

CASE COMMENTARY ON AUSTRALIA V PORTUGAL (CASE CONCERNING EAST TIMOR)

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In 1991 Portugal filed the application ‘Case Concerning East Timor²’ before the International Court of Justice (ICJ) disputing lawfulness of the conduct of Australia concerning its activities relating to East Timor. The ICJ dismissed the matter by 14 to 2 due to the lack of jurisdiction of the ICJ. The case is significant in the history of ICJ decisions as it illustrates how the human rights obligation and permanent sovereignty over natural resources become vulnerable in the presence of procedural requirements and formalism in international law. Therefore the purpose of the study is to identify the vulnerable nature of substantive rights in the international context. First the article discusses the claims made by parties, legal issues and legal reasoning of the ICJ. Then, the article moves to elaborate historical background of the matter. After critically analyzing the case, in the conclusion the author claims possibility of changing the position of the ICJ in future matters.

Claims made by the Parties and Legal Issues of the matter

Portugal made the application against Australia arguing that in negotiating, concluding and initiating internal legislative measures in accordance with the Timor Gap Treaty of 1989, Australia has infringed,

- i. the right to self determination to territorial integrity and permanent sovereignty over its wealth and natural resources and of the people of East Timor
- ii. the right of Portugal as the administering power of the territory of East Timor
- iii. the United Nations Security Council(UNSC) resolution 384 and 389 which the member states are bound to follow in good faith

Accordingly, Portugal claimed in its application,

- to declare that Australia has exploited the continental area of Timor Gap and failed its duty to negotiate in order to harmonize the respective rights

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² *Australia v Portugal* [1995] ICJ Rep 90

- reparation to the people of East Timor and Portugal since Australia has violated its international responsibility
- recognizing right to self determination of the people of East Timor and permanent sovereignty over its wealth and natural resources
- Recognizing administering power of Portugal relating to the territory of East Timor
- refraining other countries from any negotiation, signature or ratification of any agreement with a State other than administering power
- And also refraining exploration or exploitation or exercising jurisdiction over the continental shelf on the Timor Gap on the basis of any multilateral treaty where Portugal is not a party

However, objecting the application of Portugal, Australia made following assertions.

- There is no dispute between Australia and Portugal since the Treaty of 1989 was completed between Australia and Indonesia.
- The Court has no jurisdiction to decide the case since the Indonesia has not provided its consent to maintain a case before the ICJ.
- Therefore, the action of Australia as invoked by Portugal does not rise to any breach of rights under international law.

Consequently, the basic legal issue that the Court intended to be solved was whether the ICJ had jurisdiction to decide the matter. In addition,

- Has Australia violated the right to self determination of the people and sovereignty over its natural resources by negotiating, signing and initiating Timor Gap Treaty of 1989?
- Has Australia violated the administering power of Portugal?
- Accordingly, has Australia violated its international responsibility concerning East Timor?

were the basic legal issues that had to answer before the ICJ.

Legal Reasoning

Considering the submissions brought by both the parties the application was dismissed by the ICJ on the following grounds.

Jurisdiction issue

As Australia pointed out, the ICJ viewed that, there was no dispute between Portugal and Australia but with Portugal and Indonesia. The Timor Gap Treaty was concluded with Indonesia and Australia and therefore without considering the legality of the annexure of Portugal, behavior of Australia could not be decided. Portugal did not challenge the validity of Treaty or the capacity of Australia to conclude the Treaty.

However, Indonesia had not accepted the compulsory jurisdiction of the ICJ. As per the contentious jurisdiction of the ICJ is concerned, States must have accepted the jurisdiction of the Court by a special agreement, a clause in a treaty or by a unilateral declaration to maintain case³.

Hence, the Court was unable to exercise its jurisdiction conferred upon it by Article 36(2) of the ICJ Statute. Relying on the principle emphasized by Australia and as it was mentioned in *Monetary Gold Removed from Rome* of 1943, the Court viewed that, it was unable to decide a dispute between States without the consent of those States to its jurisdiction⁴. In that case, in the absence of Albania's consent, the ICJ could not take any decision on the international responsibility. Therefore, the Court opined that it was unable to decide the lawfulness of the presence of Indonesia in the territory of East Timor.

Right to self Determination

The ICJ unequivocally admitted the *erga-omnes* obligation to right to self-determination as an evolved principle from United Nations Charter(UNC), United Nations practice and jurisprudence of the Court. But the Court deemed that the 'the *erga-omnes* character of a norm and the rule of consent to jurisdiction are two different things and the Court would not decide the lawfulness of the behavior of a State which is not a party to the case even the parties to the case invoke *erga-omnes* obligations'.⁵

³ Statute of the International Court of Justice (18 April 1946) (ICJ Statute) Art 36(2)

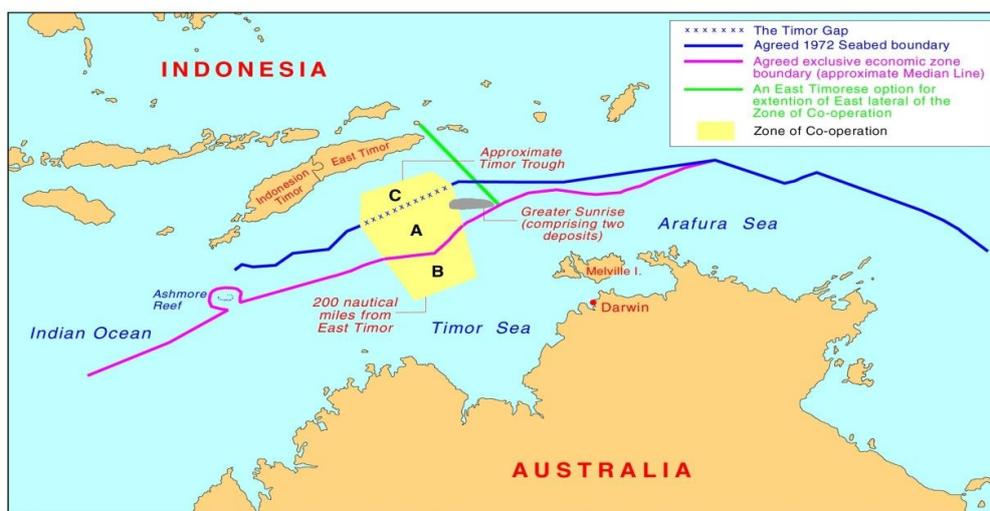
⁴ See Para 26 of the judgment

⁵ See Para 29 of the judgment

Right of an Administering State

Both parties recognized East Timor as a non self-governing territory and Portugal as the administering power of East Timor. The Court also observed that as the Chapter XI of the UNC regarded, East Timor is such a non self-governing territory. Although from a number of resolutions Portugal was considered as administering power, as the Court expressed they did not intend to establish an obligation on third states to treat Portugal as an exclusive authority to decide continental shelf of East Timor.

Historical Background of the Matter



East Timor is a country which has been exposed to diverse occupations, invasions and attacks due to its natural recourses and geographical location in Southeast Asia. Soon after the withdrawal of Armed Forces of Portugal in 1975 due to the civil disturbances happened in the country, the military of Indonesia invaded in East Timor and annexed it as a part of Indonesia. However, from 1976 Indonesia enacted a law incorporating the territory as a part of Indonesia.

Subsequently, repeated allegations of widespread violations of human rights of Indonesian military induced the Timorese resistance group, FRETILIN (Frente Revolucionaria Timor-Leste Independente) to combat against them. Even the SC and General Assembly (GA) passed many resolutions condemning the activities of Indonesian armed forces⁶. According

⁶ Security Council resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976, and General Assembly resolutions 3485 (XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November

to them, the administered power of Portugal concerning East Timor had been accepted by the SC and the GA.

Further, the Seabed Boundary of East Timor had not been completed since administering power of Portugal did not participate in the discussion of Seabed boundary treaty of Australia and Indonesia. Hence the unlimited part of continental shelf was called as the 'Timor Gap'. In 1989, Timor Gap Treaty was signed to exploit petroleum resources between Australia and Indonesia jointly.⁷

As per the Timor Gap Treaty, it provided the biggest share to Australia. (which has been marked as B on the Map). This is the main disputable agreement in the case and the above-mentioned claims of Portugal were made based on it.

Critical Analysis

As the article 36 of the ICJ Statute mentions, the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or treaties and conventions in force. Indonesia was not related any of it and the majority of judges build up their argument entirely based on the legality of the annexure of East Timor by Indonesia and absence of its consent to the ICJ jurisdiction.

However, as the principal judicial organ of the UN, the function of the ICJ is to decide disputes as submitted to it in accordance with international law⁸. Right to self-determination is an essential principle of contemporary international law. But, violation of the right to self-determination of the people of East Timor was not seriously taken by the ICJ which had been recognized by the GA and the SC through several resolutions. The Court unequivocally admitted the *erga-omnes* obligation on right to self-determination but it was not regarded as the focal point. All States could be held to have a legal interest in the protection of *erga-omnes* obligation⁹. However, the so-called world Court has restricted its task with the limitations of contentious jurisdiction. As Weeramanthry J pointed out in his dissenting judgment, there is no another court in the international plane as in municipal system to move

1977, 33/39 of 13 December 1978, 34/40 of 21 November 1979, 35/27 of 11 November 1980, 36/50 of 24 November 1981 and 37/30 of 23 November 1982

⁷ Zone of Cooperation treaty in an area between the Indonesian province of East Timor and Northern Australia, Article 2

⁸ ICJ statute(n 2) Article 38

⁹ *Case Concerning the Barcelona Traction* [1970] ICJ 1 para 32

in other than the ICJ. Also as Skubiszewski J pointed out in his dissenting opinion, the sovereignty of the East Timor has not been properly addressed from the history and it should have been addressed through this judgment. Further in 2006, *Democratic Republic of Congo v. Rwanda*¹⁰ based on the reservation made by Rwanda to the Genocide Convention relating to the jurisdiction of the ICJ. As it was observed by the Court that *jus-cogens* norms cannot constitute an entry to jurisdiction and it always depends on the consent of the parties. In contrast, according to the Article 53 and 64 Vienna Convention on Law of Treaties, if a treaty conflicts with a *jus-cogen* or emerging *jus-cogen* norm of general international law that treaty becomes void and terminated. It is problematic to entirely rely on the jurisdiction issue when there is prima facie case of violation of *jus-cogens* or *erga-omnes* obligations in the view of justice.

As the words of dissenting Judge Skubiszewski

“the Court should have resolved the dispute between Portugal and Australia not only on the basis of the rules governing jurisdiction but also in accordance with the demands of justice. The dichotomy between law and justice is perennial. The Court has constantly been looking for an answer to it. The search becomes difficult, and the contours of the dichotomy gain in sharpness, when too narrow an interpretation of the principles governing competence restrains justice.” (Emphasis added)

Conversely, it is true that the jurisdiction of the Court is required to act as a shield to protect third parties from unnecessary litigation. But, right to self-determination directly deals with the fundamental rights of the people and it is unfair to exercise consent to the jurisdiction of the Court as a counter argument to it. As Weeramantry J discussed, in *Corfu Channel case*¹¹, Yugoslavia was also acted with Albania in laying mines who was not a party to the case wasn't considered as a reason to deny the jurisdiction of the Court. Even at the absent of Yugoslavia, the ICJ protect the right to innocent passage similarly right to respect self-determination of East Timor could have been protected in the absence of legality of the Indonesian invasion.

Further, the importance of continental shelf was not seriously considered by the majority of the judges. If East Timor was known as a non-self- governing territory, the principle of

¹⁰ *Democratic Republic of the Congo v. Rwanda- (03.02.2006 ICJ)*

¹¹ *Corfu Channel Case(United Kingdom v Albania)[1949] ICJ Rep 4*

justice and equity would have been more important concerning the allocation of natural resources and political rights than a general state¹². In a non self-governing territory, the inhabitants are required to be considered and treated as a 'sacred trust' and no country can deviate from the responsibility to promote the well-being of its people and to ensure their political, economic, social advancement¹³. Protecting natural resources of such territory inevitably becomes more important and as a member of United Nations, Australia is also under the obligation of protecting the sovereignty of people and permanent sovereignty of its natural resources. The ICJ disregards the importance of this phenomenon when considering the matter. Looking into the political and economic reality, the economy of East Timor totally depends on the petroleum deposits which lie under the Timor Sea between East Timor and Australia. Australia has been differently reacted in many times relating to the invasions and occupations of Indonesia. For instance, initially condemning the invasion of Indonesia, Australia voted against Indonesia in UNGA but, from 1978 it voted in favor of the Indonesia. Massive human rights violation or massacre was not an issue for Australia or any other oil companies to enter into treaties with Indonesia. Subsequently, Australia assisted UN Transitional Administration in East Timor (UNTAET) not only to hold a referendum to secede from Indonesia but also Australia has realized monetary value of undersea oil deposits. In 2000, substituting terms of Timor Treaty Gap, 50-50 division of Zone of Cooperation continued, and Australia continued managing the development. Although it is morally incorrect to have such kind of behavior, there is no mechanism in the international law to govern the amorphous nature of state behavior.

Conclusion

To conclude, the outcome of the decision affirms the interest of Indonesia and Australia instead of the rights of the People of East Timor. The narrow ruling of the case has only promoted the formalism instead of being a turning point which concerns the substantive rights relating to the right to self-determination and sovereignty over natural resources. Even the World Court can adopt harmonious construction method while interpreting the conflict between legality and morality. If the Court would have adopted such method no appeal procedure is available to question such decision. Therefore, the complexities of the international plane must be addressed based on those complexities for the progressive development of the humankind.

¹² United Nations Charter, Article 73

¹³ Ibid 7