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INTERNATIONAL LEGAL NOTES

EAST TIMOR & INDONESIA: THE ISSUE OF SELF-DETERMINATION REMAINS

DECISION OF THE INTERNATIONAL COURT OF JUSTICE

The decision of the International Court of Justice on 30 June 1995 determined the case brought against Australia by Portugal. The outcome of the proceeding has been noted elsewhere.¹ The International Court held, by a majority of 12 Judges to 2, that the Court could not adjudicate upon the dispute referred to it by Portugal. The Court found that there was a justiciable dispute between Australia and Portugal. It reaffirmed the importance of the principle of self-determination. But it differed upon whether Portugal had the necessary standing to maintain the action and whether the application was maintainable in the absence of Indonesia. Judge C J Weeramantry and Judge *ad hoc* K Skubiszewski dissented.

Portugal had brought the case against Australia, seeking a ruling on the treaty of December 1989 between Australia and Indonesia providing for the exploitation of the continental shelf of the Timor Gap. Portugal submitted that, by negotiating and ratifying the treaty, and by taking measures to implement it, Australia had violated the rights of the people of East Timor to self-

determination and Portugal's rights as the administering power in East Timor. Australia's objection to the jurisdiction of the Court to hear the case, in the absence of Indonesia (which did not recognise the Court's competence) was the point upon which the proceedings were decided. The Court held that it could not decide the dispute without examining the circumstances in which Indonesia had entered and remained in East Timor. Because of the absence of Indonesia from the proceedings, such an examination would not be competent.

Nevertheless, in the course of the reasoning leading to the foregoing conclusion, the International Court majority observed:

"Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from the United Nations practice, has an erga omnes character, is irreproachable. The principle of self-determination of peoples has been recognised by the United Nations Charter and in the jurisprudence of the Court ...; it is one of the essential principles of contemporary international law."

Accordingly, the International Court's decision cannot be seen as in any way derogating from the right of the people of East Timor to enjoy the self-determination promised to them by international law. Their claim to enjoy the right to self-determination is the more clear by reason of the fact that they are a people newly freed from colonial rule. Indonesia has implicitly recognised the right of the people to self-determination. It claims that, following the entry of its forces on 7 December 1975 to settle civil unrest, it duly consulted the people. A "Peoples' Representative Assembly" was constituted of elected members.

According to Indonesia, on 31 May 1976, that Assembly decided to become independent of Portugal through integration in the Republic of Indonesia. The request of the Assembly was accepted on 17 July 1976 when East Timor became the 27th province of Indonesia.

Few countries have recognised the legality of this "act of self-determination". Nor has the United Nations ever accepted the "integration" of East Timor into Indonesia. In 1975 the General Assembly, and in 1976 the Security Council condemned Indonesia's actions. Over the years since 1975 there have been numerous resolutions expressing such condemnation. In July 1994, the Indonesian Government accepted a visit by the United Nations' Special Rapporteur on Extra-Judicial Summary and Arbitrary Executions.² That visit was followed by a visit of the United Nations' Secretary-General Special Envoy on East Timor (Mr Amos Wako, Attorney-General for Kenya) in April 1993.³ More recently, the Secretary-General has appointed Mr F Vendrell, Director, EAPD/DPA, as his Special Representative for East Timor. Mr Vendrell provides the good offices of the United Nations towards resolving the differences between Indonesia and Portugal and the people of East Timor.

The Indonesian Government has itself appointed a roving Ambassador on East Timor. He has met dissident groups in London and at Burg Schlaining near Vienna.⁴ Indonesia's President Soeharto has said that Indonesia "will not move backwards ... even for one step [in respect of East Timor]. We are ready to face any challenge and hurdle, both from at home and abroad". Nevertheless, the

decision of the International Court, and the earlier decision in Australia of the High Court of Australia rejecting a domestic challenge to the treaty⁵ has far from concluded the international debate about the self-determination of the people of East Timor. On the contrary, the International Court litigation has produced a series of conferences and meetings which have focussed attention on the right of the people of East Timor in a more direct way than has occurred for most of the twenty previous years. As well, a series of books have been published by human rights organisations drawing attention to the issues presented by the rights of the people of East Timor to self-determination.⁶

INTERNATIONAL CONFERENCES ON EAST TIMOR

One of the largest conferences on East Timor actually preceded the decision of the International Court. It took place in the chamber of the Parliament of Portugal between 31 May and 2 June 1995.

Present at the meeting were representatives of 33 Parliaments and elected assemblies. One feature of the Lisbon conference which struck many foreign observers was the strong support given to the Portuguese stand on behalf of the people of East Timor by the representatives of the Governments of former Portuguese colonies, now independent. There were large delegations from the Parliaments of Angola, Cape Verde, Guinea Bissau, Mauricias Islands, Mozambique and St Thomas and Principe. Amongst the Australian participants were Senator Christopher Ellison (Lib, WA), Senator Julian McGauran (Nat, Vic), Mr Garrie Gibson MP (ALP, Qld) and Mr Edward Grace MP (ALP, NSW). Justice Michael Kirby participated and addressed the conference in his

capacity as chairman of the Executive Committee of the International Commission of Jurists.

Justice Kirby collected the practical suggestions made by the Members of Parliament from different countries for steps that could be taken to advance the cause of the exercise by the people of East Timor of their right, by international law, to self-determination. Eventually, his "Action Plan" was adopted by the meeting in Lisbon. It became part of the *Lisbon Declaration of the International Inter-Parliamentary Conference on East Timor*.⁷ The declaration called on Indonesia to abide by the United Nations resolutions. It also called on the United Nations to ensure respect for human rights in East Timor. It condemned the sale of arms to Indonesia and demanded the release of Mr Xanana Gusmão and other East Timorese "political prisoners" held in custody in Indonesia and East Timor.

The *Action Plan* contained steps which could be taken by members of national and sub-national Parliaments to support the cause of self-determination in East Timor. Amongst these steps were:

- Adoption of Parliamentary resolutions calling for the exercise of the right to self-determination of the people of East Timor;
- Proposal of Parliamentary missions to the same end;
- Establishment of Parliamentary committees to receive reports and focus attention on East Timor;
- Raising the position of East Timor with major investors in Indonesia;

- Encouraging common cause with other groups denied self-determination, such as the peoples of Tibet, of Western Sahara, the Kurds etc;
- Requesting the United Nations' Secretary-General to call on the Government of Indonesia to comply with the recommendations of the Special Rapporteur;
- Requesting the High Commissioner for Human Rights to visit East Timor and to report on his findings;
- Establishing an information exchange on Parliamentary resolutions on East Timor;
- Making representations to the International Committee of the Red Cross and UNICEF to increase their presence in East Timor;
- Calling on the Inter-Parliamentary Union to add the issues of East Timor to its concerns; and
- Encouraging the establishment of an international eminent persons group to visit East Timor and Indonesia to consult with Mr Gusmão.⁸

On 15-16 September 1995 a conference was held at the University of New South Wales to consider issues arising out of the decision of the International Court of Justice. The conference was organised by the International Law Association (Australian Branch) and the Australian Institute of International Affairs (New South Wales branch). The conference was addressed by the Solicitor-General of Australia (Dr Gavan Griffith QC) who was agent and leading counsel for Australia in its successful defence before the International

Court. The conference was also addressed by leading counsel for Portugal, Dr Ribeiro Telles, and by representatives of the people of East Timor.

NEW STUDIES ON SELF-DETERMINATION OF EAST TIMOR

In addition to conferences and meetings, the issue of East Timor and of other areas of Indonesia claiming to exercise the peoples' right to self-determination, have attracted a number of recent studies which are deserving of note.

The Catholic Institute for International Relations in London has published a new book *International Law and the Question of East Timor*.⁹ The book describes a meeting of international lawyers in December 1992 which came together to discuss the application of international law to East Timor. According to the conclusion written by Professor Christine Chinkin, Dean and Professor of International Law at the University of Southampton in the United Kingdom:

"... Although we had come from different legal jurisdictions we had come to remarkably similar legal conclusions about the illegality of Indonesia's actions in East Timor. However, it is also hard not to feel increasingly frustrated by the limitations of our discipline which interlock and impact upon each other to such an extent that they seem at times to undermine the very purpose of legal analysis."

Professor Chinkin points out that enforcement of international law requires political will.¹⁰ She concludes:

"The United Nations lacks the resources, both financial and human, to undertake effectively the many tasks with

which it is now presented. ... The shortcomings of actions authorised by the United Nations ... has weakened confidence in its ability to take decisive action in such matters. ... It is evidently facile to think that [the action in Haiti] could provide a model for the removal of the Indonesian regime from East Timor, even if the United States were to provide support. In addition, the claims of self-determination coming from the newly emerged pattern of nationalist conflict has deflected attention even further away from long existing "classic" claims such as that of East Timor."

In 1994 Amnesty International in London published *Power and Impunity: Human Rights Under the New Order*. This is a study of Indonesia and East Timor. It concludes with a series of thirty-two recommendations to the Government of Indonesia and to United Nations Member States to improve the human rights situation in Indonesia and East Timor. The recommendations are addressed to the prevention of further human rights violations, the promotion of human rights and action by United Nations member countries.¹¹

Most recently, the Asian Forum for Human Rights and Development (FORUM-ASIA) has published a book *Stability and Unity on a Culture of Fear*.¹² This analyses Indonesia fifty years after its independence from the Netherlands. It describes the past structures of repression which the Government of Indonesia inherited upon independence. The thesis of the book, which is the product of a delegation of Asian human rights lawyers which visited Indonesia, is that the fundamental character of the Indonesian Republic was stamped upon it from its origins in Netherlands' colonial rule. Because that rule had extended and over-stretched itself over the two thousand main islands of a huge archipelago, containing some of the most densely populated areas of the world,

the Government of Indonesia, like its Netherlands' predecessor, has concentrated its attention on the achievement of national unity. To secure this unity it has enhanced the power of the military, enlarged police powers, reduced human rights and denied demands for the exercise of the peoples' right to self-determination, evinced in Aceh, Irian Jaya and East Timor. The book is a critical review of present and past structures of denial of human rights in Indonesia. It acknowledges some recent improvements. The establishment of a Human Rights Commission and independent decisions of the courts in 1994-1995 have given hope of more improvements. The rapid improvement of the economy and reduction of poverty, together with increased general education and living standards have produced demands for the exercise of human rights which were not earlier heard. The Government of Indonesia now faces an increasing number of such demands. Its difficulties in the years ahead will include the maintenance of national unity, progress to economic and individual liberty whilst at the same time the avoidance of disintegration and separatist movements. The book concludes:

"In Irian Jaya and Aceh, in addition to dealing with immediate human rights issues, the Government should ... develop alternatives to accommodate the interests of the non-Javanese. Its success in dealing with the conflicts in these two regions may well contribute to creating more equitable political and economic ties between different islands and the central Government. On the other hand, its obsession with a unitary model and integrationist policies in the name of Pancasila may create even more tensions between the center and the periphery. As a first step the Government should allow free debate and discussion on the relationship between the center and the

regions, including discussions on autonomy and decentralisation of power."¹³

NEW AUSTRALIA-INDONESIA LEGAL FOUNDATION

At the University of Melbourne on 28 September 1995 there was launched the Australia-Indonesia Legal Development Foundation. This body which has received a seeding grant from the Australian Government, is designed to:

- Raise awareness of legal issues in Indonesia amongst the Australian legal community;
- Develop strong links between the legal professions in both countries;
- Raise funds for Indonesian legal aid organisations;
- Retain a watching brief on the legal and human rights situation in Indonesia and East Timor; and
- Promote links between non-governmental organisations concerned in issues of law and human rights.

The one day conference on Indonesian law after the first fifty years attracted leading Indonesian and Australian speakers under the umbrella of the Asian Law Centre of Melbourne Law School. Chief Justice Benyamin Mangkoedilaga, Chief Justice of the Jakarta Administrative Court, explained the development of Indonesian administrative law and his much praised decision over-riding a ministerial prohibition of the journal *Tempo*. Other Indonesian speakers included Mr Frans Winarta of IKADIN (the Indonesian Bar Association) who spoke on "Judicial Review and the Role of Lawyers" and Mr Satya Arinanto of

the Law School of the University of Indonesia who spoke on the need for a Constitutional Court for Indonesia.

The launch of the Foundation was performed by Justice David Harper of the Supreme Court of Victoria. At the dinner, the Foundation's Patron, Justice Michael Kirby, praised the work of the Indonesian Legal Aid Institute (LBH) in Jakarta headed by Dr Buyung Nasution. Dr Nasution visited Australia in September 1994. The first fellowship of the Foundation has been granted to an officer of LBH, Mr Rambun Tjajo who is now undergoing the three month Bar Readers course in Melbourne. During this time he will establish many links with Australian lawyers. In the past, there has been relatively little contact between Australian and Indonesian lawyers. An intensive dialogue is now beginning. The issue of the rights of the people of East Timor is on the agenda of these discussions.

FOOTNOTES

1. See 'Australia Wins at International Court of Justice' *Insight* v4, No 12 at 5.
2. See United Nations, Economic and Social Council, *Report of the Special Rapporteur (Mr Bacre Waly Ndiaye) on his Mission to Indonesia and East Timor from 3 to 13 July 1994*; E/CN.4/1995/61/Add.1 (1 November 1994).
3. See Australia, Department of Foreign Affairs and Trade, *Australian Government Policy on East Timor*, 1994, 1.
4. *Ibid.*

5. *Horta v The Commonwealth of Australia* (1994) 16 ALJR 620; 123 ALR 1 (HC). See B F Fitzgerald, "Horta v Commonwealth: The Validity of the Timor Gap Treaty and Its Domestic Implementation" in (1995) 44 Int Comp LQ 643 which described the decision of the High Court of Australia as uninspiring in the sense that it avoids many important issues".
6. M D Kirby, "East Timor in the Context of the Pacific Region", unpublished paper for the Inter-Parliamentary Conference on East Timor, Lisbon, Portugal, 31 May 1995.
7. Portugal, Assembleia da Republica, *Lisbon Declaration*, 2 June 1995 with annexed *Action Plan*. See also Parliament of Portugal, *Obligations of Portugal as the Administering Power of the Non-Self-Governing Territory of East Timor*, Lisbon, 1992.
8. Catholic Institute for International Relations and International Platform of Jurists for East Timor, *International Law and the Question of East Timor*, 1995, CHR/IPJET, London.
9. *Ibid*, 309.
10. *Id*, 313.
11. Amnesty International, *Indonesia and East Timor - Power and Impunity - Human Rights under the New Order*, Amnesty, London, 1994. See also Amnesty International, *Indonesia - "Shock Therapy" - Restoring Order in Aceh, 1989-1993*, 1993, London.

12. FORUM-ASIA for Human Rights and Development, Bangkok, Thailand, 1995. See also LAWASIA, Human Rights Committee, *East Timor Trials*, Manila, 1995 including the report of Mr R Lewis for LAWASIA and the International Commission of Jurists on the trial of Francisco Branco and Gregorio Saldanha, Dili, East Timor, March 1992.

13. *Ibid*, 225.