Comments and Notes

Oil in Troubled Waters: The International Court of Justice and East Timor: *Case Concerning East Timor (Australia v Portugal)*

1. *Introduction*

In his dissenting opinion in the *Case Concerning East Timor (Australia v Portugal)* Skubiszewski J *ad hoc*[1] comments that "East Timor has not been well served by the traditional interests and sovereignties of the strong."[2] Nor, it is argued, has East Timor been well served by the recent decision of the International Court of Justice (ICJ).[3] While the Court reaffirmed the right of the East Timorese people to self-determination, it dismissed the claim brought by Portugal against Australia over its signing of the Timor Gap Treaty with Indonesia on jurisdictional grounds. Skubiszewski J criticised the Court for adopting an overly legalistic approach which, he maintained, failed to achieve real justice for the people of East Timor.[4] The case also has broader implications and raises a number of important questions as to what the proper role of the ICJ should be in the resolution of international disputes.

2. *Historical Background*

East Timor was colonised by the Portuguese in the 16th century. At the same time the western half of the island of Timor came to be under Dutch sovereignty. Once Indonesia became an independent state the Dutch ceded control over the western part of the island to Indonesia.

As well as East Timor, Portugal had colonies in Africa, including Angola, Guinea-Bissau and Mozambique, which in the 1970s were engaged in armed struggles for independence. Portugal's refusal to allow these colonies the right to self-determination, as required under the United Nations Charter,[5] led to

1 Under Art 31 of the Statute of the International Court of Justice, if the bench of the Court does not include a judge of the nationality of a party to a case brought before it, then that party is entitled to appoint a Judge *ad hoc*. Judges *ad hoc* sit for the duration of the case in question and take part in the decision on terms of complete equality with their collegues. In this case Skubiszewski J was appointed Portugal's Judge *ad hoc*.

2 *Case Concerning East Timor (Portugal v Australia)* ICJ Rep 1995 at 238.

3 The majority opinion was accepted by President Bedjaoui, Vice-president Schwebel, Guillaume, Sir Robert Jennings, Aguilar-Mawdsley, Herczegh, Shi, Fleischhauer, Koroma JJ and Sir Ninian Stephen J ad hoc. Separate concurring opinions were appended by Oda, Shahabuddeen, Vereshchetin and Ranjeva JJ. Skubiszewski J ad hoc and Weeramantry J appended separate dissenting opinions.

4 Above n2 at 237–8.

5 United Nations Charter 1945 Art 1(2). This provision provides that one of the purposes of

enormous unrest within Portugal itself. In early 1974 the Portuguese military government was overthrown in the so-called Carnation Revolution. In the face of this domestic upheaval the Portuguese accorded the problems confronting East Timor a low priority.

These problems came to the fore in 1974 when the East Timorese people began agitating for independence. A number of independence movements, including FRETILIN, were formed at this time. Portugal engaged in some discussions with these groups and announced plans to conduct general elections to determine the fate of the island. In August 1975 a rival party to FRETILIN, the UDT, staged an unsuccessful coup which led to a counter-coup by FRETILIN, who managed to take the capital of Dili. Pro-Indonesian parties in the meantime agitated for East Timor to become part of Indonesia. In mid-1975 Portugal withdrew from the island and in November FRETILIN proclaimed an independent East Timor.

On 7 December 1975 the Indonesian army invaded East Timor and remains in occupation to this day. The Indonesian occupation has been marked by horrific abuses of human rights. It is estimated that in the 20 years since the Indonesian invasion 200 000 East Timorese people (a third of its pre-invasion population) have been killed.[6]

In the wake of the invasion a number of resolutions were passed by the United Nations General Assembly and Security Council.[7] These resolutions strongly deplored the Indonesian invasion and called for the withdrawal of the Indonesian army. However, in contrast to a number of other cases (notably the Iraqi invasion of Kuwait),[8] neither the Security Council nor General Assembly resolutions imposed a specific duty of non-recognition of the Indonesian occupation of East Timor on member states.[9] Some scholars have suggested that, despite this omission, there is still a duty of non-recognition given that the 1970 United Nations Declaration on Friendly Relations provides that "[n]o territorial acquisition resulting from the use or threat of force shall be recognised as legal".[10] This remains an issue of some controversy and was, surprisingly, not addressed in the majority judgment.[11] But, whatever the status of any duty of non-recognition, the UN resolutions on East Timor unquestionably reaffirmed the territory's

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the Charter is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

6 Editorial, *The Washington Post*, 12 November 1991.

7 SC Res 384 (Dec 22, 1975); SC Res 389 (Apr 22, 1976); GA Res 3485 (xxx) (Dec 12, 1975); GA Res 31/53 (Dec 1, 1976); GA Res 32/34 (Nov 28, 1977); GA Res 33/39 (Dec 13, 1978); GA Res 34/40 (Nov 21, 1979); GA Res 35/27 (Nov 11, 1980); GA Res 36/50 (Nov 24, 1981); GA Res 37/30 (Nov 23, 1982). See below Part 5.

8 SC Res 661 (Aug 6, 1990) par9(b).

9 While resolutions of the Security Council are legally binding on member states by virtue of Art 25 of the United Nations Charter, General Assembly resolutions do not create binding legal obligations. See generally, Brownlie, I, *Principles of Public International Law* (4th edn, 1990) at 14–5.

10 For example, Chinkin, C, "The Merits of Portugal's Claims Against Australia" (1992) 15 *UNSWLJ* 423; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (Oct 24, 1970).

11 But see above n2 at 261–5 per Skubiszewski J (in dissent).

status as a non-self-governing territory with Portugal as its administering power. The last of these resolutions was passed by the General Assembly in 1982.

Despite Australia's special relationship with the East Timorese people, deriving from the support the East Timorese gave to Australians in the Second World War, successive Australian governments have in effect washed their hands of East Timor. Australia recognised Indonesia's de facto sovereignty over East Timor in 1978. In 1979 when the Fraser government commenced negotiations over the Timor Gap it effectively recognised Indonesia's de jure sovereignty over the territory.

Australia signed the Timor Gap Treaty with Indonesia in 1989. The treaty provides for joint Australian and Indonesian exploitation of the offshore oil and mineral resources of the maritime area known as the Timor Gap.[12] The Australian government seems to have had few moral qualms about the propriety of entering into this treaty. Indeed, Foreign Minister Gareth Evans has dryly noted that "[t]he world is a pretty unfair place."[13]

3. *Portugal's Application to the ICJ*

Portugal instituted proceedings against Australia in 1991 concerning "certain activities ... with respect to East Timor".[14] The Portuguese application submitted:

(1) That the right of the people of East Timor to self-determination and the rights, powers and duties of Portugal as administering power of East Timor were opposable to Australia which was therefore obliged not to disregard them but to respect them.

(2) That by negotiating the Timor Gap Treaty with Indonesia, Australia had "failed to observe ... the obligation to respect the duties and powers of [Portugal as] the administering Power [of East Timor] ... and ... the right of the people of East Timor to self-determination and the related rights."[15]

Portugal very deliberately limited its application to the Court to the propriety of Australia's conduct and did not ask the Court to decide on the lawfulness of the Indonesian invasion and occupation of East Timor. Australia contended that in so framing its application Portugal had artificially confined the issues to be determined. Under Article 36(2) of the Court's Statute, for the Court to have jurisdiction, there must be a legal dispute between the parties.[16] Australia argued that in fact there was no such dispute between Australia and Portugal and it was being sued in place of Indonesia. The Court, however, concluded that whether or not the "real" dispute was between Portugal and Indonesia, the fact that Portugal had made legal complaints against Australia, which Australia had denied, meant that there was a dispute between the parties.[17] This part of the majority judgment was also accepted by the dissenting judges.[18]

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12 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, 29 *ILM* 475 (1990).

13 Cited in Pilger, J, *Distant Voices* (2nd edn, 1994) at 311.

14 Application to Registry of Court (ICJ) dated 22 February 1991 at 3.

15 Ibid.

16 Statute of the International Court of Justice 1945, Art 36(2).

17 Above n2 at 99–100 (majority judgment).

18 Id at 234–6.

4. *The ICJ Decision*

A. *Indispensable Third Parties*

Australia's principal objection to Portugal's application was that any consideration of the propriety of Australia's conduct would necessarily require the Court to rule on the lawfulness of Indonesia's continued occupation of East Timor. It was submitted that since Indonesia was not a party to the proceedings the Court had no jurisdiction to determine this issue. The jurisdiction of the ICJ is based on consent and while both Portugal and Australia accept the Court's compulsory jurisdiction, under Article 36(2) of its Statute, Indonesia does not.[19] While Indonesia had the right to intervene in the case, under Articles 62 and 63 of the Statute, it chose not to exercise that right. The ICJ has no power to compel an unwilling party, however indispensable they may be to the case before the Court.[20]

Australia maintained that, despite Portugal's carefully worded application, Indonesia was an indispensable third party to the proceedings. There is no specific provision in the Court's Statute that says it should abstain from hearing cases which involve a third party which has not submitted to the Court's jurisdiction. However, in the *Case Concerning Monetary Gold Removed From Rome in 1943 (Monetary Gold)* the Court held that it would not hear an application by one state where the resolution of the dispute would require it to determine the rights or obligations of a third state which was not a party to the proceedings.[21] The Court emphasised that it would only abstain from exercising jurisdiction where it would be required to determine the international responsibility of a third state as "the very subject matter of the decision" and not just where a third state's "legal interests would be affected by a decision".[22]

As Shabtai Rosenne has argued, where the Court has a "measure of discretion ... to decline to decide a case", it should be "sparingly used".[23] Indeed, in cases decided since *Monetary Gold*, the ICJ has adopted a very restricted interpretation of when a third party or parties will be considered indispensable to proceedings before the Court, and none of the subsequent attempts by states to invoke the principle have been successful. Cases where the issue has been raised include *Military and Paramilitary Activities in and Against Nicaragua*,[24] and the *Case Concerning Certain Phosphate Lands in Nauru*.[25]

In the *Nauru Case* the ICJ refused to uphold Australia's objection based on the *Monetary Gold* principle, maintaining that it would be violated only where the decision on the international responsibility of a third state was a "prerequisite" to the Court's determination of the claim before it.[26] In that case Nauru

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19 Above n16.
20 Id, Arts 62 and 63.
21 *Case Concerning Monetary Gold Removed From Rome in 1943 (Italy v United Kingdom)* ICJ Rep 1954 at 19.
22 Id at 32.
23 Rosenne, S, *The Law and Practice of the International Court* (2nd edn, 1985) at 308.
24 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Rep 1984 at 431.
25 *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections* ICJ Rep 1992 at 259–62.
26 Ibid.

brought a claim against Australia for damage done by phosphate mining during its trusteeship of the island state. However, Australia was only one of three co-trustees — the others being the United Kingdom and New Zealand. It is certainly hard to see how the Court was able to conclude that the legal interests of New Zealand and the United Kingdom would not constitute the "very subject matter of the decision". The President of the Court, Sir Robert Jennings, who dissented from the majority, argued that this conclusion was "surely manifest".[27]

It is difficult to reconcile the narrow approach taken in that case (and in all other cases decided since *Monetary Gold*) with the majority decision in the *East Timor* case. The majority held that, in deciding the merits of Portugal's claim, they would inevitably have to consider the legality of Indonesia's continued occupation of East Timor, or at the very least the legal capacity of Indonesia to negotiate and conclude the Timor Gap Treaty.[28] There is no indication in the judgment of the process of reasoning which led the Court to draw this conclusion. However, despite this lack of explanation, the decision as it stands marks a move towards a far broader interpretation of the doctrine of indispensable third parties than any other case since Monetary Gold.

The dissenting judges maintained that while proceeding to decide the merits of the case would clearly affect the legal interests of Indonesia these interests would not be the "very subject matter of the decision".[29] This argument is not only more in keeping with the restrictive interpretation of the *Monetary Gold* decision adopted in prior cases, but the reasoning adopted by the dissenting judges is also more logical and persuasive than that adopted by the majority. Unlike the majority, who made no distinction between the various discrete parts of Portugal's submission, the dissenting judges considered each aspect of the submission separately.

The majority concluded that "Australia's behaviour cannot be assessed without first entering into the question of why it is that Indonesia could not lawfully have concluded the 1989 Treaty".[30] This is perhaps a valid point with respect to the second part of Portugal's application, which specifically deals with the lawfulness of Australia's conclusion of the Timor Gap Treaty with Indonesia. However, as Skubiszewski J pointed out, it is difficult to see how this assertion can apply to Portugal's first submission, which concerns only Australia's general duty to respect both the right of the people of East Timor to self-determination, and Portugal's authority as administering power of the territory, without any specific reference to the treaty.[31]

The majority actually accepted part of Portugal's first submission by recognising that the people of East Timor have a right to self-determination and, further, that this right is of an *erga omnes* character.[32] Rights *erga omnes* are by definition opposable to the rest of the world including, in this case, Australia.[33] The duty to respect Portugal as the proper administering power of East

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27 Id, dissenting opinion of Sir Robert Jennings.
28 Above n2 at 100–5.
29 Id at 237–55.
30 Id at 102.
31 See above, Part 3.
32 Above n2 at 102.
33 *Barcelona Traction Light and Power Company Case (Belgium v Spain), Second Phase,*

Timor (which formed the other half of Portugal's first submission) would seem to be equally straightforward and uncontroversial. The right of Portugal to act in this capacity has been recognised by numerous United Nations Security Council and General Assembly Resolutions.[34] The ICJ, as "the principal judicial organ of the United Nations",[35] could have quite properly made its decision on this question solely on the basis of these resolutions, without any consideration of the role of Indonesia.

Admittedly Portugal's second submission, dealing specifically with the Timor Gap Treaty, is less straightforward. The dissenting judges maintained that the Court could quite properly rule on the propriety of Australia's conclusion of the treaty with Indonesia, without ruling on the lawfulness of Indonesia's conduct. These arguments are less persuasive than those made with respect to the first part of the application, and even Skubiszewski J conceded that the Court could not in any way rule on the validity of the treaty without Indonesia present before it.[36]

B. Self Determination: The Protection of Erga Omnes *Rights*

Portugal argued in its application that even if the Court considered the case to otherwise fall within the *Monetary Gold* principle, it should not be applied because the rights which Australia was alleged to have breached were rights *erga omnes*. The nature of *erga omnes* rights and obligations was discussed by the ICJ in the Barcelona Traction case. The Court there held that:

> In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis à vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.[37]

The majority in the *East Timor* case, while acknowledging that the right to self-determination has an *erga omnes* character, held that this was a separate issue from consent to jurisdiction.[38] They maintained that, whatever the nature of the rights or obligations invoked, the Court had no power to rule on them when the other country was not a party to the case.

However, in giving paramountcy to the procedural third party rights of Indonesia, the Court has ignored the position of other third parties with substantive legal interests in the case. Most obviously, of course, the rights of the people of East Timor have been overlooked. Vereshchetin J was the only majority judge to make this point.[39] However, he examined the issue solely in the context of the Court's Statute, which provides that only states may be parties to cases before it.[40] In this case, this procedural problem was quite easily overcome since

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ICJ Rep 1970 at 32.

34 Above n7.

35 Above n16 Art 1.

36 Above n2 at 253–5.

37 Above n33.

38 Above n2 at 102.

39 Id at 135–8.

40 Above n16 Art 34.

Portugal, as the administering power of East Timor, was legally entitled to represent the interests of the East Timorese people.[41] The crucial issue here was, of course, the Court's decision not to exercise jurisdiction.

But it is not only the third party rights of the people of East Timor which have been subordinated to those of Indonesia. In the *Barcelona Traction* case the ICJ held that all members of the international legal community have a legal interest in the protection of *erga omnes* rights.[42] Christine Chinkin has argued that the international community as a whole can, therefore, constitute an interested third party with the right to intervene in proceedings before the ICJ.[43] Indeed Ago J of the Court has previously suggested that the development of *erga omnes* rights and obligations has led to the "incipient personification of the international community".[44] In ignoring the legal interest of the international community in the protection of *erga omnes* rights and obligations, the Court has in effect subordinated the protection of fundamental human rights to the national interest of a single state.

5. *East Timor, the ICJ and the United Nations*

Whatever criticism can be made of the Court's interpretation of the *Monetary Gold* principle of indispensable third parties, a far more fundamental criticism was made by Skubiszewski J in his dissenting opinion. He argued that, in declining to exercise jurisdiction in this case, the Court had misunderstood its proper role:

> The Court is not merely an organ of States which has the function of adjudicating upon disputes between those of them willing to bestow upon it jurisdiction and to submit to that jurisdiction. The Court is primarily the "principal judicial organ of the United Nations".[45]

Its judicial function must, therefore, be exercised in accordance with the fundamental principles of the United Nations Charter. Given that the United Nations recognises Portugal as the proper administering power of East Timor, and the right of the East Timorese people to self-determination, Skubiszewski J forcefully concluded that the Court should not have declined to exercise jurisdiction in this case.[46]

For the people of East Timor, and indeed for the many other dispossessed peoples of the world, the ICJ represents their only hope of upholding the rights which have been accorded to them by international law. In the wake of the Court's decision on East Timor, some commentators argued that the matter would in any case be more appropriately dealt with by the United Nations. While this may

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41 The question of standing is ignored in the majority judgment. This is perhaps because to explicitly recognise that Portugal had standing would imply that Australia was under a duty to respect Portugal as the legitimate administering power of East Timor. See further, the dissenting opinion of Skubiszewski J at 255–7.

42 Above n33.

43 See further, Chinkin, C, *Third Parties in International Law* (1993).

44 Ago, R, "Second Report on State Responsibility" [1970] 2 *YBILC* at 184.

45 Above n2 at 241.

46 Ibid; above n7.

be a theoretically attractive alternative, in reality the United Nations is constrained by political considerations to a far greater extent than the ICJ.

No resolutions on the issue of East Timor have been passed by the United Nations General Assembly since 1982, and the level of support for East Timorese independence among member states has declined steadily every year since the invasion.[47] This decline can be accounted for by a number of factors. These include, most importantly, the conscious decision by many states, including Australia, to place national interest above moral principle[48] as well as the crucial decision by the United States to support the Indonesian occupation.[49] There is also widespread apathy among many states which, in the face of widespread violations of human rights and international law the world over, are reluctant to place the problem of East Timor high on the international agenda.

The practical consequence of the ICJ decision in the *East Timor* case is to return the dispute to the political arena — in effect the United Nations. While there is a general lack of enthusiasm on the part of member states of the General Assembly, East Timor remains on the agenda of both the United Nations Commission on Human Rights and the Decolonisation Committee. Secretary General Boutros Boutros-Ghali has also acted in a good offices capacity on a number of occasions. There is still a possibility that the ICJ could play some role in the resolution of the dispute. The Court could be asked to provide an advisory opinion on the legal problems in issue, in which case Indonesia's lack of consent to the Court's jurisdiction would not be relevant.[50] However, a majority vote by the United Nations General Assembly is required before a matter can be referred to the ICJ for an advisory opinion. Given the declining support for General Assembly resolutions on East Timor's independence, it is doubtful that a majority of member states would support the referral of the matter to the ICJ.

6. *The Role of the ICJ in the New World Order*

Skubiszewski J's dissenting opinion was highly critical of the excessive legalism of the majority decision in the *East Timor* case. He argued that, even if the majority decision were legally correct (which he emphatically denied), the

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47 Ibid. The final GA Resolution in 1982 was passed with 50 votes in favour, 46 against and 50 abstentions.

48 In a series of cables in August 1975, Australia's Ambassador to Indonesia, Richard Woolcott urged that in the event of Indonesia invading East Timor, Australia should "act in a way which would be designed to minimise the public impact in Australia and show private understanding to Indonesia of their problems. ... *I know I am recommending a pragmatic rather than a principled stand but that is what national interest and foreign policy is all about*". Cited in Aarons, M and Domm, R, *East Timor: A Western Made Tragedy* (1992) at 19.

49 Daniel Patrick Moynihan, who was the US Ambassador to the UN in 1975, detailed in his memoirs US policy towards the Indonesian invasion: "The United States wished things to turn out as they did, and worked to bring this about. The Department of State desired that the United Nations prove utterly ineffective in whatever measures it undertook. The task was given to me and I carried it forward with no inconsiderable success." Cited in Chomsky, N, *Deterring Democracy* (1992) at 200.

50 See, for instance, *Legal Consequences (Namibia) Case*, ICJ Rep 1971, and *Western Sahara Case* ICJ Rep 1975; Statute of the International Court of Justice 1945, Art 65(1).

role of the ICJ cannot and should not be reduced to "legal correctness alone".[51] The ICJ has been, and still has the potential to be, true to the demands of justice without abandoning the "domain of positive law".[52] His dissenting opinion strongly reaffirmed the comments of Lauterpacht J ad hoc in the *Application of Genocide Convention* case:

> The Court should not approach it with anything other than its traditional impartiality and firm adherence to legal standards. At the same time, the circumstances call for a high degree of understanding of, and sensitivity to, the situation and must exclude any narrow or overly technical approach to the problems involved. While the demands of legal principle cannot be ignored, it has to be recalled that the rigid maintenance of principle is not an end in itself but only an element — albeit one of the greatest importance — in the constructive application of law to the needs of the ultimate beneficiaries of the legal system, individuals no less than the political structures in which they are organised.[53]

Skubiszewski J's criticisms, and indeed the whole decision, raise important questions about the nature of the Court and its role in the resolution of international disputes.

When the ICJ was established as the successor to the Permanent Court of International Justice (PCIJ), it was envisaged that it would play a central role in the resolution of international disputes. However, this vision has not been reflected in the history of the Court's practice. In a large part, this is due to the fact that the Court's jurisdiction is based wholly on the consent of states. No state can be compelled to appear before the ICJ, no matter how serious the allegation made against it.

The voluntary nature of the Court's jurisdiction is often seen as one of its most fundamental underpinnings. However, in reality it owes more to political compromise than to any underlying principle. Indeed, in 1946 when the Court was founded, the vast majority of small and medium states strongly supported the idea of compulsory jurisdiction, believing that it would give them some genuine measure of sovereign equality. However, perhaps unsurprisingly, the great powers refused to agree to compulsory jurisdiction and so the optional clause, based on its predecessor clause in the Statute of the PCIJ, was born.[54]

Some scholars have suggested that the voluntary nature of the ICJ's jurisdiction is appropriate given that international law is traditionally based on the consent of states. This argument may have had some merit prior to the Second World War, when international law was almost wholly concerned with the regulation of bilateral relationships between states. However, as Christine Chinkin has argued, this bilateral paradigm no longer reflects the substance of international law.[55] International law since 1945 has become increasingly concerned

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51 Above n2 at 237–8.

52 Id at 238.

53 *Application of Genocide Convention, Further Requests for the Indication of Provisional Measures*, ICJ Rep 1993 at 408 per Lauterpacht J *ad hoc*. Cited in *Case Concerning East Timor*, above n1 at 238–9 per Skubiszewski J (in dissent).

54 See further, Scott, G L and Carr, C L, "The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause" (1987) 81 *Am J Int'l L* 57.

55 Above n43.

with the protection of fundamental human rights, such as self-determination. The sovereign rights of states are subordinated by these and other considerations. While the current President of the ICJ has acknowledged that international law is in a state of transition "[f]rom a law of co-ordination to a law of finalities",[56] the ICJ itself has not adjusted to these changes. Unless reforms are introduced, particularly to the nature of the Court's jurisdiction, it will become an increasingly irrelevant part of the international world order.

However, the prospect of any changes being made to the voluntary nature of the ICJ's jurisdiction seem remote. Only 58 states accept the compulsory jurisdiction of the Court, and only 27 of the 58 do so without wide-ranging reservations. Even more significant is the fact that only one of the five permanent members of the Security Council, each of whom are entitled to a permanent seat on the Court, currently accepts the compulsory jurisdiction of the ICJ. It is simply not in the interests of major powers to submit disputes to the ICJ when they can use extra-legal means to achieve their ends without fear of sanction. Unless and until the world community develops an effective system of enforcing international law there is little chance of such changes being adopted.

7. *Conclusion*

The failure of the ICJ as illustrated in the *East Timor* case should not be the cause of much surprise. Indeed such outcomes are perhaps inevitable when the high ideals on which international law is based conflict with the reality of power politics. Nevertheless the result is a disheartening one in that it suggests that the promise of 50 years ago embodied in the United Nations Charter — that the sovereign rights of states would be subordinated to the protection of human rights — is yet to be realised.

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56 President Bedjaoui, cited in *Case Concerning East Timor*, above n2 at 238.

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