Multilateral Disputes and the Doctrine of Necessary Parties in the *East Timor* Case

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I. INTRODUCTION

On June 30, 1995, the International Court of Justice (ICJ) decided the case brought by Portugal against Australia concerning the Timor Gap Treaty. The Treaty covers a maritime area between northern Australia and East Timor.

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1. East Timor (Port. v. Austl.), General List No. 84, 1995 I.C.J. (June 30) [hereinafter *East Timor*]. The vote was fourteen to two.

Timor — the Timor Gap — and establishes a zone of cooperation that allows exploration and exploitation of the petroleum resources of the Timor Gap.\(^3\) The creation of this zone between the two states was a compromise over competing claims regarding the continental shelf. Portugal's action in the ICJ not only effectively challenged the validity of this treaty and jeopardized the operations of mining companies in the zone, but also demonstrated the dynamics of resolving multilateral disputes by international adjudication in the ICJ. The *Case Concerning East Timor* has also focused international attention on the struggle of the East Timorese to exercise their rights of self-determination and permanent sovereignty over their natural resources. The Timor Gap Treaty provided the legal basis for Portugal's action. Portugal alleged that, by entering into the Treaty with Indonesia, Australia breached obligations owed both to Portugal as administering power of East Timor and to the people of East Timor.\(^4\) Portugal contended that Australia breached international law by failing to observe the rights of the East Timorese to self-determination, territorial integrity, and permanent sovereignty over natural resources.\(^5\) Australia responded that the Court lacked jurisdiction to decide the claims of Portugal, that these claims were inadmissible\(^6\) and in the alternative, regardless of whether the Court found jurisdiction, that Australia had not breached Portugal's rights under international law.\(^7\) In its second submission, Australia argued that, in order to protect its sovereign rights, it was entitled to treat Indonesia as the state in actual and effective control of the territory because the United Nations did not impose any obligation of nonrecognition on third parties.\(^8\) As the questions of jurisdiction and admissibility were inextricably linked with the substance of the case, Australia argued them together.\(^9\) The ICJ found that it could not determine the legality of the Timor Gap Treaty without first determining the lawfulness of Indonesia's military invasion and subsequent incorporation of East Timor.\(^10\) Consequently, the Court refused to hear the merits of the case between Portugal and Australia on the grounds that Indonesia was not a party to the dispute and refused to accept the Court's jurisdiction.\(^11\)

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5. Counter-Memorial of the Government of Australia, *East Timor (Port. v. Austl.)* (East Timor) 99 (June 1, 1992) [hereinafter Counter-Memorial of Australia].
6. An objection to the admissibility of a claim is "a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits," whereas an objection to the jurisdiction of the Court is "a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim." Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure*, 1958 Brit. Y.B. INT'L L. 1, 12-13.
7. *East Timor*, *supra* note 1, paras. 10.
10. Id. para. 33.
11. The methods of accepting the jurisdiction of the ICJ are in *The Statute of the International Court of Justice* arts. 36, 37 [hereinafter *Statute of the ICJ*]. Article 36 provides:
1. 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 in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as
The political core of the dispute between Portugal and Australia was Indonesia's military invasion of the former Portuguese colony of Timor in late 1975 and its continuing presence there. The group claiming to represent the majority of the people of East Timor was the Frente Revolucionária Timor Leste (FRETILIN). In the aftermath of the Portuguese revolution in April 1974, FRETILIN, the União Democrática Timorense (UDT), and the Associação Popular Democrática de Timor (APODETI) were the three principal political parties in East Timor. Portugal's effort in 1975 to encourage cooperation among the parties failed, and the UDT attempted a coup. FRETILIN then launched a countercoup, which enabled FRETILIN to secure large parts of the territory. Portugal was unable to prevent the ensuing civil war and withdrew its local administration to the island of Atauro, where it remained until the Indonesian invasion. FRETILIN unilaterally declared independence and proclaimed the formation of the Government of the Democratic Republic of East Timor. UDT and APODETI condemned this action and issued a joint declaration stating their wish to establish formal ties with Indonesia and calling on Indonesia to support them against FRETILIN. Indonesia obliged by invading East Timor and occupying the island. Indonesia justified its action based on the argument that two of the major political parties in East Timor sought to integrate with Indonesia in the exercise of their right of self-determination. Portugal made compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37 provides: "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice."
no attempt to resist or repel the Indonesian armed forces and almost immediately withdrew from the area. Furthermore, Portugal passed an amendment to its constitution ending its treatment of East Timor’s status as part of Portugal.\(^{20}\) Portugal effectively took no further action with regard to East Timor until 1980, when it undertook diplomatic initiatives in the United Nations General Assembly.\(^{21}\) Australia initially voiced its objection to Indonesia’s use of force, but later recognized the continuing reality of Indonesia’s control over East Timor. It accorded Indonesia’s incorporation of East Timor de facto recognition in January 1978 as a precursor to negotiations concerning the Timor Gap.\(^{22}\) De jure recognition was thus implied when negotiations commenced a year later. The ICJ’s decision not to address the substantive issues in East Timor has been hailed as a political triumph for Australia. According to Australia’s Minister for Foreign Affairs and Australia’s Ambassador to The Hague, this decision “remove[d] any possible uncertainty about Australia’s rights in the Timor Gap”\(^{23}\) and “totally vindicated the arguments put by Australia.”\(^{24}\) The decision could be considered a victory for the East Timorese because it confirmed both their right of self-determination and East Timor’s status as a non-self-governing territory despite Indonesian control. The Portuguese government stated that it did not view the case as a failure, as it had brought East Timor to public notice.\(^{25}\) Portugal announced that it intended to continue pressing for East Timor’s right to self-determination through the United Nations and through efforts in the diplomatic arena.\(^{26}\)

This Article attempts to put the East Timor decision in its legal context by studying the Court’s treatment of the concept of necessary parties. The term “necessary parties” refers to those entities whose interests and rights form the “very subject matter of the dispute”\(^{27}\) such that they must be represented before the ICJ for determination of a case. The doctrine of necessary parties was not only highly relevant in East Timor because of the absence of Indonesia, a signatory of the Timor Gap Treaty, but also because of the absence of the people of East Timor. However, while the East Timorese’s right of self-determination was a fundamental issue in the case, the Timorese were not and could not be considered a necessary party because the

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20. Counter-Memorial of Australia, supra note 5, ¶ 44 (outlining article 307 of Portuguese constitution, as amended in 1976, and included as article 293 of 1989 revision of constitution).
21. Id. annex 7 (cable from Australian Embassy, Lisbon containing translated excerpts of interview by Portuguese Foreign Minister to Expresso newspaper, May 10, 1980: “[T]here has been no initiative from the governments which preceded us and . . . none took any initiative to resolve [the East Timor] problem whose human and political aspects are so delicate and so serious”).
22. See id. annexes 12-17 (reprinting reports of statements made by Australian Minister of Foreign Affairs, Dec. 7-29, 1975).
23. AUSTRALIAN DEP’T OF FOREIGN AFF. & TRADE, BRIEFING PAPERS ON PORTUGAL V. AUSTRALIA (July 1995).
traditional definition of necessary parties only extends to states; they therefore relied upon Portugal to adjudicate their claim on their behalf. Portugal, therefore, brought the action against Australia in its capacity as administering power of East Timor. The ICJ reaffirmed the significance of the doctrine of necessary parties by finding that Indonesia was such a necessary party in *East Timor*.

In order to study the issues that arise from the international legal doctrine of necessary parties, I will draw on a theory proposed by Antonio Cassese in *International Law in a Divided World*. Cassese's theory identifies two stages in the development of international law. The first is the "Westphalian model," or traditional international law, and is based on the notion of a community of sovereign states in which the sovereignty of a state can only be restricted through its consent. The fundamental notion of this model is the independent existence of states whose international relations are governed by self-interest. The second model, which has expanded the scope of traditional international law, is classified as the "U.N. Charter model." Under this model states remain the primary subjects of international law, but a role in interstate relations exists for organized peoples, international organizations, and individuals. While the Westphalian model emphasizes realism, Cassese considers the U.N. Charter model to be more idealistic, since its rules do not necessarily represent the current situation in international law but instead reflect a series of hortatory goals for the world community. In fact, the main feature of this model is a set of rules "aimed at introducing greater justice into international relations." Cassese does not argue that the U.N. Charter model has definitively replaced the Westphalian model; rather, the two models coexist.

The coexistence of the Westphalian and the U.N. Charter models reflects the complex and interwoven nature of the competing interests that the ICJ must balance in its role as principal judicial organ of the United Nations. The ICJ adheres to the fundamental tenets of international law encapsulated in the Westphalian model, while it also complements and develops international jurisprudence through the U.N. Charter model, a more value oriented approach to international law. The ICJ enhances its own credibility and

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28. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD (1986).
29. This stage began at the Peace of Westphalia in 1648 and lasted until the end of World War I. *Id.* at 38.
30. In this community, states cooperated minimally with each other, and force was the primary means of legitimation and of settling disputes. This system of international relations reflected the imbalance of power that existed between European states and developing countries at the time. Cassese remarks that "traditional international law made up a 'realistic' body of legal rules, for it actually sanctioned the existing power relationships." *Id.* at 400.
31. This stage began after World War I. Although faint, it intensified after World War II, and extends to the present day. *Id.* at 397-98.
32. Cassese argues that international law has become more value oriented. This trend is evidenced through the development of human rights law, the creation of peremptory norms of international law, the creation of rights and duties binding the international community as a whole, and the acceptance of certain principles forming the foundation of international rules. Also, the U.N. Charter model addresses the social and economic inequalities that the Westphalian model ignored. *Id.* at 398-99.
33. *Id.* at 399.
34. *See id.* at 163.
legitimacy, and thereby advances international law, successfully balancing the Westphalian and U.N. Charter models rather than confining itself to the traditional concepts of international law. Indeed, the international standing of the ICJ is favorably influenced when the Court's consistent application of traditional international law is tempered by the fundamental notions of fairness and equity that are inherent in the justice of the U.N. Charter model. The interplay between these two models accounts for the political and social changes that influence the work of the ICJ and contributes to an understanding of the application of the necessary parties doctrine.

I argue in this Article, however, that the ICJ has not taken a consistent approach to the issue of necessary parties in international adjudication. Instead, it has oscillated between the U.N. Charter model and the Westphalian model. The Court has alternately favored an approach that strictly confines disputes to a bilateral character in order to protect the sovereignty of states, and a more expansive approach that considers the wider dimensions of a dispute in order to satisfy equity. The "Westphalian" tendency of the Court in *East Timor* will also be analyzed against the background of earlier decisions on the doctrine of necessary parties.

The first half of this Article addresses limitations to the Court's jurisdiction arising from the doctrine of necessary parties. Part I analyzes the consensual jurisdiction of the ICJ as a limit to the effectiveness of the Court and its decisions. A state can only be brought before the Court if it accepts the Court's jurisdiction, potentially creating a situation in which a respondent must defend itself without the participation of a third state that has not accepted the jurisdiction of the ICJ and that may be equally culpable in the eyes of the respondent. Part II focuses on the ICJ's tendency to invoke article 59 of the Court's statute as a form of protection of third party rights. The Court's inclination to restrict itself to bilateral disputes is reflected in cases that hold that absent parties are protected because the Court's decision is not binding on them. A continuing emphasis on states as individual entities that are only bound by their consent is indicative of the Westphalian order. The Court in *East Timor* reinforced this emphasis by finding Indonesia's consent to the resolution of the dispute imperative despite the possible application of erga omnes rights and obligations. The Court also failed to address the international implications of any decision that commented on the right of the East Timorese to self-determination. Part III discusses how a state may be a "necessary party" because of the role it is required to play in the proceedings before the ICJ. A state may be a necessary party because it possesses evidence, or because its responsibility must be determined as a preliminary step, or to apportion fault. These issues were examined in *East Timor* with respect to Indonesia and the East Timorese. In order to ensure that justice had been served the U.N. Charter model would have required the Court to consider the wider import of the proceedings before it. The final part argues that subjects other than states, particularly organized peoples, can constitute

35. *See* Statute of the ICJ arts. 36-37.
necessary parties to a dispute if their rights and duties are inexorably linked to a dispute between or against a state or states. The U.N. Charter model recognizes that entities other than states can have a role in international law. The East Timorese, I will argue, constitute precisely this kind of entity.

II. CONSENT AND NECESSARY PARTIES IN MULTILATERAL DISPUTES

The ICJ has consistently affirmed that consent is the essential basis of its international jurisdiction. The means of expressing consent to the Court's jurisdiction are set out in the Statute of the ICJ to which all members of the United Nations are parties ipso facto. Under article 36(1), states may accept the jurisdiction of the ICJ in three ways; of these, two are used in practice. Under the first, a state may refer a case to the Court, entering an agreement "whereby two or more states agree to refer a particular and defined matter to the Court for a decision." The second permits a state to refer a matter to the Court under a multilateral or bilateral treaty. "[T]he treaty may be one providing for the reference of a given dispute to the Court, a general treaty of peaceful settlements of disputes, or a treaty containing a compromissory clause." Article 36(2) provides a final way for states to express their consent to the jurisdiction of the Court. Under this provision, states unilaterally commit themselves, in advance, to accepting the compulsory jurisdiction of the ICJ. The statute grants the Court no jurisdiction except by the methods specified. Thus, the consent of the parties to a dispute sets a firm boundary to the Court's jurisdiction. The consent of states constrains not only the Court's jurisdiction in a dispute, but also the forms of settlement it may impose. Traditionally, the Court has also deferred to state sovereignty in the sense that it will not pass judgments affecting the rights or interests of states that have not consented to adjudication or that have not agreed to be bound by the Court's decision. In East Timor, Portugal brought its action against Australia on the basis of their mutual acceptance of compulsory jurisdiction. Indonesia, however, was not a party to the dispute before the ICJ. It had neither accepted the jurisdiction of the Court under article 36(2) nor sought to intervene in the proceedings. Unsurprisingly, in view of the United Nations Charter art. 93, ¶ 1. Under article 93(2), a state that is not a member of the United Nations may become a party to the Statute of the ICJ.

37. See, e.g., Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, 1950 I.C.J. 221 (July 18); Ambatielos Claim (Greece v. U.K.), 12 R.I.A.A. 83 (1956); Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93 (July 22).
38. STATUTE OF THE ICJ arts. 36-37.
39. U.N. CHARTER art. 93, ¶ 1. Under article 93(2), a state that is not a member of the United Nations may become a party to the Statute of the ICJ.
40. Jurisdiction could comprise "all matters specially provided for in the Charter of the United Nations" under article 36(1), but the Charter does not specify any such matter, and so this form of acceptance of jurisdiction is moribund. RENATA SZAFAZ, THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 7 (1993).
42. Id.
43. Indonesia could have argued that it had a third party legal interest that would have been affected by the decision in the case and sought to intervene under articles 65 and 66 of the Court's Statute. The intervention provisions in the Statute do not constitute an exception to the principle of consent. Land, Island & Maritime Frontier Dispute (El Sal. v. Hond.), 1990 I.C.J. 92, 134-35 (Application to Intervene by Nicar. of Sept. 13) [hereinafter Land, Island & Maritime Frontier Dispute]; Continental Shelf (Libya v. Malta), 1984 I.C.J. 3, 22 (Application to Intervene by Italy of Mar. 21). Jurisdiction in intervention
Nations' reaction to the invasion of East Timor, Indonesia avoided taking part in the case. Both the Security Council and the General Assembly had passed resolutions condemning Indonesia's intervention, calling upon it to withdraw its forces, and calling on all states to respect the rights of the East Timorese to self-determination. In view of the political response to Indonesia's invasion, it is unlikely that Indonesia would have risked additional legal condemnation by submitting to the jurisdiction of the Court.

In this part, I argue that East Timor exposes the tension between the Westphalian theory of state sovereignty and the U.N. Charter alternative. In the past, the Court supported the Westphalian model of respect for the autonomy of states, finding that a state not party to the proceedings before the Court must have its interests protected if necessary. This allegiance, however, was not unwavering. The Court had begun to depart from the tradition of judicial restraint when faced with political disputes, and had sought to extend its jurisdiction when it could do so without implicating third-party states. In East Timor, however, the Court has again returned to a Westphalian approach to the issue of states' consent and the doctrine of necessary parties.

Cases is not based on the consent of the parties to the case but on "the consent given by them, in becoming parties to the Court's Statute, to the Court's exercise of its powers conferred by the Statute." Land, Island & Maritime Frontier Dispute, supra at 133. Nicaragua made this argument and also claimed that its interests were "so much part of the subject matter of the case that the Chamber could not properly exercise its jurisdiction without the participation of Nicaragua." Id. at 114. The Chamber adopted a two stage process and decided to determine first whether Nicaragua had shown the existence of a potentially affected interest to warrant intervention. If that was found to exist, the Chamber would consider whether the interest constituted the very subject matter of the dispute as well. Id. at 116. If only the first stage was reached, Nicaragua would become an intervenor, not a party to the case, with the right to be heard but without "acquir[ing] rights, or becom[ming] subject to the obligations, which attach to the status of a party." Id. at 136. If Nicaragua's interest formed the "very subject matter of the dispute," the Chamber would lack jurisdiction. The Chamber found that the legal status of the Gulf of Fonseca did affect the interests of Nicaragua as well as Honduras and El Salvador. Id. at 121, but that Nicaragua's interests did not form the very subject matter of the dispute. Id. at 122. On this basis, the degree to which an interest is affected is of importance when determining if the consent of a particular state is required for the adjudication of a dispute.

In East Timor, Indonesia could not be compelled to intervene, as the ICJ has no power to join a party to the proceedings before it. It certainly would not have been in Indonesia's interest to intervene and risk a direct ruling that its occupation of East Timor was illegal.

A. Consent and State Sovereignty

Traditionally, the ICJ has protected state sovereignty by limiting its jurisdiction to the resolution of disputes among consenting states. It adopted this approach explicitly in *Monetary Gold*, the seminal case on the concept of necessary parties. In *East Timor*, the Court reaffirmed the requirement of the consent of any state it considered to be a necessary party before considering the case on its merits. The majority opinion, which emphasizes that the independent existence of states is restricted only by consent, is suggestive of the Westphalian model, and is in line with *Monetary Gold*. Under *Monetary Gold*, the Court will not adjudicate a dispute, where the interests of a given state form the "very subject matter" of the dispute, and that state has not consented to ICJ jurisdiction in the matter.

*Monetary Gold* arose out of a dispute relating to the distribution of gold among countries that could establish that a definite amount of the precious metal belonging to them had been looted by Germany or wrongfully removed to German territory during World War II. France, the United Kingdom, and the United States created the Tripartite Commission to deal with the claims. When Italy and Albania laid competing claims to a single reserve, the three governments of the Tripartite Commission, in accordance with the Washington Agreement, submitted the matter to arbitration. An arbitrator determined that the gold removed from Rome in 1943 belonged to Albania. Under the Washington Statement, which was signed at the same time as the Agreement, the governments of France, the United States, and the United Kingdom agreed that should this determination be made, the gold would go to the United Kingdom, not Albania, in partial satisfaction of the judgment in *Corfu Channel*. On a proviso to the Washington Statement, France, the United States, and the United Kingdom accepted the compulsory jurisdiction of the ICJ, should either Italy or Albania lodge applications with it. Albania could have appealed to the Court to determine whether it was proper to deliver the gold to the United Kingdom, but made no such application. Italy, however, made an application to the ICJ for a determination as to whether its claim to the gold was the stronger. The Washington

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48. In its advisory opinion on Eastern Carelia, the Permanent Court of International Justice, the ICJ's predecessor, founded its decision on the principle of necessary consent, a principle it derived from the doctrine of state sovereignty. *See Eastern Carelia*, 1923 P.C.I.J. at 27. The Court was asked to determine whether a declaration as to the autonomy of Eastern Carelia asserted in the protocol of signature relative to the Treaty of Peace signed between Russia and Finland in 1920 was a binding international obligation. The Court found that to give an opinion on such a matter would decide an actual dispute between Finland and Russia. Russia was not a party to the Statute of the Permanent Court and formally declined to take part in the proceedings. *Id.* at 12-13. Under these circumstances, the Permanent Court refused to give an opinion, stating: "It is well-established in international law that no state can, without its consent, be compelled to submit its dispute with other states either to mediation or to arbitration, or to any other kind of pacific settlement." *Id.* at 27.
49. Monetary gold is held in the national bank of a state and intended to back the currency of that state.
51. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9). There, the ICJ found Albania to be internationally responsible and liable to compensate Britain for damage caused to British ships by a mine that exploded in Albanian territorial waters.
Statement provided that Italy possessed this right as a result of an Albanian law of January 13, 1945 concerning Albania's alleged confiscation of the assets of the National Bank of Albania, which were largely owned by the Italian government. Italy argued that it had a claim for indemnification for an alleged international wrong that Albania had committed by passing that law. According to Italy, this meant that the Court did not have jurisdiction to adjudicate upon the question of priority of claims to the gold without the consent of Albania as any decision on the merits would effectively involve the determination of a dispute between Italy and Albania rather than a determination of a dispute between Italy and the United Kingdom.

Accepting this argument, the ICJ stated: "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a state with its consent." Since Albania had neither expressly nor impliedly consented to the Court's jurisdiction in the matter, and since Albania's "legal interests would not only be affected by the decision, but would form the very subject matter of the decision," the Court held that it would not decide the case in its absence. The Monetary Gold principle reflects the fundamental notion of state sovereignty and the requirement of consent.

This point was reiterated by the Court in East Timor: "One of the fundamental principles of the Court's Statute is that it cannot decide a dispute between states without the consent of those states to its jurisdiction." Australia argued that its consent was not sufficient, under article 36(2), for the Court to proceed to determine the case since the rights and interests of Indonesia under the Timor Gap Treaty were also directly at issue. Australia submitted that Portugal sought, in effect, to challenge the validity of the Treaty, so that the consent of both contracting parties was required. Portugal, of course, did not bring an action against Indonesia because Indonesia, unlike Australia, had not accepted the compulsory jurisdiction of the Court. The Timor Gap Treaty creates reciprocal rights and obligations between Australia and Indonesia, and thus Australia argued that "[t]o challenge the existence or legality of Australia's duty to perform the Treaty is, necessarily, to challenge the existence or legality of Indonesia's right to have the Treaty performed."

Portugal argued that Australia's international obligations were independent of the actions of Indonesia and favored a narrow interpretation of Monetary

52. Italy also argued its right to the gold under the provisions of the Italian Peace Treaty. This claim, however, was dismissed for failure to invoke the provisions in the proceedings. Treaty of Peace with Italy, Feb. 10, 1947, U.S.–Italy, T.I.A.S. No. 1648.
54. Id.
56. Counter-Memorial of Australia, supra note 5, ¶¶ 6-11, 17.
57. Id. ¶ 190.
58. East Timor, supra note 1, para. 25. Portugal could have argued, for example, that Australia had independent obligations under Security Council resolutions, which are considered binding under article 25 of the U.N. Charter. Sasha Stepan, Portugal's Action in the International Court of Justice Against Australia Concerning the Timor Gap Treaty, 18 MELB. U. L. REV. 918, 921 (1992).
Gold whereby the Court was prevented from deciding a case for jurisdictional reasons only if it was asked for a decision that was binding on an absent state.\(^{59}\) According to this reasoning, Australia could be independently sued for violating its duty to treat East Timor as a self-governing territory and its duty to treat Portugal as its de jure administering power.\(^{60}\) Furthermore, Portugal argued that the former duty was independent of the latter. It was submitted that Australia had violated a duty not to recognize a state’s claim to sovereignty over territory acquired by the use of force. Portugal’s arguments raised two fundamental issues: the binding and authoritative nature of Security Council and General Assembly resolutions with regard to the self-determination of former colonial peoples and the significance of rights and duties \textit{erga omnes}.\(^{61}\) Had the Court reached these issues, its treatment of them would have carried implications for the entire international community. Any decision on the merits would have been no more binding on Indonesia than on any other member of the international community except Australia. Nonetheless, the majority of the Court applied \textit{Monetary Gold} and held that “Australia’s behavior cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so.”\(^{62}\) Indonesia’s rights and obligations were found to constitute the “very subject matter” of the dispute. The Court was therefore unable to determine the merits of the case in the absence of Indonesia’s consent.\(^{63}\)

The dissenting judgments of \textit{ad hoc} Judge Skubiszewski and Judge Weeramantry did not subscribe to the majority’s view of consent as the paramount issue. Both judges agreed that the acts of Australia could be separated from those of Indonesia\(^{64}\) and that the Court should have decided the dispute “in accordance with the demands of justice.”\(^{65}\) Judge Skubiszewski rejected an overly technical approach and advocated a high degree of understanding of the situation in view of the application of the principle of self-determination.\(^{66}\) Judge Weeramantry also opposed a narrow approach that would prevent the Court from reaching a determination of the case.\(^{67}\) He believed that a balance must be struck between the necessary party rule and the ICJ’s judicial duty to decide a dispute.\(^{68}\) Judge

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\(^{59}\) Miguel Galvão Teles, \textit{The Political and Legal Aspects of Portugal’s Action Against Australia in the Case Concerning East Timor}, in \textit{INT’L L. ASS’N (AUSTL. BRANCH), THE EAST TIMOR CASE IN THE ICJ} 24, 34 (Martin Place Papers No. 4, M. Brewster & I.A. Shearer eds., 1995) (emphasis added).

\(^{60}\) \textit{East Timor}, supra note 1, para. 10; see also Teles, \textit{supra} note 59, at 28-29 (“The duties for the violation of which Australia was brought to the Court were the ones not to disregard . . . : the duty not to deal in relation to East Timor as if it was not a non-self-governing territory and in relation to its natural resources as if they were not their own, on one hand; and the duty not to deal in relation to East Timor as if Portugal was not the de jure Administering Power, on the other hand.”)

\(^{61}\) Teles, \textit{supra} note 59, at 29.

\(^{62}\) \textit{East Timor}, \textit{supra} note 1, para. 28.

\(^{63}\) Id. para. 34.

\(^{64}\) Id. para. 60 (Skubiszewski, J., dissenting), pt. A, § 1(iii)-(iv) (Weeramantry, J., dissenting).

\(^{65}\) Id. para. 47 (Skubiszewski, J., dissenting).

\(^{66}\) Id. para. 47 (Skubiszewski, J., dissenting).

\(^{67}\) Id. para. 43 (Skubiszewski, J., dissenting).

\(^{68}\) Id. pt. A, § 6(v) (Weeramantry, J., dissenting); see also id. pt. I (separate opinion of Judge Shahabuddeen).
Weeramantry did not deny the importance of the consensual basis of jurisdiction but asserted that “it is a matter of common sense that too rigid an attraction to that principle will paralyze any international tribunal.” The willingness of the dissenting judges to consider the issues in East Timor presented in their wider context reflects an adherence to the U.N. Charter model. Justice would undoubtedly have been better served by acknowledging the significance of the principle of self-determination, and deciding the case on its merits.

B. The Influence of Politics

The ICJ’s emphasis on consent must be understood not only in consideration of the traditional adherence to the fundamental concept of state sovereignty, but also as a response to the political sensitivity of the case. Eastern Carelia and Nicaragua70 both illustrate the ICJ’s treatment of political issues in disputes before the Court. The Court’s distinction between the legal and political aspects in these cases is indicative of its desire to determine fairly the questions put before it. The fact that the Court was prepared to draw this line demonstrates that the protection of state sovereignty is not always a primary determining factor where a dispute involves political as well as legal issues.71 In East Timor, however, the Court made a distinction that implied a return to the Westphalian approach. The East Timor decision can be considered a facet of a larger negotiation process undertaken by Portugal, Indonesia, representatives of East Timor, and the United Nations. Therefore, the Court’s decision has ramifications in international relations, not just in international law. There was, however, no explicit acknowledgment of this fact in the Court’s decision, which chose to focus primarily on the Timor Gap Treaty.

In Eastern Carelia, Russia was not a member of the League of Nations and refused to negotiate on the question of the status of Eastern Carelia through the good offices of Estonia.72 Russia strongly protested Finland’s act of placing the issue before the League of Nations and considered the request for an advisory opinion to be “an act of hostility to the Russian Federation and an intervention in its domestic affairs.”73 Russia also criticized the Permanent Court for being partial because some members of the Court represented countries whose governments had not accorded de jure or, in some cases, de facto recognition to the Soviet government.74 The Court’s refusal to exercise jurisdiction was therefore appropriate not only due to Russia’s lack of consent, but also because it avoided a potentially volatile political situation.

73. Id. at 13.
74. Id. at 13-14.
Eastern Carelia was just one of many cases in which the Permanent Court addressed jurisdictional problems, stating that in each of these cases the "overriding emphasis" was judicial restraint.\(^7\) This point is well worth noting considering the backlash against the ICJ following the decision on preliminary questions in the Nicaragua case.\(^7\) Nicaragua instituted proceedings against the United States on April 9, 1984, claiming that the United States had breached international law through the use of force and intervention in the internal affairs of Nicaragua in violation of the charters of the United Nations and the Organization of American States, and of customary international law. Nicaragua claimed in its application that the United States was supporting the activities of guerrillas who were fighting to overthrow the Nicaraguan government by training them and supplying them with financial aid and military equipment. Nicaragua also asserted that the United States had attacked it directly by mining its harbors and conducting armed raids on ports and oil depots in Nicaraguan territory. The United States raised a number of objections to the Court's jurisdiction, focusing on the operation of compulsory jurisdiction and objecting to the admissibility of the dispute. These objections mostly concerned the status and role of the Court in determining inherently political, continuing disputes involving the use of armed force. The Court's declaration that it had jurisdiction to hear the case was considered "an unprecedented departure from the well-established legal principles governing the ICJ's jurisdiction that had been nurtured over decades."\(^7\)

The United States' principal reasons for withdrawing from the proceedings were the Court's failure to recognize adequately the possible abuse of the Court's procedures for political objectives and its departure from the tradition of judicial restraint.\(^7\) The United States withdrew before the ICJ gave a full hearing on the merits of the claims because it believed that its consent to the adjudication of the dispute was at issue. The United States criticized the proceedings brought by Nicaragua as a "blatant misuse of the Court for political and propaganda purposes,"\(^7\) implying that the United States' acceptance of the Court's compulsory jurisdiction in such a case would be an abuse of the Court's role.

The ICJ was able to deal with this dispute by separating its political from its legal aspects.\(^8\) The Court relied on Corfu Channel\(^8\) to demonstrate its ability to decide disputes that had political implications.\(^8\) Although the

\(^{75}\) See the analysis of the jurisprudence of the Permanent Court in Thomas J. Pax, Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?, 8 B.C. INT'L & COMP. L. REV. 471, 472 (1985).

\(^{76}\) See W. Michael Reisman, Has the International Court Exceeded its Jurisdiction?, 80 AM. J. INT'L L. 128, 132 (1986) ("The Court's creation of a valid Nicaraguan declaration is so ill-founded in the facts, in the law, and in the Court's own jurisprudence as to constitute a ground of nullity.").

\(^{77}\) Pax, supra note 75, at 473.


\(^{79}\) Id.


\(^{82}\) Nicaragua, 1984 I.C.J. at 435. This point was also affirmed in Teheran Hostages, where the Court stated that "no provision of the [Court's] Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however
acknowledgment of political issues in a case could be construed as a move away from traditional international law, the acknowledgment in Nicaragua can still be criticized as a Westphalian approach. The creation of a line separating politics and law whereby the Court deals only with those issues deemed to be legal is more consistent with the Westphalian model than with the U.N. Charter model. Decisions on the use of force and the right to self-defense inevitably entail both legal and political aspects, and it is thus extremely difficult to distinguish between purely legal issues and purely political ones. An approach more consonant with the U.N. Charter model would at least acknowledge the difficulties in drawing such a line between law and politics in international law.

The majority in East Timor, however, did not even reach the point of drawing this line. Instead, it followed the Westphalian model and entirely failed to acknowledge and consider the wider ramifications of its decision. Australia argued in its countermemorial that a judgment of the Court that Australia could not lawfully give effect to the Timor Gap Treaty with Indonesia would inevitably impinge on Indonesia's right that Australia execute its Treaty obligations. A judgment in Portugal's favor would expose Australia to two binding but inconsistent obligations. In fact, Australia contended that Indonesia would be advantaged by a decision that Australia could not give effect to the Treaty as Indonesia would be "free to reassert its view that it has exclusive rights to the greater part of the area." If the Court had looked at the entire situation before it, including the fact that negotiations were continuing between Portugal, Indonesia, representatives of East Timor, and the United Nations, it would have realized that a finding on the legal positions of Portugal and Australia would have had implications for the ongoing political processes. The Court could not have thought that it could hand down a judgment with no impact on states other than Australia and Portugal. The Court did not explicitly validate either Indonesia's invasion or Australia's actions subsequent to that invasion. The decision in East Timor, however, impacted Indonesia even without the Court ever having to proceed to the merits of the case. Judge Skubiszewski wondered whether Indonesia, as a third party, would benefit the most from the majority's decision; the ICJ failed to condemn publicly Indonesia's military invasion and essentially permitted Indonesia to continue treating East Timor as one of its provinces. The Indonesian government has always maintained the position that the people of East Timor had exercised their right of self-determination by choosing to integrate with Indonesia. The ICJ was unanimous, however, in accepting that East Timor was still a non-self-governing territory and that the East Timorese still had the right of self-determination, implying that Indonesia's occupation and control of East Timor was illegal. This is clearly an underlying


83. Counter-Memorial of Australia, supra note 5, ¶ 220.
84. Id. ¶ 268.
86. East Timor, supra note 1, para. 48 (Skubiszewski, J., dissenting).
inconsistency in the ICJ's application of the Monetary Gold rule since it is contrary to the Court's endeavor to prevent any finding on the international responsibility of Indonesia. In this sense, the pronouncement on the status of East Timor strengthens the position of the East Timorese in the political negotiations conducted under the auspices of the United Nations and may also affect the way in which the wider international community conducts relations with East Timor.

C. Scope of Consent

Although the necessary consent of a state may limit the ICJ's jurisdiction to determine a dispute, the Court has wide jurisdiction over parties that have given consent.\(^8^7\) For example, in many cases involving frontier disputes in which the rights of a third state were potentially affected but did not form the central subject matter of the dispute, the ICJ reached decisions by exercising its jurisdiction to the fullest extent. One such case was Italian Intervention into the Libya/Malta Continental Shelf Dispute where Italy sought to intervene under article 62 of the Court's statute on the basis of a legal interest that was "nothing less than respect for its sovereign rights over certain areas of continental shelf in issue in the present case."\(^8^8\) Italy argued that the delimitation of the areas of continental shelf in the central Mediterranean would inevitably lead to a determination that certain areas did not appertain to it, and Italy wished to ensure that the ICJ did not encroach on areas over which it had rights.\(^8^9\) This argument required a finding on disputes between Italy and either Libya or Malta or both.\(^9^0\) On that basis, Italy argued that the Court could not settle such a dispute without the consent of either Libya or Malta due to the "fundamental principle that the Court has no jurisdiction to determine matters in dispute between states without their consent."\(^9^1\) The ICJ thus only decided between the competing claims of Libya and Malta\(^9^2\) and, at the merits stage, refused to adjudicate on the delimitation of areas that also implicated Italy's interests.\(^9^3\) The Court held that it could only exercise jurisdiction to the extent that the parties had consented to the proceedings. This position of the Court must be viewed as somewhat ironic, however, since the refusal of Italy's application to intervene resulted in a narrowing of the dispute to a purely bilateral arrangement specifically based on the consent of Libya and Malta.\(^9^4\)

A chamber of the Court considered a similar issue in the Burkina

\(^8^8\) Continental Shelf (Libya v. Malta), 1985 I.C.J. 3, 10 (Application to Intervene of Mar. 21).
\(^8^9\) Id. at 11-12.
\(^9^0\) Id. at 19.
\(^9^1\) Id. at 10.
\(^9^2\) Id. at 27.
\(^9^3\) Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 25 (June 3).
\(^9^4\) The Court's rejection of Italy's application to intervene and subsequent limiting of the case to that part of the dispute that did not affect Italy's interests were considered "inappropriate if not irregular" by Judge Schwebel in his dissenting opinion. CHRISTINE M. CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 203 (1993) (quoting Continental Shelf, 1985 I.C.J. at 173 (Schwebel, J., dissenting)).
Faso/Mali Frontier Dispute but produced a different outcome.\textsuperscript{95} The dispute concerned determining the tripoint between Niger and the two disputant states. Mali argued that the Court must refrain from reaching any decision on the position of the tripoint because the rights of a third state not a party to the proceedings, namely Niger, would be affected.\textsuperscript{96} Burkina Faso maintained that the determination of the position of the tripoint was necessary as an integral part of the task entrusted to the chamber and that there would be no infringement of the rights of Niger as the determination of the point would be a consequence, not the object, of the dispute.\textsuperscript{97} The chamber found that its jurisdiction was not restricted just because there was a tripoint and the third state was not represented.\textsuperscript{98} The chamber had the consent of Burkina Faso and Mali and so decided to exercise its jurisdiction to its full extent.

A similar analysis could have applied in \textit{East Timor} since the Court had obtained the consent of Australia on the basis of compulsory jurisdiction. This analysis would have involved an adoption of Portugal’s argument that Australia’s acts could be separated from those of Indonesia,\textsuperscript{99} permitting the ICJ to exercise jurisdiction. This argument was rejected by the majority, which found instead that Indonesia’s international responsibility was a prerequisite to any decision on Australia’s responsibility.\textsuperscript{100} An alternative view of Australia’s consent to the adjudication of the dispute could have involved examining the genuine position of the disputant states prior to deciding whether the consent of any other state or states was necessary for the determination of the dispute. This was the path taken by the ICJ in \textit{Certain Phosphate Lands in Nauru},\textsuperscript{101} where the Court emphasized substance over form. Nauru brought an action against Australia concerning the rehabilitation of certain phosphate lands in Nauru worked out prior to Nauruan independence. Nauru, which was previously administered under a League of Nations mandate by Australia, New Zealand, and the United Kingdom, was placed under the Trusteeship System by the United Nations General Assembly in 1947. The joint administering authority under the mandate was replaced by a trusteeship with “Australia continuing to exercise full powers of legislation, administration and jurisdiction in and over the Territory.” The exploitation of the mines was entrusted to an enterprise managed by three British Phosphate Commissioners appointed by the three governments. Nauru brought proceedings against Australia on the basis of article 36(2), since both Nauru and Australia had accepted the compulsory jurisdiction of the Court.\textsuperscript{102} The

\textsuperscript{95} Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554 (Dec. 22).
\textsuperscript{96} Id. at 576.
\textsuperscript{97} Id.
\textsuperscript{98} In reaching this decision, the ICJ noted that Niger was not bound by the decision and that Niger was not prevented from claiming rights to territories lying beyond the tripoint. Id. at 577-78.
\textsuperscript{99} East Timor, supra note 1, para 25.
\textsuperscript{100} Id. para. 28; see infra text accompanying notes 181-84.
\textsuperscript{102} Nauru could not have brought its application against the United Kingdom under article 36(2) due to a reservation in the United Kingdom’s declaration that excludes from compulsory jurisdiction any disputes with members of the British Commonwealth with regard to facts existing prior to 1969, which was the case here. Nauru could have instituted proceedings against New Zealand, but this might have emphasized the absence of the United Kingdom without avoiding the problem that not all three states were amenable to the jurisdiction of the Court. I.A. Shearer, \textit{Australia and the International Court of Justice},
majority of the Court did not solely analyze the legal position of Australia based on the various documents concerning the administration of the mandate and trusteeship but instead considered the “true” role of Australia compared with the roles of the other two administering authorities. This analysis is most clearly evidenced in the separate opinion of Judge Shahabuddeen, which highlighted Australia’s dominant role and stated that “Australia had exclusive authority to administer Nauru for all practical purposes, as well as the even more significant power to prevent any diminution or withdrawal of that authority.” Judge Shahabuddeen even took note of the fact that only the Australian flag flew in Nauru up to the date of its independence. By looking beyond the formal documents, the majority of the Court found that Australia alone had the governmental powers that could be exercised for the purpose of legally ensuring rehabilitation of the phosphate lands. On this basis it would seem that Australia’s consent to jurisdiction did not restrict the Court to the stark legal dimensions of the dispute. Its consideration of the greater dimensions extending from consent enabled the Court to find that New Zealand and the United Kingdom were not necessary parties and that it therefore had jurisdiction.

The Court’s decision in East Timor arguably followed this notion of substance prevailing over form in order to comprehend fully the respective positions of the disputants. This approach led, however, to the opposite outcome. Indeed, in his separate opinion Judge Shahabuddeen made it clear that Indonesia constituted a necessary party because of this emphasis. The Court looked beyond Portugal’s technical application to the effective demand of a declaration of the invalidity of the Timor Gap Treaty, and moved beyond the strict legal dimensions of the dispute. However, it was not prepared to go so far as to analyze what the dissent claims is the broad basis of the argument, namely, the status of East Timor and the operation of the right of self-determination. When the position of the majority is thus compared with that of the dissenting judges, it is evident that Judges Skubiszewski and Weeramantry were prepared to consider the case in its entirety in the same way as Judge Shahabuddeen did in Nauru. The majority in East Timor, however, considered the position of the different parties only to the extent required for the application of the Monetary Gold principle.

D. Conclusion

By a strict application of the Monetary Gold principle, the Court in East Timor determined that it could not decide the case without ruling on the rights and interests of Indonesia and that Indonesia’s consent would have been required for such an adjudication. In reaching this decision, the Court moved

103. Nauru, supra note 101, at 278-79 (separate opinion of Judge Shahabuddeen).
104. Id. at 280 (separate opinion of Judge Shahabuddeen).
105. Id.; cf. id. at 301 (Jennings, J., dissenting), 337-40 (Schwebel, J., dissenting).
106. East Timor, supra note 1, paras. 45, 50 (Skubiszewski, J., dissenting) (“The substance of the case is broader and goes deeper than that Treaty.”); see also id. pt. A, § 1(iii), pt. C (Weeramantry, J., dissenting).
away from the expansionist U.N. Charter model approach developed in cases such as Nauru and Nicaragua and reverted to a Westphalian approach. The Court in East Timor had the opportunity to satisfy the justice of the case by resting consent to jurisdiction on a broad basis to allow the ICJ to appreciate the scope of the dispute and by deciding the case on the fundamental principle of the right of self-determination. Unfortunately, it made no such advancement and instead based its decision on the Timor Gap Treaty.

III. ARTICLE 59 AND NECESSARY PARTIES IN MULTILATERAL DISPUTES

The rights and interests of third parties in the settlement of disputes are protected by more than the limitation imposed by the consensual jurisdiction of the ICJ. Article 59 of the Court's statute provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case." This article not only protects state sovereignty but also enables the Court to maintain the purely bilateral character of disputes in order to exercise jurisdiction. The limitation imposed by article 59 was a prominent issue in East Timor. The people whom Portugal sought to represent and whose right of self-determination formed a central issue to the dispute could not constitute a party before the ICJ.\(^{107}\) Portugal thus brought an action against Australia, a party to the bilateral treaty in issue. The reduction of East Timor to a bilateral dispute between Portugal and Australia, however, would have been inappropriate. This section argues that the Court's use of article 59 to avoid findings of responsibility against absent states inadequately protects third party rights given both the multilateral nature of modern international relations and the influence that judicial decisions may have on later adjudications.

A. Article 59 and Multilateral Disputes

The traditional approach to international law was that no joint interest in compliance with law existed.\(^{108}\) The breach of a rule of law had to be settled between the offending state and the victim state and was of no concern to other states in the international community. With the development of international relations and the concurrent growth of interdependence between states, the "two party, zero-sum dispute" is now the "exception rather than the rule."\(^{109}\) Despite this, the accepted theory of international adjudication continues to assume that all disputes can be analyzed and settled in a bilateral framework, thus emphasizing state sovereignty while neglecting the "multifaceted interests characteristically at stake in international disputes."\(^{110}\)

The ICJ's use of article 59 in Certain Phosphate Lands in Nauru illustrates the Court's reluctance to explore the wider, multilateral implications of its decisions. In its preliminary objections in that case, Australia argued

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107. STATUTE OF THE ICJ art. 34(1) ("Only states may be parties in cases before the Court.").
108. CASSESE, supra note 28, at 397.
110. CHINKIN, supra note 94, at 148.
that Nauru’s claim was against the administering authority in relation to Nauru rather than against Australia itself. Consequently, Australia argued, the Court could not pass upon Australia’s responsibility without adjudicating upon the responsibility of New Zealand and the United Kingdom, states that had not consented to the Court’s jurisdiction in the case.\textsuperscript{111} The ICJ relied on \textit{Monetary Gold} to hold that it was not precluded from adjudicating on the matter unless the legal interests of the absent states formed the “very subject matter” of the dispute. Where a state chose not to intervene, the Court held, its interests would be protected by article 59. The Court found that the interests of the United Kingdom and New Zealand did not form the central subject matter of the dispute since the determination of their responsibility was not a prerequisite for the determination of the responsibility of Australia, as had been the case with Albania in \textit{Monetary Gold}.\textsuperscript{112} The Court did acknowledge that a finding against Australia could have “implications for the legal situation” of the other two states\textsuperscript{113} but chose to restrict what would otherwise have been a multilateral dispute to the parties that were before the Court.\textsuperscript{114} While Judge Shahabuddeen specifically acknowledged that disputes were more likely to be multilateral in nature, he argued that the Court’s approach endangered neither the principle of state sovereignty nor the requirement of consent to adjudication.\textsuperscript{115}

Judge Ago criticized this aspect of the case in his dissenting opinion. He argued that the legal rights and obligations of the United Kingdom and New Zealand inevitably would be affected even if no actual finding on their legal situation were necessary for the determination of Australia’s responsibility.\textsuperscript{116} Judge Schwebel also dissented on this issue, stating that the protection afforded the United Kingdom and New Zealand by article 59 was “notional rather than real,”\textsuperscript{117} and recognizing the multilateral nature of the dispute.

The potential operation of article 59 was not discussed by the majority in \textit{East Timor}, as the \textit{Monetary Gold} principle of state sovereignty was held to apply. Nonetheless, in his separate opinion, Judge Shahabuddeen acknowledged that article 59 did not mean that the ICJ could determine a dispute with “entire disregard of the implications of the decision for the legal position of a non-party.”\textsuperscript{118} Portugal, relying on its narrow interpretation of \textit{Monetary Gold}, argued that Indonesia would not be bound by the ICJ’s decision. Contrary to the Court’s general approach to this provision, however, the ICJ held that article 59 was not a “standing reservation” that allowed the Court to pronounce as it liked on the legal interests of states not before the

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112. Id. at 261.
113. Id. at 261-62. In Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 136 (June 7), the Court found that wider implications of a dispute did not prevent adjudication when considering the obligations arising from the Treaty of Versailles.
114. An agreement was ultimately reached between Australia and the United Kingdom with regard to the rehabilitation of Nauru. See infra text accompanying note 133.
116. Id. at 328 (Ago, J., dissenting).
117. Id. at 342 (Schwebel, J., dissenting).
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The dissenting judges considered Indonesia to be merely "affected" by the judgment and, in any event, protected by article 59. Judge Weeramantry recognized both that there is a "network of interlocking international relationships" and that the interests of a third party state would be inevitably affected by the Court's judgment. He stated that the East Timor dispute did not, however, require an inquiry into all the military, diplomatic, and political nuances of the situation, and the fact that a nonparty state is only "affected" would not bar the ICJ from exercising its jurisdiction. His equation of Australia with any other state that had entered into treaties with Indonesia with respect to East Timor is not convincing if Portugal's Application is viewed as relating solely to the negotiations and conclusion of the Timor Gap Treaty. Since this treaty was directly at issue, Australia, as a cosignatory, was specifically affected by any decision that had an impact on the validity of the treaty. The plausibility of the dissenting opinions derives from their grounding in broader arguments concerning the right of self-determination—a right that affects Australia and all members of the international community.

B. Implications for Future Proceedings

Even if the interests of a state do not form the central subject matter of a decision before the ICJ, the multilateral nature of the dispute may mean that one of the parties before the Court may wish to bring proceedings against an absent state at a future date. Unlike the cases of Nicaragua and Nauru, the probability that Indonesia would accept the jurisdiction of the ICJ in a case brought against it by Portugal is virtually nonexistent. The East Timor decision may, however, influence future proceedings between different parties where the issues at stake are similar to those in East Timor. Although article 59 originally may have been intended to prevent the common law rule of stare decisis from applying to international adjudication, the ICJ must decide disputes in accordance with international law. This requirement has two consequences. First, if the ICJ states in any judgment that a rule of international law has been established by the necessary state practice and opinio juris, this holding binds all states regardless of article 59, since it is international law and must be respected in accordance with the Charter.

120. Id. pt. A, § 3(iv) (Weeramantry, J., dissenting).
121. Id. pt. E(vi) (Weeramantry, J., dissenting).
122. Id. pt. A, § 2(iii) (Weeramantry, J., dissenting).
123. "[T]he debate in the committee of jurists responsible for the Statute indicates clearly that Article 59 was not intended merely to express the principle of res judicata but to rule out a system of binding precedent." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 21 (4th ed. 1990).
124. STATUTE OF THE ICJ art. 38.
125. U.N. CHARTER pmbll.; Gerald P. McGinley, Intervention in the International Court: The Libya/Malta Continental Shelf Case, 34 INT'L & COMP. L.Q. 671, 690-91 (1985). Judge Ranjeva in East Timor also supported the notion that the function of the ICJ must include "not only the settlement of disputes but also the scientific development of general international law." East Timor, supra note 1, pt. II.
Second, the Court does defer to past decisions where rules of international law have been articulated. Thus, an earlier judgment, although binding only on the parties to the case at the time, may influence a later decision.\footnote{126}

In \textit{Certain Phosphate Lands in Nauru}, Judge Shahabuddeen stated that a judgment in favor of Nauru would not, per se, amount to a judicial determination of the responsibilities of New Zealand and the United Kingdom but rather would have “influential, not controlling, precedential value.”\footnote{127} Any possible future adjudication among the parties was, however, affected by the Court’s decision on the preliminary questions in \textit{Nauru}. Australia had asserted even before the decision was handed down that if the Court found against Australia, its government would seek contributions from the United Kingdom and New Zealand for any payments of compensation.\footnote{128} After the Court rejected Australia’s preliminary objections, the parties pursued negotiations while the legal procedures for the merits stage of the case proceeded. As a result of the negotiations between Australia and Nauru, a settlement was reached prior to the oral pleadings.\footnote{129} Under this agreement, Australia consented to make \textit{ex gratia} payments to Nauru to “assist . . . Nauru in its preparations for its post-phosphate future.”\footnote{130} In return, Nauru waived its right to make any further claims regarding the administration or termination of the mandate and trusteeship or relating to the phosphate mining.\footnote{131} This waiver also extended to any potential claims against the United Kingdom and New Zealand.\footnote{132} This release from claims by Nauru resulted in an \textit{ex gratia} contribution by the United Kingdom to the government of Australia.\footnote{133}

The ICJ considered similar possible effects of its decisions on later proceedings involving absent states in \textit{Nicaragua}. The United States argued that the case was inadmissible since an adjudication of Nicaragua’s claims would necessarily implicate the rights and obligations of Honduras, Costa Rica, and El Salvador with respect to collective self-defense, which would require their express consent or participation in the proceedings before the Court.\footnote{134} In response, the Court stated that it needed merely to rule on the submissions in the proceedings before it. Its decision would be binding only on the United States and Nicaragua, in accordance with article 59.\footnote{135}

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\item[126] McGinley, \textit{supra} note 125, at 691.
\item[130] \textit{Id.} art. 1(1), 32 I.L.M. at 1474.
\item[131] \textit{Id.} art. 3, 32 I.L.M. at 1475.
\item[132] \textit{Id.}
\item[135] \textit{Id.} at 431.
\end{footnotes}
ICJ rejected the United States’ argument that a requirement of consent or participation would “only be conceivable in parallel to a power, which the Court does not possess, to direct that a third state may be made a party to the proceedings.” The Court avoided the multilateral aspects of the dispute by observing that all three states had made declarations of acceptance of the compulsory jurisdiction of the Court. Thus, if their interests were affected, separate proceedings could be instituted or the procedure of intervention could be employed. The Court’s previous rejection of El Salvador’s application to intervene undercuts the credibility of this argument. El Salvador did not seek to intervene again at the merits stage of the proceedings, and one can only speculate as to whether or how the ICJ might then have dealt with the multilateral nature of the dispute. It would hardly have seemed appropriate to reject the application and suppose that the final decision on the facts and law in Nicaragua would not affect a later dispute between El Salvador and Nicaragua.

The impact of the decision on the merits in Nicaragua was, however, soon tested. As part of Nicaragua’s overall political campaign to discredit support for the guerrillas, Nicaragua instituted simultaneous proceedings against Costa Rica and Honduras one month after the merits judgment in Nicaragua was delivered. Nicaragua alleged failures by the Costa Rican government to prevent border and transborder attacks and incursions by guerrillas operating out of its territory. Nicaragua argued that these failures constituted a breach of Costa Rica’s legal responsibility.

The allegations directed at Honduras in Armed Actions were more extensive. Nicaragua argued that Honduras had incurred legal responsibility for breaches similar to those alleged against the United States, namely, breaches of the charters of the United Nations and the Organization of American States and of customary international law regarding the threat or use of force and intervention in the internal affairs of Nicaragua. Nicaragua claimed that guerrillas based in Honduras were carrying out armed attacks on Nicaraguan territory with the knowledge and assistance of the Honduran government.

Honduras submitted that the Court had no jurisdiction over the matters raised in Nicaragua’s application and that the dispute was inadmissible since the application was “a politically inspired, artificial request which the Court should not entertain consistently with its judicial character.” Honduras

136. Id. at 425, 431.
137. Id. at 425, 431.
144. Id. at 73.
argued that Nicaragua’s request was artificial, since certain facts had already been at issue before the Court in Nicaragua and the distinct bilateral disputes that Nicaragua claimed to exist there could not be separated from the general conflict existing in Central America.  

In response to this argument, the Court pointed to article 59, under which it was not “possible to rely on considerations of res judicata in another case not involving the same parties.” The facts would still have to be established according to the usual rules of evidence by the parties before the Court. In a separate opinion, Judge Schwebel criticized the Court’s argument as not “fully adequate.” In its memorial, Nicaragua had invoked the findings of fact and the conclusions of law reached by the Court in Nicaragua. These findings and conclusions were implicit findings against Honduras due to the general nature of the dispute even though Honduras was not a party to the case. To prevent Nicaragua from using the earlier decision to its full advantage, which could well have deprived Honduras from pleading collective self-defense as a major defense, Judge Schwebel believed it was “crucial” for the Court to give “the most rigorous effect” to article 59. The potential effectiveness of article 59 was unfortunately never tested in these circumstances, because Nicaragua discontinued the proceedings before the case reached the merits stage.

C. Conclusion

The use of article 59 demonstrates that the Court has viewed international disputes mainly in a bilateral context. Consequently, in true Westphalian fashion, the ICJ has maintained emphasis on the need to protect the sovereignty of states. Article 59 is meant to protect states that do not intervene in proceedings. The very act of providing states with the means of intervening, however, is an indication that a state’s interests can be affected and that article 59 cannot provide absolute protection of absent states’ rights. The Court’s continued reliance on article 59 in order to avoid the reality of the multilateral nature of disputes prevents the introduction of the U.N. Charter model, and thus greater justice, into international relations. In the rare event that a dispute is purely bilateral in nature, article 59 may have a logical purpose. However, it is difficult for the Court to ignore that disputes are increasingly multifaceted. It is unrealistic to expect article 59 to serve as a blanket protection of third states’ interests. This point was acknowledged to some extent in East Timor through the application of the Monetary Gold

145. Id. at 91.
146. Id. at 92.
147. Id. at 128 (separate opinion of Judge Schwebel).
148. Id. at 130 (separate opinion of Judge Schwebel).
149. Id. at 131 (separate opinion of Judge Schwebel).
151. See, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 431 (Nov. 26) (discussing nonbinding nature of Court decisions on third party states); Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K., U.S.), 1954 I.C.J. 19, 33 (June 15) (“Where . . . the vital issue to be settled concerns the international responsibility of a Third State, the Court cannot, without the consent of that Third State, give a decision on that issue binding on any State.”).
principle to Indonesia. Nevertheless, the majority decision did not address the rights and obligations of the East Timorese and the international community in general. Any discussion of the duties of the international community with regard to the status of East Timor, the right of the East Timorese to self-determination, and the binding nature of the Security Council resolutions is likely to affect future proceedings dealing with these issues. These questions, however, were mostly left unresolved. If the Court does not take cognizance of the multilateral nature of the cases before it, and if the Statute of the ICJ remains unaltered, one may question whether adjudication, as opposed to negotiation, mediation, or arbitration, is an appropriate method of settling multilateral disputes.

The dispute concerning the status of East Timor and the rights of the East Timorese is still far from resolved, and any satisfactory conclusion will be reached only by negotiations between organs of the United Nations, the East Timorese, Portugal, and Indonesia. Even if Indonesia did accept the jurisdiction of the Court — an unlikely event — any case brought by Portugal against it would still exclude the direct involvement of the relevant United Nations bodies as well as, and more particularly, the East Timorese, since at present, only states can be parties before the Court. Adjudication, which necessarily involves the application of certain rules in the determination of a winner and a loser, cannot easily meet the political and diplomatic challenges that must be balanced for the resolution of a complex multilateral dispute. It is also possible that any agreement reached on a political level may have more force than a decision of the ICJ, which lacks an effective enforcement mechanism. Adjudication might be more effective if jurisdiction were made compulsory for all states party to the Court’s statute and if joinder of parties were allowed so that in a case such as East Timor, where it is alleged that two contracting parties to a treaty have breached international law, both parties can be brought before the Court. This would also allow actions to be brought against states that have acted in concert and against a state that is complicitly involved in a breach of law by another state. Such a change would better reflect the current state of international relations.

IV. HOW THE INTERESTS OF STATES FORM THE ‘VERY SUBJECT MATTER OF THE DISPUTE’

When a state has not consented to the settlement of a dispute and its interests are unable to be protected by the wording of article 59, the ICJ does not have jurisdiction to decide cases where those interests also constitute the very subject matter of the dispute. This section analyzes the reasons why a state may be considered a necessary party so that its interests may gain such a status in the view of the Court. Such interests may be a central issue because, first, the absent state may have evidence that is crucial to the determination of questions of fact by the Court; second, the determination of international responsibility of another state may be an essential step prior to the Court’s finding against a party; third, the Court may decide to apportion

152. See infra Part V.
fault so that if the respondent state is not entirely responsible for an
international wrong, blame is cast on an absent third state. Most commonly,
the respondent state will raise these points as preliminary issues, arguing that
the absence of the necessary party will greatly prejudice its defenses.

A. Provision of Evidence by a Necessary Party

The ICJ has not yet held that the possession of evidence by an absent
third state is a sufficient reason to deny jurisdiction. Under article 36 of the
Court's statute, the ICJ is empowered to determine "the existence of any fact
which, if established, would constitute a breach of an international
obligation."\textsuperscript{153} The Court has wide discretion in matters concerning
evidence. It is able to seek its own expert advice\textsuperscript{154} and may direct questions
to agents, counsel, witnesses, and experts in oral proceedings.\textsuperscript{155} Most
factual issues before the Court are resolved by pleadings and documentary
proof.\textsuperscript{156} As a result, the Court normally obtains adequate evidence to
determine the facts in question,\textsuperscript{157} but occasionally difficulties may arise
when the parties before the Court do not have possession of certain facts that
are crucial to the presentation of their case.

The United States argued that at the jurisdictional phase of
Nicaragua,\textsuperscript{158} the dispute was inadmissible because Nicaragua had failed to
bring before the Court parties whose presence and participation were
necessary for their rights to be protected. El Salvador, Costa Rica, and
Honduras constituted "indispensable parties" not only because their rights and
obligations may have been implicated in the determination of the dispute, but
also because, as the United States contended, necessary facts relevant to the
conduct at issue were available only from the absent parties.

Nicaragua relied on the powers of the Court to obtain evidence under
article 44 of the Statute of the ICJ and under article 66 of the Rules of
Court.\textsuperscript{159} Nicaragua also argued that "it would be in the third states' interest

\textsuperscript{153} Statute of the ICJ art. 36(2)(c).

\textsuperscript{154} See id. art. 51.

\textsuperscript{155} Id.; Rules of Court, 1978 I.C.J. Acts & Docs. No. 4, at 93, 133-35 (art. 65).

\textsuperscript{156} Keith Higget, Evidence, the Court, and the Nicaragua Case, 81 Am. J. Int'l L. 1, 15 (1987).

\textsuperscript{157} Id. at 7; see also Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 321-22
(June 27) (Merits) (Schwebel, J., dissenting) (outlining ICJ's considerable powers to obtain evidence under
articles 49 and 50 of its statute).

\textsuperscript{158} Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26) (Jurisdiction
and Admissibility).

\textsuperscript{159} Article 44 of the Statute provides:

1. For the service of all notices upon persons other than the agents, counsel, and advocates,
the Court shall apply direct to the government of the State upon whose territory the notice has
to be served.

2. The same provision shall apply whenever steps are to be taken to procure evidence on the
spot.

Article 66 of the Rules provides:

The Court may at any time decide, either \textit{propter motu} or at the request of a party, to exercise
its functions with regard to the obtaining of evidence at a place or locality to which the case
relates, subject to such conditions as the Court may decide upon after ascertaining the views
of the parties. The necessary arrangements shall be made in accordance with Article 44 of the
Statute.

to provide the United States with factual material under [the third states']
control. This suggests that there was some evidence beyond the reach
of the United States and that to protect the interests of the third states —
interests that were not supposed to be the very subject matter of the dispute —
these states should have volunteered the information the Court needed.
This argument, presented by Nicaragua, was hardly satisfactory. It did not
however, provoke any response from the Court, which instead relied on the
allocation of the burden of proof as the basis for the determination and
acceptance of the facts, whereby a lack of factual evidence would result
in the rejection of a submission for being unproved rather than in a finding of
inadmissibility due to lack of evidence.

In East Timor, Australia requested that the ICJ find the dispute
inadmissible on the basis that the Court could not make reliable findings of
fact on issues central to the case. Australia argued that the Court required
information on the Consultation of 1976 through which the Popular Assembly
in Dili formally accepted integration into Indonesia, as well as geographic,
social, and political data relevant to the issue of self-determination in order to
decide on issues of sovereignty and self-determination. Australia asserted that
only Indonesia had this factual information and attempted to distinguish the
proceedings from Nicaragua, in which the Court addressed the problem of
evidence in the possession of absent parties through the allocation of the
burden of proof. Despite provisions to the contrary in the ICJ’s statute,
Australia again emphasized the Court’s limited ability to acquire facts and
stressed its lack of authority to demand evidence from absent parties. The
majority did not address this argument directly, but Judge Vereshchetin in his
separate opinion stated that evidence could have been provided by the
appropriate organs of the United Nations. Judge Weeramantry compiled a list
of salient facts based on admissions by Australia, relevant documents, and
general knowledge of the situation. He thought that those facts were all
that was necessary for the Court to decide the case against Australia without
having to rule against Indonesia. Judge Weeramantry interpreted
Australia’s argument to require the Court to rule on the legality of Indonesia’s
invasion as a request to the Court to reexamine fully the facts and politics

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161. Australia contended in Nauru that the absence of the United Kingdom and New Zealand would
deprive the Court of crucial factual information. Certain Phosphate Lands in Nauru (Nauru v. Austl.),
1992 I.C.J. 240, 299 (June 26) (separate opinion of Judge Shahabuddeen). However, Judge Shahabuddeen
considered that Australia would be in possession of all the relevant evidence from having in fact been in
charge of Nauru’s administration at all relevant times and that the various procedures of the Court for
obtaining evidence could be utilized. Id. at 300 (separate opinion of Judge Shahabuddeen).
163. Id. So, for example, at the merits stage, the Court found as an established fact that the United
States gave financial aid to the guerrillas, but there was insufficient evidence to show that the United States
exercised such an overall degree of control to warrant a finding that the guerrillas acted on behalf of the
(Merits).
164. Counter-Memorial of Australia, supra note 5, ¶ 301.
165. Id.
166. Id. ¶ 304.
involved at the time of the invasion, and believed that the necessary materials and information were already available to the Court through United Nations organs. Apparently, Judge Weeramantry considered the illegality of Indonesia’s invasion to be a notorious fact and thus believed that such a ruling was not necessary, and that the Monetary Gold principle did not apply.

The lack of evidence on the actual wishes of the East Timorese caused some concern to the Court. Judge Skubiszewski stated that, despite this absence, the Court could still make certain elementary assumptions. Judge Vereshchetin, in contrast, considered Portugal and Australia’s failure to consult with the East Timorese another reason that the Court lacked jurisdiction. This statement from his opinion is the only indication in the ICI’s jurisprudence that a lack of evidence might render a party necessary in the adjudication of a dispute.

According to one commentator, Nicaragua was “founded upon an intricate, shifting and controversial background of factual assertion.” At the merits stage of Nicaragua, the Court drew many inferences and made factual assumptions about events concerning El Salvador, Costa Rica, and Honduras in order to reach legal conclusions on the situation between Nicaragua and the United States. Judge Oda appraised the Court’s finding on the facts by saying that it was “beyond any doubt that the picture of the present dispute painted by the Court is far from reality.” If the Court in a case like Nicaragua would not accept the argument that a state is a necessary party because of its possession of facts, it seems unlikely, even despite Judge Vereshchetin’s efforts in East Timor, that this argument would stand on its own as a basis for the ICJ to refuse to exercise jurisdiction. The Court’s approach to evidence has been more consistent with the U.N. Charter model than the Westphalian model. By relying on its own resources and processes, the Court arguably sought a satisfactory resolution of the proceedings without being constricted by technical arguments fundamentally based upon state sovereignty. The decision in Nicaragua may be seen as a violation of necessary judicial restraint — indeed, one may even consider it an encroachment on the sovereignty of all states involved in the proceedings — but it is also illustrative of the trend in the Court to “introduce greater justice into international relations.”

169. Judge Skubiszewski was willing to take account of facts concerning Indonesia’s invasion on the basis that it was public knowledge. Id. para. 88 (Skubiszewski, J., dissenting).

170. “[T]he interests of the [East Timorese] are enhanced when recourse is made to peaceful mechanisms, not to military intervention; when there is free choice, not incorporation into another State brought about essentially by the use of force; [and] when the active participation of the people is guaranteed . . . .” Id. para. 52 (Skubiszewski, J., dissenting).

171. Id. (separate opinion of Judge Vereshchetin).


173. Damrosch, supra note 109, at 392 n.76.


175. Cassease, supra note 28, at 399.
B. Prior Determination of Responsibility

A respondent state may claim that another state is a necessary party to a case because it believes that state is also culpable for the alleged breach of international law. This was a central issue in *Monetary Gold*, where the ICJ found that Albania’s interests formed the central subject matter of the dispute because the Court had to consider whether Albania was responsible for an international wrong before it could consider the competing interests of Italy and the United Kingdom. The general rule developed in *Nauru* and *East Timor* stresses the importance of the timing of the determination of responsibility. In this recent interpretation of the *Monetary Gold* principle, which requires a prior finding of international responsibility of an absent state, the temporal distinction has overshadowed the individual responsibility of the respondent state before the Court.

In *Nauru*, the ICJ found that it was not a prerequisite to determine the responsibility of either New Zealand or the United Kingdom in order to determine Australia’s responsibility. If it had been a prerequisite, the situation would have been analogous to that in *Monetary Gold*. Australia argued in *Nauru*, however, that there would be a simultaneous determination of the responsibility of all three states based on the legal equality in the trusteeship system and that such a situation would be “equally precluded by the fundamental reasons underlying the *Monetary Gold* decision.” The Court rejected Australia’s argument in *Nauru* and held that the distinction was not only temporal but also logical, and it would not decline jurisdiction just because it was more convenient to make a decision with all the potentially affected parties present. A court would have to find that an absent state was central to the dispute to make it judicially impossible for the Court to adjudicate it. Judge Schwebel disagreed with the temporal issue since he did not believe that the timing of the finding of responsibility was significant. The important factor is “whether the determination of the legal rights of the present party effectively determines the legal rights of the absent party,” regardless of any temporal prerequisites.

In its countermemorial in *East Timor*, Australia tackled the temporal qualification to the *Monetary Gold* principle the Court imposed in *Nauru*. Australia’s argument that Indonesia’s rights and obligations formed the central subject matter of the dispute also addressed the temporal issue insofar as its alleged violations were contingent on Indonesia’s own wrongs. The fundamental issue for Australia was “whether, in 1989, the power to conclude a treaty on behalf of East Timor in relation to its continental shelf lay with Portugal or Indonesia.” Whether the East Timorese had been denied their right of self-determination and permanent sovereignty over natural resources

177. Id.
178. Id.
179. Id. at 293 (separate opinion of Judge Shahabuddeen).
180. Id. at 331 (Schwebel, J., dissenting).
181. Counter-Memorial of Australia, supra note 5, ¶¶ 191, 194.
182. *East Timor*, supra note 1, para. 27.
and whether Australia had violated its obligations to respect Portugal’s status as administering power and East Timor’s status as a non-self-governing territory depended on whether Indonesia had sovereignty over East Timor.\footnote{183} The Court’s first step was to determine whether Indonesia had the legal capacity to enter into the treaty based on its purported sovereignty. The result of this deliberation would have then determined whether Australia had breached international law by negotiating and concluding the treaty with Indonesia. This initial decision on Indonesia’s international responsibility made Indonesia’s position analogous to that of Albania’s in \textit{Monetary Gold}. The ICJ’s interpretation of \textit{Monetary Gold} has since been criticized by Portugal, which has emphasized that the binding nature of the obligation is the critical issue and any temporal distinction is irrelevant.\footnote{184}

Judge Ranjeva stated in his separate opinion that he thought the crux of the case lay in the determination of whether a prior adjudication of the lawfulness of Indonesia’s presence in East Timor was required, and this decision involved a consideration of objective and subjective rights.\footnote{185} Subjective rights are those “rights relating to the legal situation of a state which has not consented to the jurisdiction or which does not appear before the Court” whereas objective rights are those opposable \textit{erga omnes}.\footnote{186} This distinction is based on Judge Ranjeva’s interpretation of \textit{Monetary Gold} where the “determining proposition turned upon a question of personal subjective rights governing mutual relations between two legal entities, whereas the principal question turned upon a true objective point of law: the attribution of gold.”\footnote{187} In applying this reasoning to \textit{East Timor}, Judge Ranjeva found that the Court was not obliged to rule on Indonesia’s actions as a prerequisite to the adjudication of the dispute between Portugal and Australia.\footnote{188} Instead, Portugal’s objective of requiring the “nullification” of the Timor Gap Treaty, thereby depriving Indonesia of the performance of this treaty, called for a direct determination of subjective rights.\footnote{189} In Judge Ranjeva’s view, it was impossible for the ICJ to resolve the question of subjective rights without the consent of Indonesia.\footnote{190} The objective right in the case was the East Timorese’s right to self-determination, opposable \textit{erga omnes} to Australia’s action.\footnote{191} Judge Ranjeva believed, however, that the Court could have adjudicated this right without the requirement of a prior decision. The emphasis that he placed on the \textit{Monetary Gold} rule appears to be on the types of interests and rights involved. His distinction between objective and subjective rights avoids the arbitrariness of a temporal adjudication of responsibility and also allows for the application of \textit{erga omnes} rights and duties without hiding behind the rule of consent to jurisdiction.

\begin{itemize}
\item \textit{East Timor}, supra note 1, pt. I (separate opinion of Judge Ranjeva).
\item Id.
\item Id. pt. II (separate opinion of Judge Ranjeva).
\item Id. pt. I (separate opinion of Judge Ranjeva).
\item Id. pt. II (separate opinion of Judge Ranjeva).
\end{itemize}
In his dissent, Judge Weeramantry was very critical of the majority's interpretation of the Monetary Gold principle whereby the international responsibility of a third state must be established as a prerequisite to the claim or defense. Fundamentally, this would mean that,

where a claim by state A against state B cannot be made good without demonstrating as a prerequisite, some wrongful conduct on the part of state C, state B can avoid an inquiry into its own conduct, however wrongful, by pointing to C's wrongdoing as a precondition to its own liability.\(^2\)

This is an enlightening perspective on the Monetary Gold principle. The focus in the cases is generally on the plight of the reluctant respondent state that is dragged before the Court for an adjudication of its international responsibility when another state may be equally culpable for the conduct in question.\(^{193}\) Judge Weeramantry's opinion appropriately switches the emphasis back to the wrongful conduct of the respondent state.\(^{194}\) Even if Australia's responsibility derived from Indonesia's conduct, Australia could not, and should not, avoid its own responsibility by pointing to Indonesia's primary responsibility.\(^{195}\) This reasoning is analogous to that expressed in Judge Shahabuddeen's separate opinion in Nauru: "[T]hat others had the same obligation does not lessen the fact that Australia had the obligation. It is only with Australia's obligation that the Court is concerned."\(^{196}\) The success of this argument depends on how easily the actions of one state can be separated from those of another state. Such an approach is preferable, and ascertains a state's individual responsibility rather than drawing a temporal distinction.

Another point to be drawn from Nauru that could have been relevant in East Timor is that simultaneous responsibility is not enough to invoke the operation of the Monetary Gold principle. The ICJ could have rejected Australia's pedantic reasoning that essentially drew a distinction between direct and indirect responsibility. Judge Weeramantry took this position in his dissent and emphasized the importance of individual responsibility in a multilateral international community. The entire Court accepted Portugal's submission that the right of peoples to self-determination was a right \textit{erga omnes}; this assertion was "irreproachable."\(^{197}\) On this basis, the Court could have reasoned that if Indonesia breached this \textit{erga omnes} obligation by negotiating and concluding the Timor Gap Treaty, then Australia

\begin{itemize}
\item \textit{Id.} pt. A, § 2(vi) (Weeramantry, J., dissenting).
\item In Nauru, for example, Australia emphasized the shared responsibility of New Zealand and the United Kingdom as members of the administering authority, Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240, 255 (June 26), and thus brought attention to the alleged injustice of Australia's being sued alone.
\item "One of the principles most deeply rooted in the doctrine of international law and most strongly upheld by state practice and judicial decisions is the principle that any conduct of a state which international law classifies as a wrongful act entails the responsibility of that state in international law." Roberto Ago, [1971] 2 Y.B. INT'L L. COMM'N pt. 1, at 205, para. 30, quoted in East Timor, supra note 1, pt. A, § 3(ii) (Weeramantry, J., dissenting).
\item East Timor, supra note 1, pt. A, § 3(ii) (Weeramantry, J., dissenting).
\item East Timor, supra note 1, para. 29.
\end{itemize}
simultaneously breached this obligation as the other contracting party to the bilateral Treaty. The Court could have therefore concluded that the Monetary Gold principle did not apply, and exercised jurisdiction in the case. The ICJ’s refusal to find a simultaneous breach of an *erga omnes* obligation lessened the impact of its affirmation of the right of the East Timorese to self-determination.

The concept of simultaneous responsibility can also explain the anomalous position of *Corfu Channel*, which the Court decided prior to Monetary Gold. One of the arguments raised by the United Kingdom in *Corfu Channel* was that the minefield that had damaged the British ships was laid with the connivance of the Albanian government, implying Albania’s collusion with the Yugoslav government. Albania in turn asserted that the minefield may have been laid by the Greek government. In view of these accusations of international responsibility, it was apparent that the issue of necessary parties was before the Court. The case, however, did not ultimately decide this issue since the Court ascribed responsibility to Albania based upon Albania’s knowledge of the presence of the minefield and its failure to warn the United Kingdom. Judge Weeramantry referred to *Corfu Channel* in *East Timor*, noting that:

Had the Court accepted the United Kingdom’s submissions, it would have been making a clear finding of the commission of an illegality by Yugoslavia. The fact that such a wrongful act was alleged against a third party did not deter the Court from considering the alternative argument placed before it.

Judge Weeramantry considered *Corfu Channel* to be a “stronger instance of third-party involvement” than *East Timor*. One commentator has suggested that since the ICJ considered the facts to be investigated in Monetary Gold beyond its jurisdiction in contrast to its more flexible approach in *Corfu Channel*, Monetary Gold should be regarded as a unique case. Judge Shahabuddeen in his separate opinion in *East Timor* sought to rationalize the *Corfu Channel* decision by saying that there was no finding of international responsibility against Yugoslavia since Albania, through its acquiescence, had made Yugoslavia’s act its own. An alternative explanation is that any finding of collusion between the governments would be consistent with a finding of simultaneous responsibility. Therefore, following the reasoning of the ICJ in *Nauru*, the Court would still be able to exercise its jurisdiction to decide the case in accordance with the Monetary Gold principle.

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199. *Id.* at 16–17.
200. *Id.* at 17. The Court dismissed this argument as mere conjecture.
202. *Id.*
C. Apportionment of Responsibility

An absent state may also be necessary in proceedings if it is partially responsible for the alleged international wrong. This situation arose in *East Timor*, as Australia was being sued by Portugal for negotiating and concluding the Timor Gap Treaty with Indonesia. Thus, any alleged breach of international law by Australia in concluding the Timor Gap Treaty clearly would also have been committed by Indonesia as cosignatory to the treaty. In framing its argument, Australia relied on the decision of the ICJ in *Nauru*. Australia argued in *Nauru* that determination of its joint or joint and several liability with New Zealand and the United Kingdom would necessarily involve adjudicating the responsibility of New Zealand and the United Kingdom. The *Nauru* Court found whether Australia could be sued alone and whether there was joint or joint and several liability to be two independent issues. Judge Shahabuddeen accepted the majority’s opinion on this point with respect to joint liability. He determined, however, that on the assumption of Australia’s responsibility for an international wrong, the appropriate standard of liability would be joint and several liability; accordingly, Australia could be sued alone.

Australia briefly considered the severability issue in *East Timor*. On the basis of the majority’s separation of the two issues in *Nauru*, Australia argued in its countermemorial that “[i]f Portugal’s action is sustainable, this action constituted identical violations by both [Indonesia and Australia] of identical obligations resulting in identical damage.” Australia sought to establish that no separation was possible because Indonesia was condemned on either a finding of joint liability or of joint and several liability. Thus, the judges could have distinguished *Nauru* from *East Timor* on the facts, but all of the judges focused on prior determination of responsibility and did not address this point. If the Court had considered the issue, the ICJ should have chosen to follow the approach of Judge Ago in *Nauru*. Judge Ago, in his dissent, stated that a finding of either Australia’s full or its partial responsibility would affect the legal rights and obligations of New Zealand and the United Kingdom. Apportioning fault expressly to the respondent state before the Court implicitly apportions fault against certain nonparties. Any express apportionment of responsibility to Australia in *East Timor* would have undeniably constituted a finding of fault against Indonesia due to their respective positions under the Timor Gap Treaty. Such a determination of responsibility would manifestly contradict the Monetary Gold principle and would have undoubtedly produced political ramifications for the reciprocal rights and obligations created under the treaty in the exploitation of the Timor Gap. Despite Indonesia’s absence before the Court, it too would be found to be breaching international law by adhering to the terms of the treaty.

206. Id. at 285 (separate opinion of Judge Shahabuddeen).
207. Counter-Memorial of Australia, supra note 5, ¶ 228.
D. Determination of Responsibility at the Merits Stage

Some commentators argue that the Court cannot always satisfactorily resolve whether an absent state should be a necessary party at a preliminary stage. For example, the Court could leave the issue of whether a state is necessary to provide crucial factual information until the merits stage when the Court has a clearer view of what evidence it needs to make a reasoned decision. The merits stage of the *Libya/Malta Continental Shelf Dispute*, after the ICJ had refused Italy's application to intervene, serves as an example. Only at the merits stage, when the Court was fully aware of the implications of Italy's exclusion from the proceedings, did it find that it could not adjudicate the dispute in view of Italy's claims over certain areas. Similarly, in *Nicaragua*, the Court reached legal conclusions based on factual assumptions about events in and affecting states not present before the Court. This reflected the multilateral nature of the dispute and emphasized the importance of having other states before the Court. Only after the full presentation of the case did the need to protect those states' interests become apparent.

In *East Timor*, the ICJ had the advantage of hearing the jurisdictional issues and the merits of the case together. Australia employed this tactic because “it was appreciated that the natural interest and sympathy of the Court for the East Timorese people and their undoubted right of self-determination might have operated to inhibit the Court from accepting Australia's preliminary objections to competence.” The Court may have been more...

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209. See, e.g., Damrosch, supra note 109, at 394; McGinley, supra note 125, at 692.

210. Damrosch, supra note 109, at 394.

211. CHINKIN, supra note 94, at 202-03.

212. Damrosch, supra note 109, at 392 n.76.

213. Another aspect of *Nicaragua* that resulted in a modicum of protection for third states' rights concerned a jurisdictional argument raised by the United States on whether its declaration accepting compulsory jurisdiction constituted the necessary consent to the jurisdiction of the Court, particularly in view of its multilateral treaty reservation. This reservation applied to “disputes arising under a multilateral treaty, unless... all the parties to the treaty affected by the decision are also parties to the case before the Court” and was meant to protect the United States and third states from any prejudicial effects of partial adjudication of multiparty disputes. Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 421-22 (Nov. 26) (Jurisdiction and Admissibility). The United States argued that Honduras, Costa Rica, and El Salvador would all be “affected” in a legal and practical sense by adjudication of the claims submitted to the Court. *Id.*

The ICJ considered this a substantive question and, as such, the issue did not possess an exclusively preliminary character. *Id.* at 425. At the merits stage, the Court found that El Salvador would be affected by the judgment. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 38 (June 27) (Merits). Although this decision meant that the ICJ had to apply the multilateral treaty reservation, it still could determine if customary international law had been breached. *Id.* This result indicates that circumstances do exist wherein the potentially affected interests of a third state may have an impact on the Court's ability to decide a case. SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 163 (1993). This decision, however, hardly has far-reaching implications for the protection of third states given that out of the small number of states that have accepted the compulsory jurisdiction of the Court, an even smaller number have included the multilateral treaty reservation, and not all multiparty disputes are treaty-based. See Leo Gross, Compulsory Jurisdiction Under the Optional Clause: History and Practice, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS, supra note 109, at 19, 25 tbl. 2 (listing states that have included multilateral treaty reservation).

214. Gavan Griffith, Case Concerning East Timor (Portugal v. Australia): An Overview, in THE EAST TIMOR CASE IN THE ICJ, supra note 59. Australia adopted this strategy out of a belief that the "natural curiosity of the Court to look at the merits of what was an extraordinary and unusual claim in the
willing to accept Australia’s argument that Indonesia constituted a necessary party because the arguments on the merits consolidated the significance of Indonesia’s absence from the proceedings. If so, the East Timor decision emphasizes that the ICJ should have reserved a determination of a potential necessary party’s responsibility until the merits stage.

Problems may also arise when a respondent state attempts to establish at a preliminary stage that a third state’s presence before the Court is necessary to apportion fault properly. Unlike the majority in Nauru, Judge Shahabuddeen decided to consider the issue of joint and joint and several liability at the jurisdictional stage of the case, and in doing so worked under the assumption that Australia was indeed responsible for the rehabilitation of the phosphate mines. Thus, he seemed to be deciding on a final aspect of the case at a preliminary stage.

Then-President of the Court Sir Robert Jennings’ view on this issue also related to a final aspect of the case. He stated that New Zealand’s and the United Kingdom’s “inextricable involvement” in the trusteeship meant that by addressing reparations, the Court would unavoidably influence their interests. Vice President Oda, on the other hand, considered the necessary parties argument to be too closely connected with the merits for decision in the preliminary objections and believed that it would be “premature to close the door on the objection concerned.” Since Nauru did not reach the merits stage, one can only conjecture whether Vice President Oda adopted this view in recognition of the multilateral nature of the dispute.

E. Conclusion

The analyses of Nauru and East Timor suggest that the Court will only consider states as necessary parties in proceedings in which the finding of international responsibility of a third state is a prerequisite to a determination of responsibility of the parties before the Court. This reasoning supports the Westphalian model by emphasizing the independent existence of states, but neglects the importance of individual state responsibility — an issue highlighted by Judge Weeramantry in East Timor. The demand that the proceedings be virtually analogous to Monetary Gold for the Monetary Gold principle to apply is exigent since the facts of that case were unique. Indeed, some have described it as a case of “exceptional singularity.” The other reasons why a state may be a necessary party have not greatly impacted the preliminary stages of disputes. By reserving a decision to the merits stage, the ICJ is more likely to realize and account for whether the interests of an absent state form the very subject matter of the dispute. Such a development would

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Nauru Case might be suggested as a motivation for the Court to qualify the necessary parties [sic] principles in the preliminary objection stage.” *Id.*


216. *Id.* at 301 (Jennings, J., dissenting).

217. *Id.* at 303 (Oda, J., dissenting).

allow the Court to reach resolutions of the dispute that would more satisfactorily address the potential complications involving the determination of international responsibility.

V. NONSTATES AS NECESSARY PARTIES

The development of international law — from focusing on the traditional notion of separate state entities to emphasizing global interdependence — has produced a concomitant growth of new subjects in the international arena. This part examines the ICJ's dealings with these new subjects when they have potentially been necessary parties. Traditionally, states were the sole subjects of international law. When the Statute of the Permanent Court was first drafted, article 34 clearly stated: "Only States can be parties before the Court." States were not prepared to limit their sovereignty by granting other entities jurisdiction to bring proceedings against them in an international forum. However, *East Timor* illustrates that organized peoples may be among the new subjects of international law.

Issues surrounding nonstates are the subject of increasing debate at the international level. As nonstates continue to develop into recognized subjects of international law, it becomes increasingly important to ensure that the structures of the international order afford adequate protection to their rights and interests. Furthermore, these new subjects of international law could constitute necessary parties to a dispute before the ICJ. The ICJ may soon be confronted with a factual scenario in which the international responsibility of a nonstate must be determined as a prerequisite to a determination of the

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220. The jurisprudence of the ICJ has not always focused solely on states as subjects. See, e.g., *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6); *Ambatielos Claim* (Greece v. U.K.), 12 R.I.A.A. 83 (1956); *Barcelona Traction, Light & Power Co.* (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 25); *Anglo-Iranian Oil Co.* (U.K. v. Iran), 1952 I.C.J. 93 (July 22) (dealing with international wrongs suffered by state national that may be taken up by that state under banner of diplomatic protection). In its advisory opinions, the ICJ has more readily protected the rights of individuals. See, e.g., *Judgments of the Administrative Tribunal of the ILO upon Complaints Made Against the UNESCO*, 1956 I.C.J. 77 (Oct. 23) (requiring hearing of views and arguments of four individual officials to ensure good administration of justice). Also, since *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Apr. 11), where the United Nations sought an advisory opinion on whether it had standing against Israel in the murder of a U.N. mediator, the ICJ has recognized that international organizations have international personality and may make claims. In *Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labor Conference*, the Permanent Court allowed the participation of any international organization that wished to be heard. Advisory Opinion No. 1, *Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labor Conference*, 1922-1926 P.C.I.J. (ser. B) No. 1, at 9 (July 31, 1922). The Permanent Court's successor, the ICJ, however, has not been as flexible in its approach in calling for and accepting submissions from international organizations. CHINKIN, *supra* note 94, at 229-30, 230 n.20.

international responsibility of a state. The fundamental notion of consent encapsulated in the Westphalian model could come into play here; it is just as legitimate not to assess a nonstate's responsibility for a breach of international law in its absence as it is to assess that of a state. To extend the principle of adjudicative consent to nonstate actors in this way would move toward the U.N. Charter model. Such a development is certainly warranted when principles such as the right of self-determination are at issue, as this right necessarily affects international subjects other than states. Thus, in East Timor, Indonesia was not the only international subject to be affected by the ICJ's ruling on Portugal's arguments regarding the right of self-determination and permanent sovereignty over natural resources. The East Timorese, as a group of organized peoples, were intrinsically affected by the decision as well. This part will consider the roles that organized peoples may have before the Court. This analysis will encompass the current contribution of the entities and assess why they may constitute necessary parties. In light of the various opinions in East Timor, particular attention will be paid to the impact of erga omnes rights on the position of organized peoples in disputes before the ICJ.

A. Organized Peoples

Cassese has defined organized peoples as national liberation movements — peoples under colonial, alien, or racist dominations endowed with a representative organization. These movements are usually characterized by the group's controlling or striving to control some part of a territory, aspiring to possess effective control over a population living in a given area, and having international legitimation based on the principle of self-determination. The fact that organized peoples' international legitimation stems from the principle of self-determination distinguishes them from insurgents whose legitimation is derived from control of territory. Cassese's definition appears to support claims to self-determination of organized peoples who are not solely within existing colonial boundaries. However, he has not expressly taken this position, and the right of self-determination across existing colonial borders remains controversial in international law. This was not, however, a perplexing issue in East Timor, as the East Timorese clearly fall into the traditional category of those peoples entitled to exercise a right of self-determination as part of the decolonization process.

Organized peoples may try to invoke the jurisdiction of the Court on the ground that they constitute a nation. Such a claim was made by the Aboriginal Legal Service in Australia, which appealed to the ICJ for advice on the legal status of Aborigines and on the ownership of Australia. Claims that are

222. CASSESE, supra note 28, at 90-91.
223. Id. at 91.
224. Id. at 98.
based on the organized people’s constituting a nation are not usually adequate to invoke the Court’s jurisdiction. A request for an advisory opinion may be framed to enable the Court to pronounce upon the rights of the organized peoples. For example, in Western Sahara, the Court was asked to give an opinion on whether Western Sahara was terra nullius at the time of its colonization and if not, what legal ties existed between it and Morocco and Mauritania. The Court decided that Western Sahara was not terra nullius and that neither Morocco nor Mauritania had exercised territorial sovereignty over the area at the time of colonization. This opinion effectively reaffirmed a resolution passed by the General Assembly that the people of Western Sahara had the right of self-determination. The rights of organized peoples may arise in contentious proceedings, although East Timor is the only case that has come before the ICJ in which the rights of an organized people have been inextricably linked to the central issues of the case. In East Timor, Portugal claimed that Australia owed an obligation “to observe the right of the people of East Timor to self-determination and the related rights (including the right to territorial integrity and unity and to permanent sovereignty over its natural wealth and resources)” and “to negotiate with the competent State,” namely Portugal, on maritime areas near East Timor. Australia contended that Portugal did not have a right to bring an action on behalf of the people of East Timor on the basis of the right of the East Timorese to self-determination. If the derivation could not be established, it was argued, the claim was inadmissible.

The right of self-determination is clearly established as a principle of international law. It is included in article 2 of the United Nations Charter and is also stated in article 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The ICJ accepted that this had crystallized into a norm of international law both in its advisory opinion on Namibia in 1971 and in its advisory opinion on the Western Sahara in 1975. State practice is demonstrated by the millions of people who have

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227. Article 1 of the Montevideo Convention of 1933 on the Rights and Duties of States provides that the four criteria are: (a) a permanent population, (b) a defined territory, (c) a government, and (d) a capacity to enter into relations with other States. Montevideo Convention of 1933 on the Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100.

228. J.G.S., Access of Individuals, supra note 226, at 524.


231. Id. at 67.

232. In Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16 (June 21), the Court also affirmed that the people of Namibia had the right of self-determination.

233. Counter-Memorial of Australia, supra note 5, ¶ 233.

234. Id. ¶¶ 258-63.


been liberated from colonial rule under the banner of self-determination. When the Court considered the issue of self-determination in *Namibia*, it found that "the subsequent development of international law in regard to non-self-governing territories as enshrined in the Charter of the United Nations made the principle of self-determination applicable to all nations."\(^{238}\) In *East Timor*, the Court described it as "one of the essential principles of contemporary international law."\(^{239}\) Therefore, the issue that the ICJ had to address in *East Timor* was not the existence of this principle but rather the duties of third parties toward peoples claiming the right of self-determination.

Judge Vereshchetin considered the right of the East Timorese to self-determination to be at the core of the proceedings.\(^{240}\) Therefore, the Court should have dealt with Portugal’s repeated assertions that "the main interest in bringing the present proceedings belongs to the people of East Timor."\(^{241}\) He recognized that the East Timorese could not receive the same procedural treatment as Portugal or Australia due to the operation of article 34 of the Court’s statute,\(^{242}\) but that did not mean that their wishes should not be ascertained and taken into account by the Court.\(^{243}\) This was the minimum level of involvement of the East Timorese acceptable to Judge Vereshchetin. The East Timorese were considered to be "directly concerned" in the negotiations and consultations being conducted by the United Nations.\(^{244}\) This should have indicated the importance of ascertaining the views of the East Timorese through their representatives.\(^{245}\) Judge Vereshchetin criticized both Australia and Portugal for their failure to present this aspect of the case. He thus distinctly recognized the fact that evidence was required from the East Timorese and apparently expected their maximum involvement in the case within the confines of the Court’s statute and rules.

Australia also argued that the people of East Timor had rejected Portugal as an administering power. This was based on statements made by the Timorese political parties both before and after the Indonesian invasion. These groups denied that Portugal had any sovereignty over East Timor, as it was no longer a colony. This position has changed over the years; Mr. Ramos Horta, the Permanent Representative of FRETILIN, has stated that the East Timorese are willing to accept Portugal as East Timor’s administering authority in order for its claim to self-determination to progress.\(^{246}\) In this case, Australia argued that Portugal’s loss of status was also supported by the general practice of the United Nations and the international community. Resolutions were passed by the General Assembly in 1973 that withdrew

\(^{238}\) *Namibia*, 1971 I.C.J. at 31.

\(^{239}\) *East Timor*, supra note 1, para. 29.

\(^{240}\) Id. (separate opinion of Judge Vereshchetin).

\(^{241}\) Id. (separate opinion of Judge Vereshchetin) (quoting statements by Professor Correia on behalf of Portugal).

\(^{242}\) Article 34(1) provides: "Only States may be parties in cases before the Court."

\(^{243}\) *East Timor*, supra note 1 (separate opinion of Judge Vereshchetin).


\(^{245}\) Id. (separate opinion of Judge Vereshchetin).

\(^{246}\) José Ramos Horta, *Australia and East Timor, Moving Beyond a Contentious Relationship*, *in* *The East Timor Case in the ICI*, supra note 59, at 47, 56.
Portugal’s right to represent its colonies in the United Nations. According to Australia, Portugal was subsequently referred to as the “administering Power” for the limited purpose of cooperating with the United Nations in consultation and negotiation processes; it was certainly not for the purpose of acting on behalf of the East Timorese. Australia also drew support for its position from the facts that Portugal did not formally or unequivocally protest the alleged denial of its rights between 1978 and 1985, and that voting patterns of the international community in the General Assembly illustrate the limited role of Portugal in the settlement process. The Court addressed this argument only by saying that Portugal would not be considered the administering power of East Timor on the sole basis of its being given this title in the United Nations resolutions. The Court did not expressly opine as to the possible binding nature of the resolutions, but concluded that any final decision on the status of Portugal as administering power would require a prior determination on the legality of Indonesia’s conduct and the Court thereby could not rule finally on this contention.

In contrast, Judge Weeramantry analyzed this point more extensively. Judge Weeramantry addressed most of the arguments raised by Australia on this issue. In his dissent, he emphasized the importance of giving effect to the “sacred trust” provisions in the Charter and asserted that a loss of control over territory did not mean that the administering power also lost its status. He also drew support from the texts of the United Nations General Assembly resolutions and believed that they were not without legal consequences for the Member states even though these resolutions are only recommendatory in nature. Overall, Judge Weeramantry allowed form to prevail over substance through his interpretation of the resolutions and his refusal to take voting patterns into account. It was noble to avoid a conclusion that would “result in the anomalous situation of the current international system leaving a territory and a people, who admittedly have important rights opposable to all the world, defenseless and voiceless precisely when those rights are sought to be threatened or violated.” He neglected, however, to address the ineffectiveness of Portugal’s continuing to hold the title of administering power when another country was in control of the territory, and minimized the significance of Portugal’s years of inaction.

Portugal also sought to justify its claim on the basis of a service public...
international. Due to the restrictive terms of the Court’s statute, Portugal could act in this mode because otherwise, the East Timorese would not be able to have the dispute adjudicated. Portugal’s action on behalf of the international community concerned erga omnes obligations — obligations that bind the international community. An action based on a service public international is capable of encompassing the multilateral aspects of a dispute as it must necessarily consider issues that have an impact upon the entire international community.

The ICJ unequivocally stated in Barcelona Traction that a state must be able to show that it has a legal interest in the subject matter of the decision in order to bring the claim. The level of interest required was discussed in the South West Africa Cases where the Court found that Ethiopia and Liberia did not have standing to bring the application alleging that South Africa had infringed its obligations under the mandate. This was because Ethiopia and Liberia did not have a specific interest greater than that owed to every other member of the international community that had been violated. The Court determined in the South West Africa Cases that an actio popularis — a third party claim made on behalf of the international community — does not exist in international law.

The Court in East Timor did not ultimately deal with these perplexities as it held that the rule of consent to jurisdiction would effectively override the operation of the erga omnes rights in question. This approach is overly restrictive and, indeed, regressive. The nature of erga omnes rights is that they are binding on each state in the international community. It is irrelevant whether a breach of these obligations occurs by direct conduct of a state or through the action of another state. It is the actual breach of the obligation that is important rather than how it occurred. The majority’s adoption of this somewhat contradictory approach exemplifies the tension between the U.N. Charter model and the Westphalian model. After the development of the right of self-determination, a right that Judge Skubiszewski goes so far as to describe as jus cogens, the Court could not deny its importance in the modern international legal system. However, at the same time the Court was still restricted by its traditional approach to consensual jurisdiction.

Judge Weeramantry’s treatment of this issue is much more acceptable insofar as it truly seeks to satisfy the justice of the case. He believed that the principles of self-determination and permanent sovereignty over natural resources were the central principles of the case. “An erga omnes right is, needless to say, a series of separate rights erga singulum, including inter alia, a separate right erga singulum against Australia, and a separate right erga singulum against Indonesia.” Consequently, “if the people of East Timor have a right erga omnes to self-determination, there is a duty lying

260. East Timor, supra note 1, para. 29.
261. Id. para. 135 (Skubiszewski, J., dissenting).
262. Id. pt. C (Weeramantry, J., dissenting).
263. Id. pt. A, § 3(iii) (Weeramantry, J., dissenting).
upon all Member states to recognize that right.” He considered Portugal to have a sufficient interest in the observance of this right due to its status as administering power. Judge Weeramantry held that Australia had violated these rights as it was “party to an agreement which recognize[d] the incorporation of a non-self-governing territory in another state and deal[t] with the principal non-renewable asset of a people admittedly entitled to self-determination, and without their consent.” He further stated that had the ICJ proceeded to the merits, the Court would have reached a definitive decision on the consequences of a violation of erga omnes obligations for the first time. The Court did not address these difficult third-party issues and simply considered Indonesia as the only third party rather than tackling the possibility of the international community being a third party with regard to erga omnes obligations. Such a recognition would indeed have been a felicitous development by the Court in line with the U.N. Charter model and would have been a great impetus for further recognition of the importance of nonstate entities as necessary parties in the adjudication of disputes.

B. Conclusion

In dealing with the rights and interests of nonstate entities, the ICJ will always be confined by the terms of article 34 of its statute. This fact was recognized by Judge Vereshchetin in his separate opinion in East Timor. It thus seems that a warranted alteration of the statute would extend article 34 to allow at least organized peoples and international organizations to be parties to a dispute, if not individuals as well. The fact that organized peoples, individuals, and international organizations may not be parties to a dispute before the ICJ does not lead naturally to the conclusion that they would not or could not constitute necessary parties. To the extent that justice requires that a nonstate entity be present before the Court, the ICJ should utilize all its powers to ensure maximum involvement. This could be achieved when erga omnes rights and obligations are central to the dispute, as was the case in East Timor. There is no reason why the interests of organized peoples, individuals, or international organizations should not be protected by the Monetary Gold principle.

VI. CONCLUSION

East Timor “concerns the Court’s jurisdictional reach in the wide range of third party–related disputes which are increasingly brought before it in a more closely interrelated world.” This Article has argued that there is inconsistency in the Court’s approach to the issues raised by third parties in

266. Id. pt. C, § (ii) (Weeramantry, J., dissenting); see also id. pt. D, § C(ii) (Weeramantry, J., dissenting).
268. Chinkin, Rights But No Remedies, supra note 203, at 107.
269. East Timor, supra note 1, Introduction (Weeramantry, J., dissenting).
international adjudication, and has analyzed the Court's oscillation in the context of movement between Cassese's Westphalian and U.N. Charter models. The ICI's adherence to the tradition of consent as paramount and its tendency to settle cases within a bilateral framework support the Westphalian model and reinforce the independent existence of sovereign states. On the other hand, the Court's inclination to follow the U.N. Charter model was evident in Nauru where the ICJ went beyond the stark legal dimensions of the case. The Court has also been prepared to exercise the full reach of its jurisdiction in cases involving frontier disputes. The Court's shifting approach in favor of the U.N. Charter model is also apparent in its adaptability regarding evidentiary problems associated with determining why a state may constitute a necessary party.

East Timor was the first case since Monetary Gold in which the ICJ decided that it lacked jurisdiction due to the absence of a necessary party. Any belief that the Monetary Gold principle had fallen into desuetude was quashed. The East Timor decision reaffirmed the significance of this principle and has defined the criteria for its application. The decision firmly entrenched the prerequisite of determining another state's responsibility prior to a determination of the dispute before the Court. The Court decided the case within a bilateral framework by holding that it could not adjudicate the case between Australia and Portugal in the absence of Indonesia. In so holding, the majority did not address the future implications of its decision for other states. The Court also did not consider the impact of its decision on negotiations among the interested parties in the United Nations. Only Judge Weeramantry, in his dissenting opinion, attempted to take the multilateral aspects of the dispute into account, and only he considered the possible application of erga omnes rights and obligations. The majority decided that the principle of consent to the settlement of disputes would prevail over erga omnes obligations. In East Timor, the Westphalian model was paramount over the U.N. Charter model. Nevertheless, this decision can be viewed as a pragmatic approach by the ICJ, as states might have withdrawn their acceptance of compulsory jurisdiction if they had believed the Court was prepared to construe jurisdiction on the broad basis of erga omnes rights and duties. Unfortunately, such an approach is unnecessarily speculative and is not conducive to the development of international law. The East Timor decision failed both to consider the individual responsibility of states and to analyze the implications of East Timor's status as a non-self-governing territory and the right of the East Timorese to self-determination.

The acceptance and application of the Monetary Gold principle in East Timor left unresolved problems concerning multilateral disputes, the interests of parties other than states, and the apportionment of responsibility to absent states that are equally culpable of breaching international law. These problems will inevitably arise in modern international relations due to the increasing interdependence of states and the increasing role of nonstate subjects in the international community. The ICJ must integrate political and diplomatic considerations into its legal adjudication.

Judge Weeramantry has clearly set the example that should be followed by the other members of the Court. The Court has been oscillating between
the Westphalian model and the U.N. Charter model in the resolution of necessary party disputes ever since Monetary Gold. East Timor has not definitively established the future trend of the Court as the majority took a step back whereas the dissents of Judges Weeramantry and Skubiszewski progressed, laying the foundation for change. The potential now clearly exists for the Court to swing forward toward the greater justice that the U.N. Charter model provides.