for the withdrawal of the Indonesian forces. Although the political will has never been present to put teeth into these resolutions,⁴ the United Nations continues to treat Portugal as the legal administering power of the territory. Moreover, the General Assembly has specifically rejected the claim that East Timor has been legally integrated into Indonesia.⁵

II. THE TIMOR GAP

The continental shelf area between northern Australia and East Timor is believed to contain oil. Exploiting the area has been complicated by the difficulty of delimiting boundaries, given conflicting claims and sharp disagreement about the applicable legal principles. Prior to 1975, Australia had some inconclusive negotiations with the Portuguese on the subject. More recently, the discussions have taken place with the Indonesians. The essence of the problem is that while the width of the sea in the relevant area between the two coastlines varies from some 250 to 290 nautical miles, there are, geographically-speaking, two continental margins between the two land masses. To the south

² See generally Roger S. Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 YALE J. WORLD PUB. ORD. 2 (1980).

³ G.A. Res. 3485 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 118, U.N. Doc. A/10034 (1976); S.C. Res. 384, U.N. SCOR, 30th Year, Resolutions and Decisions 10, U.N. Doc. S/INF/31 (1976).

⁴ The matter, however, refuses to go away. Note the recent widespread coverage of the November 12, 1991 massacre by Indonesian troops in Dili, the capital of East Timor. See, e.g., Notes and Comment, *The Talk of the Town*, THE NEW YORKER, Dec. 9, 1991, at 41.

⁵ In July of 1976, Indonesia purported to annex the territory. The General Assembly rejected this claim, inasmuch as the people of the territory had been prevented from freely exercising their right to self determination. G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 39, at 125, U.N. Doc. A/31/39 (1977).

there is a more than 200 nautical mile Australian margin, and to the north a 40 to 70 nautical mile margin the two are separated by a deeper area known as the Timor Trough. The issue is what are the legal implications - if any - of the shape of the shelf or shelves. Australia has argued essentially that it is entitled to the full natural prolongation of its shelf to the edge of the margin, while Portugal and Indonesia have argued that, since it is not possible to accommodate a full 200 mile shelf for both Timor and Australia, the median line of the shelf (ignoring the trough) is where the boundary should be. The law on such delimitations has been evolving in the past two decades and is still far from clear. Both Australia and Portugal are parties to the 1958 Geneva Convention on the Continental Shelf,⁶ so that as between them, the Convention should provide the framework for a delimitation. The result of such an exercise is far from predictable.⁷ Indonesia, while it signed the 1958 Convention, has not ratified it. Presumably Indonesia would argue that the relevant rules are those of customary law developed under the aegis of the 1982 Convention on the Law of the Sea.⁸ This approach, especially when account is taken of the development of the concept of Ex-

⁶ Geneva Convention on the Continental Shelf, 1958, 449 U.N.T.S. 311. 6 (1) provides :

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

⁷ Australia would argue that there are two shelves - not one that is the "same". Portugal would argue for the equidistance rule. Contemporaneously with an Application to the International Court of Justice concerning the Timor Gap Treaty, *infra* note 19, Portugal insisted that Australia continue efforts to negotiate a delimitation of the shelf with Portugal by application of the 1958 Convention. See Letter handed on Feb. 22, 1991 to the Minister of Foreign Affairs of Australia by the Ambassador of Portugal at Canberra, in U.N. Doc. A/46/97 (1991).

⁸ 1982, Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (1982). 83's "non-rule" on the subject provides that "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." See also the extended definition of the shelf in 76 (1): "to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

clusive Economic Zones (EEZs),⁹ suggests that some kind of median line should probably be drawn. The force of the Australian argument, which is based on there being "two" shelves as a result of the geographic features, appears to have weakened in the more recent practice.¹⁰

In 1971 and 1972 Indonesia and Australia agreed to a shelf boundary between them to the west and the east of East Timor, since at that point, no one disputed that it was Portuguese territory.¹¹ The agreed line tracked the shelf edge along the Timor Trough essentially in accord with the Australian position. Thus, Australia fared much better than Indonesia in terms of area in this deal. Apparently Indonesia has since regretted its generosity. The hole in the line of delimitation is popularly known as "The Timor Gap."

It is in this context that Australia and Indonesia entered into what is titled the "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia"¹² ("the Treaty"). The Treaty was signed on December 11, 1989 and subsequently ratified by the two parties.¹³ The Treaty describes itself as a "provisional" solution to

⁹ Indonesia lays general claim to a 200 mile EEZ. Articles 56 and 57 of the 1982 Convention appear to permit claims to be made over the sea-bed in an exclusive economic zone of up to 200 nautical miles, regardless of the shape of the shelf. These Articles may well supersede some of the earlier legal notions of the continental shelf, but it is all very uncertain.

¹⁰ For a case concerning the Continental Shelf, see *Libya v. Malta*, 1985 I.C.J. 6, 56: "Each coastal State is entitled to exercise sovereign rights over the continental shelf off its coasts for the purpose of exploring it and exploiting its natural resources . . . up to a distance of 200 miles from the baselines - subject of course to delimitation with neighboring States - whatever the geophysical or geological features of the sea-bed within the area comprised between the coast and the 200-mile limit." But see the dissenting opinions of Judge Sette-Camara, *id.* at 61-62, and Judge Valticos, *id.* at 105. Those judges saw the Timor Trough as exceptional, although their argument is obviously influenced by viewing the 1971-72 Indonesian-Australian agreements, *infra* note 11, as state practice; a practice, as it turns out, Indonesia came to regret.

¹¹ See *Australia-Indonesia: Agreement Establishing Seabed Boundaries*, done at Canberra, May 18, 1971, 10 I.L.M. 830 (1971); *Australia-Indonesia: Agreement on Certain Seabed Boundaries*, done at Jakarta, Oct. 9, 1972, 11 I.L.M. 1272 (1972); *Australia-Indonesia: Map of Seabed Boundary as Delineated in Agreement of Oct. 9, 1972*, 12 I.L.M. 357 (1973).

¹² The Treaty is reproduced in 29 I.L.M. 469 (1990).

¹³ The exploitation is now continuing apace, notwithstanding the uncertainties caused by the Portuguese position, *supra* note 7 and *infra* note 19. On December 12, 1991 the Australian Federal Minister for Resources announced that eleven production-

the problem.¹⁴ The relevant part of the shelf between East Timor and Australia ("the Zone of Cooperation")¹⁵ has been divided under Articles 3 and 4 of the Treaty into three "Areas." Area A is in the middle and is to be jointly developed. Area B, nearest to Australia, is an area of sole Australian jurisdiction. However, Australia will allocate to Indonesia ten percent of the gross Resource Rent Tax revenues, which is equivalent to sixteen percent of the net Resource Rent Tax collected from this area. Similarly, Area C, nearest to Indonesia, is an area of sole Indonesian jurisdiction. However, Indonesia will allocate ten percent of Contractors' Income Tax revenues from this area to Australia. The whole deal - A, B and C - obviously comes as a package, and the resources of the total package are thus subject to sharing.

III. ILLEGALITY OF ENTERING INTO THE TREATY

My object here is to expand upon a view that has been espoused by the Government of Portugal in various protests to the Australian authorities and to the United Nations,¹⁶ and which I

sharing contracts with oil companies had been approved for exploration in Area A of the Zone of Cooperation. Media Release, [Australian] Minister for Resources, DPIE91/320G.

¹⁴ See first preambular paragraph and Article 33 of the Treaty. "Provisional" in this case means a minimum of 40 years, subject to renewal for 20 year periods. *Id.* According to a note issued by the Australian Department of Foreign Affairs and Trade in January of 1990, "Australia continues to assert sovereign rights over the seabed extending to the geomorphological edge of the natural prolongation of Australia's continental shelf, marked by the Timor Trough, i.e., slightly to the north of the Zone of Cooperation." Note by Australian Department of Foreign Affairs and Trade (Jan. 1990) (on file with author).

¹⁵ William T. Onorato & Mark J. Valencia, *International Cooperation for Petroleum Development: The Timor Gap Treaty*, 5 ICSID REV. FOR. INVEST. L.J. 1, 5 (1990), describe the area thus:

The Zone is delineated on the northern side by a simplified bathymetric axis line; on the southern side by a 200 nautical mile line measured from the Indonesian archipelagic baselines; on the eastern and western sides by equidistance lines. Thus both States conceded the extreme boundary claims of the other and presumably the principles on which they were based. These equidistant lines are determined by the former relationships between the coasts of Indonesia and Portuguese Timor. The northern limit of the coffin-shaped Zone is a simplified line marking the axis of the Timor Trough. The southern limit lies 200nm from the coast of Timor. The two other intermediate lines that separate the three areas are a straight line in the general vicinity of the 1,500 meter isobath and median lines between Australian and Indonesian territories.

¹⁶ See, e.g., Question of East Timor, Letter dated November 10, 1988 from the Per-

have previously addressed in outline¹⁷: The Australian Government has acted in breach of its international obligations by entering into the Timor Gap Treaty¹⁸ with Indonesia. I believe, that this Treaty is null and void under international law and that, if properly seized of the issue,¹⁹ the International Court of

manent Representative of Portugal addressed to the Chairman of the Special Committee on Decolonization, U.N. Doc. A/AC.109/981 (1989).

¹⁷ See Submission to the Senate Standing Committee on Foreign Affairs and Defence (Reference: East Timor), Commonwealth of Australia, Official Hansard Report 1388, 1400 (1982); Letter to Gordon McIntosh, Senator for Western Australia, 27 February 1986. Sasha S. Stepan assisted me in developing my views during the writing of her monograph entitled *Credibility Gap: The Timor Gap Agreement and its International Implications* (1989) (on file with author).

¹⁸ *Supra* note 12. It is not my purpose here to criticize its details. If the Treaty had been validly entered into with the party having legitimate status, unlike Indonesia, then it would certainly seem to be a creative solution to an awkward boundary problem. See generally Onorato & Valencia, *supra* note 15. In this Article, my focus is on the legitimacy of the whole enterprise. On principles of delimitation in such cases, see generally CATRIONA COOK, *THE AUSTRALIA-INDONESIA MARITIME BOUNDARY*, OCCASIONAL PAPERS IN MARITIME AFFAIRS 40 (1985). On the Treaty, see also Ernst Willheim, *Australia-Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the "Timor Gap"*, 29 NAT. RESOURCES J. 821 (1989) (which contains some useful maps); Keith Suter, *Oil in Troubled Waters*, INSIDE INDON., Dec. 1988, at 7; Henry Burmester, *The Timor Gap Treaty*, [1990] AUSTL. MINING & PETROLEUM ASS'N Y.B. 233 (and several commentaries on the Burmester piece in that volume); Kym P. Livesley, *The Timor Gap Treaty - An Update*, AUSTL. MINING & PETROLEUM L. ASS'N BULL. 213 (1991); Garrie J. Moloney, *Australian-Indonesian Timor Gap Zone of Cooperation Treaty: A New Off-shore Petroleum Regime*, 8 J. ENERGY & NAT. RESOURCES L. 128 (1990); Anthony Bergin, *The Australian-Indonesian Timor Gap Maritime Boundary Agreement*, 5 INT'L J. ESTUARINE & COASTAL L. 383 (1990).

¹⁹ For example, the International Court of Justice (I.C.J.) would have jurisdiction to decide the validity of the treaty if either Portugal or a future independent East Timor raised the issue. Litigating all the issues is complicated since, while Australia and Portugal have made declarations accepting the jurisdiction of the Court, Indonesia has not. In fact, Portugal instituted proceedings against Australia in the International Court on February 22, 1991. However, Portugal neither challenged the validity of the Timor Gap Treaty, nor the use of force in the acquisition of the territory. Instead, Portugal emphasizes both Australia's obligation not to act contrary to the duties of Portugal as administering power, and the interests of the people of the territory. Portugal's Application was public at the time of writing, but not at its initial Memorial. Para. 1 of the Application reads:

1. The dispute relates to the opposability to Australia: (a) of the duties of, and delegation of authority to, Portugal as the administering Power of the Territory of East Timor; and (b) of the right of the people of East Timor to self-determination, and the related rights (right to territorial integrity and unity and permanent sovereignty over natural wealth and resources).

Portugal maintains that, in its capacity of administering Power within the meaning of Article 73 of the Charter, it is performing an international public ser-

Justice (I.C.J.) would so decide. Needless to say, in making this case, I do not mean in any way to minimize the blatant illegality of Indonesia's aggression against, and denial of self-determination to, East Timor. I have, indeed, addressed that issue at length elsewhere.²⁰ Apparently, the illegality of Indonesia's actions is not disputed by the Australian authorities,²¹ and has, of course, been duly noted in resolutions of the Security Council²² and the General Assembly.²³ One of the many tragedies of the

vice and that, so long as the United Nations has not discharged it from its responsibility, it is invested with the corresponding duties and powers, which continue to be opposable, as do the rights of the people of East Timor, *erga omnes*, and in particular to all the member States of the United Nations and hence to Australia.

2. The dispute has arisen from the actions, recounted below, by which Australia has, in the view of Portugal, failed to observe, at least, the obligation to respect the duties and powers of the administering Power as mentioned in the preceding paragraph, the right of the people of East Timor to self-determination and the related rights, and Article 25 of the Charter; Australia by so doing has incurred international responsibility vis-à-vis both the people of East Timor and Portugal.

Those activities, shortly stated, have taken the form of the negotiation and conclusion by Australia with a third State of an agreement relating to the exploration and exploitation of the continental shelf in the area of the "Timor Gap" and the negotiation, currently in progress, of the delimitation of that same shelf with that same third State.

Presumably, in spite of this effort to draft the pleadings in such a way as to emphasize Australia's breaches of international law rather than those of Indonesia, Australia will argue some variations on the theme that Indonesia is an indispensable party in the proceedings which should therefore not proceed. *See generally* Iain Scobbie, *The East Timor Case: the Implications of Procedure for Litigation Strategy* (unpublished manuscript of lecture given at various Portuguese universities, November 1991, on file with author).

²⁰ Clark, *supra* note 2. *See also* Paula Escameia, *Formation of Concepts Under International Law: Subsumption Under Self-Determination in the Case of East Timor* (unpublished S.J.D. dissertation, Harvard Law School, 1988).

²¹ As the Department of Foreign Affairs and Trade, *supra* note 14, put it, "[t]his recognition in no way implies approval of the circumstances of acquisition." *See also*, Statement by Senator Gareth Evans to Timor Gap Forum, Darwin, November 3, 1990 (on file with the author).

²² The Situation in Timor, S.C. Res. 384, U.N. SCOR, 30th Year, Resolutions and Decisions, at 10, U.N. Doc. S/INF/31 (1976) and S.C. Res. 389, U.N. SCOR, 31st Year, Resolutions and Decisions, at 18, U.N. Doc. S/INF/32 (1977).

²³ Question of Timor, G.A. Res. 3485 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 118, U.N. Doc. A/10034 (1976). The General Assembly continued to adopt resolutions critical of Indonesia through 1982. *See* G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 39, at 125, U.N. Doc. A/31/39 (1977); G.A. Res. 32/34, U.N. GAOR, 32d Sess., Supp. No. 45, at 169, U.N. Doc. A/32/357 (1978); G.A. Res. 33/39, U.N. GAOR, 33d Sess., Supp. No. 45, at 181, U.N. Doc. A/33/45 (1979); G.A. Res. 34/40, U.N. GAOR, 34th Sess., Supp. No. 46, at 206, U.N. Doc. A/34/46 (1980); G.A. Res. 35/27, U.N. GAOR, 35th Sess., Supp. No. 48, at 219, U.N. Doc. A/35/48 (1981); G.A. Res. 36/50, U.N. GAOR, 36th Sess., Supp.

Timor situation is, however, that otherwise law-abiding governments such as those of Australia, the United States and of my own country, New Zealand, have for political reasons not been prepared to take a stand on this issue, which I believe their own assessment of the facts should have required them to make. There are times when even one's friends should be called on to take responsibility, and this is one of them!

IV. THE DUTY NOT TO RECOGNIZE THE ACQUISITION OF TERRITORY THROUGH UNLAWFUL FORCE

In its simplest form, my argument is that, by entering into the Treaty, Australia breached an international obligation. This obligation is reflected²⁴ in two unanimously-adopted resolutions of the United Nations General Assembly: the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States,²⁵ and the 1974 Resolution on the Definition of Aggression.²⁶ The 1970 resolution was adopted in celebration of the occasion of the twenty-fifth anniversary of the organization, after a careful seven-year drafting period. The resolution provides that: "The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."²⁷ The scope of the 1974 resolution is perhaps narrower,²⁸ but in

No. 51, at 200, U.N. Doc. A/36/51 (1982); G.A. Res. 37/30, U.N. GAOR, 37th Sess., Supp. No. 51, at 227, U.N. Doc. A/37/51 (1983). The issue has remained on the agendas of the General Assembly and the Special Committee on Decolonization, but no substantive resolutions have been adopted in recent years. The Secretary-General has continued with endeavors to find a solution.

²⁴ "Reflected" is a little ambiguous, but has been chosen deliberately. See *infra* notes 48 and 52.

²⁵ G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

²⁶ G.A. Res. 3314 (XXIX) Art. 5, para. 3, 29 U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1975).

²⁷ G.A. Res. 2625 (XXV), *supra* note 25. The paragraphs are not numbered in this resolution.

²⁸ It provides "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful." Unlike the 1974 resolution, which speaks of "aggression", the 1970 resolution speaks of "threat or use of force." In the context of the territories occupied by Israel, debate has been joined about whether territory can be properly acquired following a *lawful* use of force - as in self-defense. See, e.g., Malvina

terms equally apposite to the Timor situation as characterized by the Security Council²⁹ and the General Assembly³⁰: "No territorial acquisition or special advantage resulting from aggression shall be recognized as lawful."³¹

The language of the 1970 Friendly Relations resolution is quite blunt and has a rather obligatory ring: "No territorial acquisition or special advantage resulting from the threat or use of force shall be recognized as legal."³² One might have thought, just from reading it, that it carried some obligations with it, moral or even legal. Note the mandatory sound of the word "shall" in a context where apparently less imperative provisions of the Friendly Relations instrument use the softer "should."³³ Moreover, one might have expected some embarrassment in ignoring it, since the Australian Government participated actively on the Committee that drafted the 1970 resolution and co-sponsored the draft when it reached the General Assembly.³⁴ Instead, Australian Senator Gareth Evans, a former law teacher and now Minister for Foreign Affairs and Trade, has on several occasions denied the relevance of the Friendly Relations Declaration. Responding to a question from Senator McIntosh, Senator Evans, in the Australian Senate on March 20, 1986, made the following claim: "I make it plain that the legal status of [the Friendly Relations] declaration, which is not a treaty in any sense, has long been very hotly contested."³⁵ On November 1, 1989, he repeated much of the language that he had used in 1986:

[W]e have taken the view since 1979 that whatever the unhappy

Halberstam, *Recognition, Use of Force and the Legal Effect of United Nations Resolutions Under the Revised Restatement of the Foreign Relations Law of the United States*, 19 ISR. L. REV. 495 (1984); JOHN DUGARD, *RECOGNITION AND THE UNITED NATIONS* 156 (1987). Dugard goes as far as to contend that even acquisition following lawful force is contrary to principles of *jus cogens*. (On *jus cogens*, see *infra* at note 90.) It is not necessary to pursue this line of debate here since the Indonesian actions come within the core meaning of *unlawful* force condemned by both resolutions.

²⁹ *Supra* note 22.

³⁰ *Supra* note 23.

³¹ Definition of Aggression, G.A. Res. 3314 (XXIX), *supra* note 26.

³² *Supra* text accompanying note 27.

³³ For example, G.A. Res. 2625 (XXV), *supra* note 25, at 123, asserts that states "should" co-operate in the economic, social and cultural fields, and "should" co-operate in the promotion of economic growth, especially that of the developing countries.

³⁴ 1970 U.N.Y.B. 787, U.N. Sales No. 3.72.I.1 (Australia one of 64 co-sponsors).

³⁵ Hansard, Senate, (Australia) 20 March 1986, at 1377.

circumstances and indeed, possible illegality, surrounding Indonesia's acquisition of East Timor in the mid-1970's, Indonesian sovereignty over that territory should be accepted not only on a de facto [sic] but on a de jure basis. There is no binding legal obligation not to recognize the acquisition of a territory that was acquired by force. Such a recognition does not, of course, imply approval of the circumstances of the acquisition. In international law the legality of the original acquisition of territory by a state has to be distinguished in subsequent dealings between the state acquiring that new territory and other states - in this instance, Australia.³⁶

More recently, on November 3, 1990,³⁷ Senator Evans added that "[t]his recognition does not mean that Australia condones the method of incorporation — on the contrary, the Government has been forthright in protesting the circumstances of incorporation."³⁸ I believe that the Senator is dead wrong on three fronts:

³⁶ Hansard, Senate, (Australia) 1 November 1989, at 2702. I am puzzled by the way the word "distinguished" is used in the last sentence. It also appears almost verbatim in other statements by the Minister. It seems to suggest that the legality of the acquisition is to be distinguished from something else, but the fragment of the sentence that explains the something else has not been included. I take it that the something else is the way other states treat the title in later dealings. If this is what it means, this sentence is a restatement of the basic point that there is no obligation to deny recognition to title acquired by aggression. This is the point that I dissent from in the text. Perhaps the Minister had in mind something like the position very tentatively advanced in R.Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* (1963), before the adoption of the 1970 and 1974 resolutions. Jennings asserts that "It seems therefore impossible any longer to concede that the successful seizure of another's territory by force, i.e. conquest, or subjugation, may be itself a lawful title to territory." *Id.* at 67. He goes on to discuss the case of "the State that has successfully seized possession of territory by illegal force and seems likely to stay." He writes: "It is suggested that in these circumstances it may eventually come about that a title by consolidation is acquired through recognitions or other forms of acknowledgment of the position expressive of the will of the international community." *Id.* See also *id.* at 64, suggesting that there should be "some collectivization of the process, possibly through the United Nations itself which would, one must presume, have been involved already in dealing with the illegal resort to force." Perhaps Australia should sponsor a resolution in the General Assembly recognizing Indonesia's "consolidation" of its position!

³⁷ Senator Gareth Evans, Statement to the Timor Gap Forum, *supra* note 21, at 3.

³⁸ In light of this statement, which is part of a consistent pattern of Australian statements, Australia is surely precluded from now arguing that, contrary to the assessment of others, what the Indonesians did was perfectly legitimate. Had Australia from the start argued that the incorporation was legal, it could now, at least as a rhetorical posture, tough out the contrary assessment of others (including a majority of the General Assembly) and argue that, on the facts as Australia sees it, the norm of non-recognition does not apply. My position is simply that a state like Australia, acting in good faith on

he is wrong about the status of the Declaration on Friendly Relations being hotly contested; he is wrong about there being no legal obligation to comply with its requirement of non-recognition; and he is wrong in the suggestion that his Government has paid its international dues once it "has been forthright in protesting the circumstances of incorporation."³⁹ Australia has an obligation to go beyond that.

An understanding of the nature of General Assembly resolutions and their role in the creation of international law is necessary to discuss a resolution's binding effect on U.N. Member States. During the drafting of the U.N. Charter,⁴⁰ an effort to give the General Assembly a broad legislative power failed.⁴¹ Moreover, Article 38 of the Statute of the International Court of Justice, which describes "international law"⁴² at least for the purposes of the jurisdiction of the Court, and which is widely regarded as generally more useful,⁴³ makes no reference to resolutions of international organizations amongst its "sources" of law. Article 13 of the United Nations Charter does, however, empower the General Assembly to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification."⁴⁴

the basis of its own assessment of the facts, must apply the rule of non-recognition. Because of the clarity of the facts, Senator Evans has found it necessary to try to take the high ground and deny the legal status of the obligation.

³⁹ No doubt there are those who dispute the forthrightness of the Australian protests.

⁴⁰ U.N. CHARTER (1945).

⁴¹ A proposal to this effect (subject to further approval by a majority vote in the Security Council) by the Philippines was rejected 26-1 in Commission II at the 1945 San Francisco Conference. 9 U.N.C.I.O. Docs. 316 (1945).

⁴² Article 38 of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE [hereinafter I.C.J. STATUTE] refers to four sources:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted by law;
- (c) the general principles of law recognized by civilized nations; and
- (d) subject to Article 59, judicial decisions of the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁴³ See, e.g., the reference to it in 83 of the 1982 Convention on the Law of the Sea, *supra* note 8.

⁴⁴ U.N. CHARTER art. 13, para. 1.

The difference between the two terms progressive development and codification used in the Charter is explained in article 15 of the [International Law] Commis-

There are two ways in which some widely accepted General Assembly resolutions can become law: either by custom or by an authentic interpretation of the U.N. Charter. Article 38 of the I.C.J. statute lists among its sources "international custom, as evidence of a general practice accepted by law."⁴⁶ Customary law is composed of two elements: (1) state practice and (2) an indication that the practice is regarded by states as legally binding rather than coincidentally concordant.⁴⁶ The second element is usually referred to in its Latin form - *opinio juris*.⁴⁷ Traditionally, before the latter part of the nineteenth century and the rise of international organizations, most state practice and expression of *opinio juris* took place in a bilateral setting. But all that has changed, particularly with the dramatic alteration in the nature of diplomacy brought about by the birth of the United Nations and its subsequent membership by many new nations.

Against this backdrop, assume that all the states of the United Nations (or even most of them) were to behave in a particular way, pursuant to Article 13 of the U.N. Charter, by adopting a resolution espousing a particular point of international law, and that they were to express their *opinio juris* in that resolution, either expressly or impliedly.⁴⁸ Such actions must in appropriate cases contribute to customary international law, perhaps in a definitive fashion where the practice is deemed unequivocal.⁴⁹

sion's Statute. For convenience codification is used as meaning the more precise formulation and systematization of rules of public international law in fields where there has already been extensive State practice, precedent and doctrine. Progressive development is used as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not been sufficiently developed in the practice of States.

SHABTAI ROSENNE, *PRACTICE AND METHODS OF INTERNATIONAL LAW* 73 (1984).

⁴⁶ I.C.J. STATUTE *supra* note 42, at art. 38, para. 1.

⁴⁶ Ian MacGibbon, *Means for the Identification of International Law*, *INTERNATIONAL LAW: TEACHING AND PRACTICE* 10, 19 (Bin Cheng ed., 1982).

⁴⁷ "For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation. . . ." *Restatement (Third) of Foreign Relations Law*, § 102 cmt. c. (1987).

⁴⁸ See *infra* note 52.

⁴⁹ See Richard A. Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966); and see generally, American Law Institute, *Restatement (Third) of Foreign Relations Law* § 102, cmts. b and c and Reporters' Note 2 (1987) and authorities cited therein espousing the basic view suggested in the text.

Suppose further that all or most of the parties to an international treaty such as the Charter of the United Nations adopt, after exhaustive discussion, a set of rules that spell out some of the details of a number of the general principles contained in the treaty. Might not this be fairly assimilated to the treaty itself?⁵⁰ Such an effort is sometimes referred to as an "authoritative interpretation" of the treaty in question.⁵¹

With this discussion on the role of General Assembly resolutions in mind, let me return to the Declaration on Friendly Relations. My case is that it represents either a customary rule or an authoritative interpretation of the Charter, and thus should have the full and binding force of International Law.

The Friendly Relations Declaration asserts that it is concerned with the progressive development and codification of the principles addressed within it.⁵² Contrary to Senator Evans' position, I do not believe the status of the Declaration on Friendly Relations was ever hotly debated.

I have searched the literature in vain for evidence of this hot debate. We do not have the benefit of Senator Evans'

⁵⁰ Unlike some constitutions that grant a power to make definitive interpretations of the constitution to a particular organ of government — typically a Court — the Charter is silent on who has the final power of interpretation. This means that, in the first instance at least, the General Assembly can make its own determination. See United Nations Conference on International Organization, Report of Rapporteur of Committee IV/2, San Francisco 1945, excerpted in FREDERIC L. KIRGIS, *INTERNATIONAL ORGANIZATIONS IN THEIR LEGAL SETTING* 382 (1977). If an organ such as the General Assembly asks the Court for advice, the Court at least gives considerable weight to what the organ has done in the past. See Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16.

⁵¹ Montreal Statement of the Assembly for Human Rights, March 22-27, 1968, in 9 J. INT'L COMM'N JURISTS 94 (1968); RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 127 (2d ed. 1991). See also Vienna Convention on the Law of Treaties art. 31 (3) (b), U.N. Doc. A/CONF. 39/27 (1969), which asserts that in interpreting a treaty, there shall be taken into account, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

⁵² See the Declaration, *supra* note 25, preambular para. 17. Article 13 of the Charter speaks both of "progressive development" and of "codification." U.N. CHARTER art. 13, §1. Where a rule is in the fluid stage, reasonable people might differ about whether its clarification amounts to mere codification or whether more is being done to develop it. My point about the Friendly Relations Declaration is that whether it codified or developed does not particularly matter. Whatever the case, the development was complete by then.

sources for his assertion.⁵³ I thought that the obvious place to look was at the preparatory work on the drafting of the Declaration on Friendly Relations, to see whether the Australian representatives involved in its drafting had placed on the record some specific reservations about the whole exercise or some substantial part of it. However, no such reservation was made. On May 1, 1970, the Australian representative on the special committee of thirty-one states that drafted the Declaration on Friendly Relations stated:

[H]is delegation was pleased at the progress reflected in the draft declaration and paid a tribute to those who had contributed to its production. The task of the Committee had not been to amend the Charter but, in accordance with Article 13 [of the Charter], to elaborate some of its most important principles for the purpose of encouraging the progressive development and codification of international law.⁵⁴

He also made some remarks that may well have been aimed at Indonesia for its "confrontation" against Malaysia in 1963-66 in which it used guerilla tactics to further territorial claims, efforts that Australia helped to overcome.⁵⁵

The inclusion in the principle on the non-use of force of a paragraph stating that States had a duty to refrain from organizing or

⁵³ It is believed that the government received some unpublished advice on the matter in general from Professor Don Greig of the Australian National University. Laurie Ferguson, a member of the Australian House of Representatives, endeavored to obtain a copy of this unpublished material. His efforts were rebuffed by the Department of Foreign Affairs and Trade. After some discussion about the benefits for Australia "in terms of strengthening our ties with an important regional neighbor and providing an interim solution to a maritime boundary dispute" the departmental response continued: "[y]ou will appreciate therefore that it is Government policy not to make public any confidential and privileged legal advice which may have been prepared in reaction to the treaty. The release of such material would be contrary to the national interests which the Government is seeking to promote." Letter from Department of Foreign Affairs and Trade to Laurie Ferguson, Member for Reid, dated Sept. 6, 1990 (on file with the author).

⁵⁴ Report of the Special Committee on Principles of International Law Concerning Friendly Relations And Co-operation Among States, U.N. GAOR, 25th Sess., Supp. No. 18, at 104, U.N. Doc. A/8018 (1970). For a definition of progressive development and codification, see *supra* note 44. (The particular Australian speaker is not identified in the text of the Report. It was presumably either Mr. Owen Davis, listed in the Annex to the Report as "Representative", or Mr. David Evans, listed as "Alternate.")

⁵⁵ See generally J.A.C. MACKIE, *KONFRONTASI: THE INDONESIA-MALAYSIA DISPUTE 1963-1966* (1974). The remarks may also have been prompted in part by Australia's involvement in the Vietnam War.

encouraging the organization of any form of irregular forces or armed bands was essential. So too, were references to the prohibition on organizing or participating in actions of civil strife in another State. These activities were unfortunately present in the area of which Australia formed a part, namely in South East Asia, and were a breach of Article 2 (4) of the Charter.⁵⁶

In this statement, the representative of Australia appears to support the proposition (which does not seem to be disputed) that this part of the Declaration on Friendly Relations amounted to a spelling out of the broad generalities of Article 2, paragraph 4 of the Charter. He also addressed himself to the role of General Assembly resolutions more generally in creating international law. Singling out the sixteenth preambular paragraph of the Declaration on Friendly Relations,⁵⁷ he said:

On preambular paragraph 16, the Australian view was that General Assembly resolutions were recommendatory and not binding upon Member States. *Resolutions of the General Assembly could therefore play on [sic. only?] a limited role in relation to the interpretation of the declaration.* There would be different ideas about which resolutions, or parts thereof, were relevant, and in any case they could not be understood as overriding or amending provisions of the Charter.⁵⁸

This is hardly a vigorous attack on the legal status of the Declaration. Indeed, the statement seems to concede that the Declaration on Friendly Relations has some such status but is aimed at preventing the Declaration from bootstrapping up some other (unnamed and perhaps unknown) resolutions that the representative feared might surface to cause trouble. The argument goes to weight and relevance in particular cases and refers to other resolutions, not to the Declaration on Friendly Relations. And, of course, this argument is correct. Some resolutions simply do

⁵⁶ Report of the Special Committee on Principles of International Law Concerning Friendly Relations And Co-operation Among States, U.N. GAOR, 25th Sess., Supp. No. 18, at 104, U.N. Doc. A/8018 (1970).

⁵⁷ "Considering the provisions of the Charter as a whole and taking into account the role of relevant resolutions adopted by the competent organs of the United Nations relating to the content of the principles. . . ." G.A. RES. 2625 (XXV), *supra* note 25.

⁵⁸ *Supra* note 56. (Author's emphasis.) It appears from the Summary records of the Sixth Committee of the General Assembly that a Mr. Brennan repeated the same speech for Australia on Sept. 23, 1970. U.N. Doc. A/C.6/SR. 1178 at 8-9 (1970).

not command the respect that the Friendly Relations one does, and thus lend less support to the notion that such resolutions should be given the force of law.

As vigor goes, however, this statement seems to have been the most vigorous assertion in the debates. Robert Rosenstock, a leading commentator on the Declaration on Friendly Relations and Adviser on Legal Affairs of the United States Mission to the United Nations, is not a bold proponent of the law-making power of General Assembly resolutions. He makes the following comment, worth quoting at some length:

There is some difference of opinion among Members of the United Nations as to whether the Declaration represents a mere recommendation⁵⁹ or a statement of binding legal rules. The truth would appear to lie somewhere between these two extremes, but closer to the latter. Two considerations point to the more limited view as to the effect of the adoption of the text on the state of international law. The first is that there is no difference in United Nations practice between the term "declaration" and "recommendation." Secondly, statements accepted by the San Francisco Conference limit to some extent the efficacy of efforts at interpretation other than through the amendment route. The principles involved, however, are acknowledged by all to be principles of the Charter. By accepting the respective texts, states have acknowledged that the principles represent their interpretations of the obligations of the Charter. The use of "should" rather than "shall" in those instances in which the Committee believed it was speaking *de lege ferenda* or stating mere *desiderata* further supports the view that the states involved intended to assert binding rules of law where they used language of firm obligation.⁶⁰

Perhaps I was clutching at straws in an attempt to make Senator Evans' case. In any event, the death knell to the Evans

⁵⁹ Here Rosenstock cites the Brennan statement in the Sixth Committee, *supra* note 58. In my view it is not even as strong as Rosenstock reads it, or even relevant since it is addressed to *other* resolutions.

⁶⁰ Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 714-15 (1971) (footnotes omitted). The Indonesian representative, Mr. Rachmad, was at the binding end of the spectrum. "He agreed with other delegations that the formulation of the seven principles was of a legal character and hoped that it would receive widespread support when it was considered by the General Assembly." U.N. Doc. A/C.6/SR.1182 at 33 (1970) (emphasis added).

argument regarding a hot contest was surely sounded by the I.C.J. decision in the Case Concerning Military and Paramilitary Activities In and Against Nicaragua.⁶¹ That case concerned the United States support of the *contras* who were fighting against the Nicaraguan government. Because of the jurisdictional stance of the case,⁶² Nicaragua was not able to rely on arguments based on Article 2, paragraph 4 of the United Nations Charter and analogous provisions of the Organization of American States Charter. Nicaragua was therefore constrained to make a customary law argument based in substantial part on the Declaration on Friendly Relations. After noting that both Nicaragua and the United States had accepted the treaty obligation to refrain from the use of force contained in Article 2, paragraph 4, the Court continued:

The Court has, however, to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles on International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations". The effect of consent to the text of such resolutions cannot be understood as merely that of a "reiteration or elucidation" of the treaty commitment undertaken in the Charter. On the contrary, *it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves*.⁶³

⁶¹ Case Concerning Military and Paramilitary Activities In and Against Nicaragua, 1986 I.C.J. 14.

⁶² The United States' 1946 acceptance of the jurisdiction excepted "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to the jurisdiction." The Court found that El Salvador, at least, was a party "affected." 1986 I.C.J. 14, 38.

⁶³ 1986 I.C.J. 14, 89-90. (Author's emphasis.) The Court seems to have taken for granted that there was plenty of supporting state practice and that all that remained was the *opinio* problem. The Court went on to note the expression of the same principle in the resolution of the Sixth Annual Conference of American States condemning aggression (Feb. 18, 1928), the Montevideo Convention on Rights and Duties of States (Dec. 26, 1933) and the Helsinki Accords of 1975. In context, in referring to these items, the Court was addressing the *opinio juris* of the United States which this represented. Even

In short, Senator Evans' argument that legal status of the Declaration on Friendly Relations is hotly contested is a shaky one. In fact, there is strong authority that it represents a legal obligation. In the Nicaragua case, the Court was of course addressing itself to the basic rule on the non-use of force, rather than the corollary about the non-recognition of the fruits of illegal force.⁶⁴ But the 1970 formulation came as a package and I can find no statements anywhere to the effect that some parts of the package are less obligatory than others.

The Declaration on Friendly Relations rule of non-recognition was developing in international law for half a century.⁶⁵ The Declaration did not suddenly arrive on the scene in 1970. Some have traced the doctrine back to Article 10 of the League of Nations Covenant;⁶⁶ some to the Kellogg-Briand Pact under which the parties renounced war as an instrument of national policy in their relations with one another;⁶⁷ and others to Article 2, paragraph 4 of the U.N. Charter.⁶⁸ I would certainly rely upon the cumulative effect of much reiteration of the doctrine. Robert Langer, author of the 1947 work *Seizure of Territory*, asserted the existence of a legal obligation not to recognize territorial changes effected by force.⁶⁹ Another author, Ian Brownlie, es-

if the *opinio* of such acts cannot be attributed to Australia, there is certainly plenty of state practice represented in such events. Australia's *opinio* is demonstrated by the Charter itself and by Resolution 2625 (XXV).

⁶⁴ 1986 I.C.J. 14.

⁶⁵ This is why I chose the word "reflected" earlier to describe what the 1970 resolution does with the principle - the resolution merely crystallizes what had long been developing, if not developed.

⁶⁶ "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all the Members of the League. In case of any threat or danger of such aggression the Council should advise upon the means by which this obligation shall be fulfilled."

⁶⁷ Treaty Providing for the Renunciation of War as an Instrument of National Policy, done at Paris, Aug. 27, 1928, 94 L.N.T.S. 59 (1929).

⁶⁸ "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

⁶⁹ ROBERT LANGER, *SEIZURE OF TERRITORY: THE STIMSON DOCTRINE AND RELATED PRINCIPLES IN LEGAL THEORY AND DIPLOMATIC PRACTICE* (1947). Langer refers, as state practice, notably to the Stimson notes on Manchuria to Japan and China on Jan. 7, 1932 and the subsequent reaffirmations of the principles therein; the Resolution of the League of Nations Assembly of March 11, 1932, also on Manchuria; the Chaco Declaration of Aug. 3, 1932 by 19 American republics asserting non-recognition of territory obtained by conquest; the Saavedra Lamas Anti-War Treaty of Oct. 10, 1933; the Montevideo Con-

poused a similar position in 1963 in his work *International Law and the Use of Force by States*.⁷⁰ Furthermore, the rule of non-recognition has been applied in subsequent United Nations practice. For example, in one of its resolutions on Iraq's invasion of Kuwait, the Security Council insisted that "annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void." It called upon all states and international organizations "not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation."⁷¹

Furthermore, there is the matter of the 1974 General Assembly Resolution on Definition of Aggression.⁷² Not wishing to belabor the point, I merely note that the legislative history of that resolution demonstrates no hot debate either. I have found no statements by Australia, or anyone else, disassociating themselves from the principle of non-recognition. Australia was a member of the Committee that labored for seven years on the

vention on the Rights and Duties of States of Dec. 21, 1933. *Id.* at 95. See also his discussion of Article 10 of the Covenant of the League of Nations and attempts to either amend or interpret it (depending on your point of view) so as to assert a rule of non-recognition. *Id.* at 40-49.

⁷⁰ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 418 (1963). See also JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 106-107, 122-23, 418-19 (1979). Crawford speaks of a general principle that *ex injuria jus non oritur*. Much of the literature, and state practice, deals with non-recognition of the Soviet acquisition of the Baltic States. See, e.g., Heino Ambros, *Nonrecognition - Its Development in International Law and Application by the United States With Particular Reference to the Baltic States* (unpublished Ph.D. thesis, New York University, 1965); William J.H. Hough III, *The Annexation of the Baltic States and its Effect on the Development of Law Prohibiting forcible Seizure of Territory*, 6 N.Y. L. SCH. J. INT'L & COMP. L. 301 (1985); KRISTYNA MAREK, *IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW* 398-416, 551-587 (1968).

⁷¹ S.C. RES. 662, adopted on 9 August 1990, U.N. SCOR, 45th Year, Resolutions and Decisions, at 2, U.N. Doc. S/INF/46 (1991). I suppose that Australia might try to respond that the situations are different because the Security Council did not adopt such a resolution in the case of East Timor. The answer to this is that the obligation not to recognize arises from the general law - not from the Security Council resolution. In the case of Iraq, the political forces were such that it was possible for the Security Council to remind states of their obligations under the law. See also operative para. 5 of G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 29, at 125, U.N. Doc. A/31/39 (1977) in which the General Assembly (Australia abstaining): "Rejects the claim that East Timor has been integrated into Indonesia, inasmuch as the people of the territory have not been able to exercise freely their right to self-determination and independence." The General Assembly spoke strongly for the international community.

⁷² *Supra* note 28.

drafting of the resolution and was a co-sponsor when it was adopted by a unanimous General Assembly.⁷³ The relevant language in the 1974 Resolution on the Definition of Aggression is written in equally mandatory terms to the 1970 formulation, even if its field of application is arguably narrower in ways not relevant in the present context.⁷⁴ Once again, non-recognition was stated in the language of obligation and Australia was deeply involved in the acceptance of that language by the Assembly.

To summarize, the Australian Government had an international obligation not to recognize Indonesia's forcible acquisition of the territory of East Timor.⁷⁵ Merely being "forthright in protesting the circumstances of incorporation"⁷⁶ is not enough.

One might reasonably ask how I think Australia might have behaved differently. I believe that the principled position for Australia to take was to refuse to deal with the Indonesians, even if this meant that the boundaries of the continental shelf would not be delimited and the area in question would remain, for the foreseeable future, unexploited. There is nothing obviously obnoxious about leaving resources untapped for reasons of principle. For example, consider the case of Antarctica,⁷⁷ in respect of which Australia has played a leading protective role.

⁷³ U.N. Doc. A/C.6/SR.1502 at 227 (1974). According to the representative of Indonesia, Mr Wisnoemoerti:

His delegation welcomed Article 5, in particular the third paragraph, which reaffirmed the principle of international law according to which any territorial acquisition resulting from the threat or use of force was inadmissible and should not be recognized.

U.N. Doc. A/C.6/SR.1482 at 110 (1974).

⁷⁴ *Supra* note 28.

⁷⁵ In an earlier writing, *see supra* note 2, I made the point that Indonesia's action breached the separate norm of self-determination as well as the proscription of the use of force, and both points are made in the relevant Security Council and General Assembly resolutions deploring the Indonesian military intervention. One can probably argue that international law also requires that such a denial of self-determination independently requires non-recognition. However, this point is not as developed either in state practice or in the literature. In view of the strength of the case concerning use of force, it is not necessary to pursue the denial of self-determination for the purposes of the present analysis. *See also infra* note 91, on self-determination and *jus cogens*.

⁷⁶ Senator Evans, *supra* note 38.

⁷⁷ M. Browne, *France and Australia Kill Pact on Limited Antarctic Mining and Oil Drilling*, N.Y. TIMES, Sept. 25, 1989, at A 10, col. 1; David C. Scott, *Australia Advocates "Wilderness" Status for Antarctica*, CHRISTIAN SCIENCE MONITOR, May 24, 1989, at 4.

But let me, for the purposes of argument only, concede what I believe is the kernel of the Australian position: at some point it is necessary to "get on with it" and accept that the Indonesians are in control and that they must be dealt with to some degree. There is, indeed, some force to this argument. There are situations which may arise that make it necessary to deal with the Indonesians, such as humanitarian arrangements for refugees, questions on the validity of a marriage or divorce arising in an Australian court or even an international tribunal, or the registration of a birth performed by Indonesian authorities in East Timor after the takeover. In these situations it is probable that some exceptions will be made. The hard question is where to draw the lines.⁷⁸ In a comparable case regarding the illegal occupation of Namibia the I.C.J. released an advisory opinion indicating that such exceptions must be narrowly drawn.⁷⁹

How might that line of reasoning apply to the Timor Gap? I suggest this reasoning indicates that if some treaty arrangement has to be made, it must be one which itself asserts the basic non-recognition principle, and further reserves a position on this point. Apparently no attempt was made to do this. The Australian authorities conceded from the very beginning of the treaty negotiations that dealing with the Indonesians on the issue required that they accept and recognize Indonesian sovereignty *de jure*.⁸⁰

⁷⁸ See generally Hans Blix, *Contemporary Aspects of Recognition*, 130 R.C.A.D.I. 589, 662-65 (1970).

⁷⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 56:

In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

For a similar discussion by the Privy Council, see *Madzimbomuto v. Lardner-Burke* [1968] 3 ALL ENG. REP. 561 (illegal Rhodesian regime).

⁸⁰ The concession appears to have taken place as early as February 1979. See, e.g., statement by Senator Evans, Australian Hansard, Senate, 18 October 1988, at 1525. I have yet to be persuaded of the inevitability of this position. I do not see why as a legal/diplomatic position they could not have dealt with Indonesia insisting that they were

Yet why should this be so? And where is the authority for this position in international law? Surely it is not beyond the wit of the diplomatic mind to say something like "I am dealing with you because necessity demands, but I do not thereby concede your legitimacy." Nothing like this seems to have been attempted. Indeed, the Indonesians apparently went out of their way to rub the Australian negotiators' noses in the Indonesian position and the Australians acquiesced. Note the title of the Treaty: it refers to "An Area Between *the Indonesian Province of East Timor* and Northern Australia." If Australia objects to the mode of incorporation, why would it not insist all along on a formula such as "the territory currently under the *de facto* control of Indonesia"⁸¹ or something of that ilk. I am certainly not privy to any departmental material on the drafting history of the Timor Gap Treaty, but it does seem to me that the Austra-

conceding *de facto* but not *de jure* control. Much modern state practice (but apparently not Australia's) downplays the difficult distinction between *de facto* and *de jure* recognition, and indeed formal recognition in general. The distinction has always seemed to be one of degree, with *de jure* coming after some significant passage of time indicating a greater degree of permanency. *De jure* recognition, because of its name, inevitably carries with it some connotation of prescriptive legitimacy. The absolutely weakest possible interpretation of the non-recognition principle is that it forbids explicitly granting *de jure* recognition. See Blix, *supra* note 78, at 664 (emphasis in original.): "It is believed that this formula [in the 1970 Declaration] may be interpreted to mean that *no formal admission* may be made of the *legality* of a forcible acquisition as described." This would permit some accommodation of the aggressor while still making the basic point about illegitimacy. Obviously, I think the obligation goes beyond that. For an example of Australia's (shifting) recognition policy, including its unique recognition and de-recognition of the Soviet Union's *de jure* sovereignty over the Baltic States, see Keith Suter, *Australia's New Policy on Recognizing Governments*, 61 *AUSTL. Q.* 59 (1989).

⁸¹ I have in mind the language of the Boundary Agreement between China and Pakistan of 2 March 1963, which admits that India (and possibly the Kashmiris themselves) may have some claims to the area in question, by speaking of "the alignment of the boundary between China's Sinkiang and the contiguous areas the defence of which is under the actual control of Pakistan." Text in 2 *I.L.M.* 541 (1963). Six of the treaty reads:

The two Parties have agreed that after the settlement of the Kashmir dispute between Pakistan and India, the sovereign authority concerned will re-open negotiations with the Government of the People's Republic of China, on the boundary, as described in Article Two of the present Agreement, of Kashmir, so as to sign a Boundary Treaty to replace the present Agreement.

Provided that in the event of that sovereign authority being Pakistan, the provisions of this Agreement and of the aforesaid protocol shall be maintained in the formal Boundary Treaty to be signed between Pakistan and the People's Republic of China.

lian negotiators fell over themselves to accommodate the Indonesian position on incorporation right from the start. Even accepting their premise that some deal had to be cut, I am not persuaded that it was lawful to cut one that gives away so much on the recognition point.⁸²

Moreover, when the Treaty shares out the proceeds of exploitation of the area, why did Australia not insist on putting some of its share, along with Indonesia's, in a trust fund for the people of East Timor? In a 1990 speech, Senator Evans commented that the Australian recognition of the Indonesian incorporation means that "Australia has been able to work together constructively and effectively with the Indonesian authorities in improving the economic situation of the people of East Timor."⁸³ I believe that this is not a contention that the profits from the exploitation of the area will benefit the people of Timor as a matter of treaty obligation, although there may be some benefits derived in practice. It is true that the Treaty refers to the desire of the Governments to "cooperate further for the mutual benefit of their peoples in the development of the resources of the area"⁸⁴ and to taking "appropriate measures to

⁸² There is one other possible line of inquiry as to this aspect of the situation. The Treaty is "provisional" in nature in the sense that it is an "interim" solution pending a final agreement on the delimitation of the continental shelf. It will last, however, for a minimum of 40 years. See the first preambular paragraph and 33 of the Treaty. In an article in *Background Magazine*, Vol. 1, No. 8 on 23 February 1990, entitled *Australia Rejects Portuguese Criticism of Timor Gap Treaty*, the Australian Department of Foreign Affairs and Trade emphasized this interim point. The Department commented:

The treaty itself contains provisions to the effect that it will not prejudice the position of either Australia or Indonesia in respect of permanent delimitation of the continental shelf in the Zone of Cooperation. Therefore Australia does not concede that any sovereign rights over seabed resources that appertain to the land mass of East Timor in fact extend into the Zone of Cooperation.

The assertion that the people of East Timor have permanent sovereign rights over the seabed resources in the Zone of Cooperation is not accepted by Australia. Consistent with this position is the fact that Australia had never conceded, prior to 1975, any Portuguese interest in the area of seabed forming part of the Zone of Cooperation.

In short, the interim nature of the solution is not meant as a device to protect the rights of the people of East Timor, if any. They are cut out of the deal. Again, it should have been possible to draft language which expressly protected the position of an eventually separate East Timor - even while disagreeing about what its legal rights might be. But this was not done.

⁸³ Statement to Timor Gap Forum, *supra* note 21.

⁸⁴ Treaty, preambular para. 5.

ensure that preference is given in employment in Area A to nationals and permanent residents of Australia and the Republic of Indonesia.”⁸⁵ But here, “Indonesia” probably means “Jakarta” - there is not a word in the Treaty about anything for the people of Timor. Why should not one or both of the parties to the Treaty be earmarking some of the proceeds for the people of East Timor?

V. THE TREATY IS NULL AND VOID

I come then to the point that the Timor Gap Treaty should be regarded as a nullity under international law. There is a fairly fundamental assumption, but I think a plainly correct one, in what follows: If Australia and Indonesia were to embark on a judicial or arbitral delimitation⁸⁶ of the relevant parts of the continental shelf,⁸⁷ a decision entitling Australia to the whole of areas A, B and C is almost inconceivable. My guess is that they would succeed in respect to Area B, and possibly some of Area A, but probably none of Area C. If they were to win with respect to all three areas, my argument about recognition, while it would be relevant to the actual territory of East Timor, would be irrelevant with respect to territory that by virtue of the delimitation would belong to Australia. Australia is presumably entitled to give away some of its own resources to its good neighbor. My contention of course is that, far from giving away its own resources, it is engaged with an aggressor in sharing out someone else's resources. The Timor Gap Treaty, in some significant part, divides up resources obtained by aggression even if, in the absence of a final delimitation, one cannot be sure exactly which part this is.

⁸⁵ Treaty, operative para. 24.

⁸⁶ Delimitation is “[t]he act of fixing, marking off, or describing the limits or boundary line of a territory, country, authority, right, statutory exception or the like.” BLACK’S LAW DICTIONARY 427 (6th ed. 1990). 83 of the United Nations Convention on the Law of the Sea, on delimitation of the continental shelf between states with opposite or adjacent coasts, speaks of achieving “an equitable solution” on the basis of international law. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 83(1) at 29-30. There is much learning and numerous instances determined by third-party dispute-settlement and procedures, but the outcome in a particular case is not highly predictable. Many of the authorities are mentioned in Cook, *supra* note 18.

⁸⁷ *Supra*, text accompanying note 15.

There are at least two lines of argument why I believe this effort to be null and void. I shall call them the "Nemo Dat" and "Jus Cogens" arguments. They both lead inexorably to the same conclusion.

(i) *Nemo dat quod non habet*

Ian Brownlie, in his leading text on public international law, notes that the maxim *Nemo dat quod non habet*, the principle that you cannot give a better title than you have, is a "familiar feature of English commercial law, and the principle which the maxim represents is undoubtedly a part of international law."⁸⁸ A domestic law analogy helps to grasp the point: I buy your car from a thief. You find me in possession of it. You are entitled to have your car back, and I must seek redress from the thief for the purchase price of the car. This is true whether or not I know of the circumstances of the thief's acquisition. The thief gets no title, and I cannot get a good title through the thief. Notice that in domestic law my legal problems get potentially worse, much worse, if it can be shown that I knew of the thief's thievery. Then I may be a receiver of stolen property or an accessory after the fact. I would thus be liable to criminal sanctions, as well as to suit in tort or delict.⁸⁹ Australia seems to be in this worse

⁸⁸ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 125 (4th ed. 1990). Brownlie refers to the *Island of Palmas* case (*Netherlands v. U.S.*) 2 R.I.A.A. 829 (1928). The Arbitrator held that Spain could transfer no more territorial rights under the 1898 Treaty of Paris than she herself had. In particular Spain could not transfer Dutch territory forming part of the Netherlands Indies (now Indonesia).

⁸⁹ I have not explored this line of thought in depth in the international area, but it leads quickly into two other bodies of material that at least characterize the Indonesian effort: (1) The invasion was an international crime as understood in the General Assembly's Reaffirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. RES. 95 (I), U.N. GAOR, 1st Sess., Resolutions, at 188, U.N. Doc. A/64/Add.1 (1946) (crime by individual), in 19 of the International Law Commission's draft on State Responsibility, Report of the International Law Commission on the Work of its Twenty-Eighth Session, U.N. GAOR, Supp. No. 10, at 174, U.N. Doc. A/31/10 (1976) (crime by state), and in 15 of the Draft Articles on the Draft Code of Offenses Against the Peace and Security of Mankind with commentary thereto adopted by the International Law Commission on first reading (unnumbered 1991 U.N. Doc. on file with author) (individual criminal responsibility). Moreover, there was serious talk about the criminal responsibility of a certain Iraqi leader whose actions sound rather like some of those in East Timor. See, e.g., "International Law Mavens Picture New Order," *NAT. L.J.*, Feb. 11, 1991, at 5. (2) The invasion was a breach of an obligation *erga omnes*, as that concept was floated by the dicta of the I.C.J. in the *Case Concerning The Barcelona*

position since it has known the circumstances all along. But it does not seem necessary to pursue the argument that far. On any theory, Australia cannot get a good title through the bad Indonesian one.

(ii) *Jus cogens*

Alternatively, the Treaty is null and void based on the principle of *jus cogens*.⁹⁰ Article 53 of the Vienna Convention on the Law of Treaties (a treaty to which Australia acceded without reservation in 1974) provides for what it calls Treaties Conflicting with a Peremptory Norm of General International Law (*Jus Cogens*):

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁹¹

The exact scope of Article 53 is disputed, notably the categories of breaches of international law to which it applies. One thing, though, is stunning: the basic Charter/Friendly Relations Declaration rule proscribing the use of force is on every significant commentator's list of *jus cogens* norms, starting with the Commentary by the International Law Commission which drafted the Convention.⁹² If Australia were to enter into an arrangement

Traction, Light and Power Company, Limited (Judgment), 1970 I.C.J. 4, at 32, which lists "acts of aggression" as one of the breached rights which, in view of their importance, all states can be said to have a legal interest in their protection. Does this mean that someone other than Portugal or the Timorese can enforce against Indonesia the right of East Timor not to be forcibly taken off the map? Where does this lead on a complicity argument with Australia?

⁹⁰ I do not wish to overstate the distinctiveness of the two arguments — they may well be essentially alternative modes of expressing the same point.

⁹¹ Vienna Convention on the Law of Treaties, 53, U.N. Doc. A/CONF.39/27 (1969).

⁹² [1966] 2 Y.B. INT'L L. COMM'N 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1. See also the most comprehensive discussion of the topic to date LAURI HANNIKAINEN, PEREMPTORY NORMS (*JUS COGENS*) IN INTERNATIONAL LAW 163-64, 323-56 (1988); And see Crawford, *supra* note 69, at 81. The right to self-determination is listed by many scholars as a norm of *jus cogens*. See Hannikainen at 357-424. But see Crawford, *id.* See G.A. RES. 35/118, U.N. GAOR, 35th Sess., Supp. No. 48, at 21, U.N. Doc. A/37/48 (1980), the

with Indonesia to jointly invade and take over the territory of East Timor, that agreement would clearly be void under the peremptory norm doctrine. Logically, the same result follows if the territory is shared out after the invasion, even if Australia had completely clean hands at the point of conquest.

VI. CONCLUSION

The way in which Australia has attempted to avoid the application of one or other of these arguments is by suggesting that its recognition of Indonesian title gets it off the hook. In my humble submission this simply will not fly, for the reasons I suggested earlier in the paper. The sleight of hand in trying to avoid the problem by "recognizing" Indonesia's title will not work under the modern international law which Australia itself helped to create. This law provides for the non-recognition of territories acquired by the use of force. Thus, the recognition itself is void!

Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, in para. 5 of which the General Assembly:

Categorically rejects any agreement, arrangement or unilateral action by colonial and racist Powers which ignores, violates, denies or conflicts with the inalienable rights of peoples under colonial domination to self-determination and independence.

Thus, the right to self-determination of the Timorese supports a separate argument for the treaty being void. Note, however, that while Portugal's case in the International Court, *supra* note 19, stresses the self-determination aspects of the situation, it does not need to go so far as to argue the invalidity of the Timor Gap Treaty.