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# *The East Timor Story: International Law on Trial*

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## **Abstract**

*This article considers the story of East Timor in the light of the international legal rules on self-determination. It is argued that such an analysis is both timely and necessary. For more than 20 years, international lawyers have brought the force of international legal norms to bear upon the 'Question of East Timor'. This article aims to do the reverse: to bring the force of the East Timorese debacle to bear upon international law. Following on from the Introduction, the argument proceeds in three parts. Part 2 considers the legal basis for East Timor's right of self-determination. Part 3 argues that, contrary to its populist characterization as excessively indeterminate, the right of self-determination has a discernible core content which confers on beneficiary peoples, such as the East Timorese, two distinct sets of entitlements: self-determination as process, and self-determination as substance. Finally, having established the basic legal framework, Part 4 compares two moments of high-level institutional engagement with (the two aspects of) East Timor's self-determination entitlement: the case brought by Portugal against Australia before the ICJ in 1995; and the UN-sponsored 'popular consultation' of August 1999. It is argued that the institutional shift from the ICJ to the UN was also characterized by a shift from formalism to pragmatism, and that both institutions failed to uphold the international legal rights of the East Timorese.*

\* School of Law, University of Glasgow. This is a revised and expanded version of a paper presented at Suffolk Law School, Boston, at the annual dinner of Boston-based international lawyers in October 1999. I benefited greatly from the questions and discussion of the participants. Most of the research was completed while I was a Visiting Fellow at the Human Rights Program, Harvard Law School, 1999/2000. This was a collegiate and challenging environment and I would like to thank all my colleagues at the Human Rights Program as well as elsewhere in the Law School: Abigail Abrash, Yishai Blank, Deborah Cass, Susan Culhane, Rosalind Dixon, Daniela Dohmes-Ockenfels, Michael Ikhariale, Shawqi Issa, Catherine Le Magueresse, Zachary Lomo, Dominic McGoldrick, Moria Paz, Mindy Roseman, Peter Rosenblum, Alvaro Santos, Hani Sayed, Leslie Sebba, Susan Sessler, Gerry Simpson, Christine Soh, Dori Spivak, K. Sritharan, Henry Steiner, Anje Van-Berckelaer and Yosuke Yotoryama. I would also like to acknowledge a more general debt to David Kennedy's inspirational international law class (1999/2000) which greatly influenced the writing of this article. Particular thanks to John Saul Marco for research assistance, and to Nathaniel Berman, Graeme Laurie and Iain Scobbie for comments and encouragement.

It is, by now, a familiar pattern: egregious human rights violations . . . an assertion of international authority . . . a solution of sorts . . . demands for those responsible for atrocities to be brought to account under international law. For East Timor — like Bosnia before it — the closing stages of its self-determination struggle are likely to be played out against the backdrop of formal or informal ‘trials’: of *individuals* at the hands of some newly established ad hoc tribunal<sup>1</sup> or truth and reconciliation commission;<sup>2</sup> of complicit *states*<sup>3</sup> at the bar of world opinion. East Timor shall have its independence, and the international community shall have its culprits.<sup>4</sup> Or so, one

<sup>1</sup> While there have been calls for the Security Council to establish an ICTY/ICTR-style International Criminal Tribunal (see e.g. Amnesty International, ‘Letter to UN Secretary-General on East Timor Commission of Inquiry’, 30 September 1999 or, more recently, CAFOD *et al.*, *Justice for East Timor*, 13 June 2001), the Secretary-General and the Security Council early on favoured allowing Indonesia to ‘do a credible and transparent job of holding people accountable for their crimes’. See the UN Secretary-General’s ‘Briefing Report’, 29 February 2000. See also ‘Letter from the President of the Security Council, Arnaldo Manuel Listre, to the Secretary-General’, 18 February 2000, S/2000/137; ‘United Nations–Indonesia Accord on Judicial Cooperation in East Timor’, 5 April 2000. On 24 April 2001, President Wahid issued a decree establishing an Indonesian ad hoc tribunal to deal with gross human rights abuses committed in the aftermath of the popular consultation on 30 August 1999. In East Timor itself, the Serious Crimes Investigation Unit has begun prosecuting two categories of crimes committed in the September 1999 violence: serious crimes under the Indonesian penal code and crimes against humanity. For details, see ‘Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the Period 27 July 2000 to 16 January 2001)’, S/2001/42, 16 January 2001, para. 24. On the problems of pursuing a large number of trials in the context of ‘transitional’ countries such as East Timor, and the proposal to try only ‘serious crimes’, see Hayner and van Zyl, ‘The Challenge of Reconciliation in East Timor’, in *Report on a Mission to East Timor June 18–28 2000 on Behalf of the Human Rights Office of UNTAET*, July 2000 (on file with author).

<sup>2</sup> For details of the National Council of Timorese Resistance (CNRT) early proposal for a ‘Commission for Reception and National Reconciliation’, see Hayner and van Zyl, *supra* note 1. On 13 December 2000, the East Timor Transitional Cabinet agreed to establish a ‘Truth, Reception and Reconciliation Commission’, with a mandate to facilitate the reintegration of returning refugees, document human rights abuses since 1975 and promote community reconciliation by dealing with low-level offences committed in 1999. See ‘Report of the Secretary-General on the United Nations Transitional Administration in East Timor (for the Period 27 July 2000 to 16 January 2001)’, S/2001/42, 16 January 2001, para. 26.

<sup>3</sup> For criticism of the role of the Western powers (Australia, the United States and the United Kingdom), see Budiardjo, ‘A Global Failure of Human Rights in East Timor’, in a special issue of the *Human Rights Law Review*, edited by E. Hedman, entitled ‘East Timor in Transition: Sovereignty, Self-Determination and Human Rights’, 4 *Human Rights Law Review* (1999) 20. Yet revisionist histories are already in the writing. For example, Australia has been praised for ‘its leading role . . . in transforming the fortunes and prospects of East Timor’. UN Secretary-General, ‘Briefing to the Security Council’, New York, 29 February 2000.

<sup>4</sup> Curiously, the international community appears to be interested mainly in pursuing investigations into the violence of 1999 and not the widely documented human rights atrocities of the earlier period since the Indonesian occupation began in 1975. See ‘Report of the United Nations International Commission of Inquiry on East Timor’ (A/54/726-S/2000/59). Similarly, the ‘Report of the Commission to Investigate Violations of Human Rights’ established by the Indonesian National Commission for Human Rights deals with the period from January 1999 to the immediate aftermath of the ballot. It is unclear why the genocidal policies of the Indonesians in the earlier period of the occupation should continue to attract immunity. This point was brought to my attention by students at Northeastern Law School during a panel discussion on East Timor in October 1999. In East Timor itself, however, the proposed ‘Truth, Reception and Reconciliation Commission’ is to have a mandate to create a record of human rights abuses since 1975. For discussions of early proposals to backdate investigations, see Hayner and van Zyl, *supra* note 1.

imagines, the rest of the story will go. Of course, what is suppressed in this Hollywood ending — the triumph of right (self-determination) over might (the Indonesian army), of law over brute politics — is any suggestion that, in revisiting earlier chapters of the East Timor story, international law itself — its doctrines, its institutions — may be cast in a leading role as one of the ‘bad guys’.

## 1 A Formal Analysis of the Right of Self-Determination: Dispensing with Two Preliminary Objections

Before turning to my substantive arguments, it is perhaps necessary to make a pre-emptive strike on what I anticipate are two likely objections to any proposal to embark on a formal analysis of the East Timor Story in the light of the international law of self-determination. First, there could be the ‘indeterminacy’ objection. According to this — now standard — critique, the right of self-determination is simply one of the most normatively confused and indeterminate principles in the canon of international legal doctrine.<sup>5</sup> Moreover, as commentators have shown,<sup>6</sup> traditionally it was formal legal analysis that was deployed to deny, rather than endorse, the existence of a legal right of self-determination.<sup>7</sup> To adopt a formalist posture in favour of the right of self-determination may thus appear positively oxymoronic.

A second — perhaps more compelling — objection might be on the grounds of political redundancy. The recent history of East Timor is well known.<sup>8</sup> On 30 August 1999, in a United Nations-sponsored ‘popular consultation’, the people of East Timor voted overwhelmingly<sup>9</sup> to reject the Indonesian offer of ‘special autonomy’ in favour of a United Nations-supervised transition to independent statehood. From then on, events moved apace. On 15 September 1999, the Security Council authorised the establishment of a multinational force (INTERFET) with a mandate to restore peace

<sup>5</sup> See e.g. Cass, ‘Rethinking Self-Determination: A Critical Analysis of Current International Law Theories’, 18 *Syracuse Journal of International Law and Commerce* (1992) 21; Koskeniemi, ‘National Self-Determination Today: Problems of Legal Theory and Practice’, 43 *International Law and Comparative Law Quarterly* (1994) 241.

<sup>6</sup> Berman, ‘Sovereignty in Abeyance: Self-Determination and International Law’, 7 *Wisconsin International Law Journal* (1988) 51, at 61–62.

<sup>7</sup> See e.g. Fitzmaurice, ‘The Future of Public International Law and the International Legal System in the Circumstances of Today’, in Institut de Droit International, *Evolution et Perspectives du Droit International* (1973) 196, at 233, discussed in Berman, *supra* note 6.

<sup>8</sup> For background, see the UN’s excellent website, [www.un.org/peace/etimor/etimor.htm](http://www.un.org/peace/etimor/etimor.htm). For critical reflections in the lead-up to the ballot, see the collection of papers in Hedman, *supra* note 3.

<sup>9</sup> 78.5 per cent. For discussion, see Part 4 below.

and security in East Timor.<sup>10</sup> On 15 October 1999, the Indonesian People's Consultative Assembly repealed the infamous law of July 1976 under which East Timor had been annexed,<sup>11</sup> paving the way for the United Nations Transitional Administration in East Timor (UNTAET) to assume control of the territory.<sup>12</sup> And by November 1999, the last of the Indonesian troops had, finally, left East Timor.

In short, is not the 'Question of East Timor' passé?<sup>13</sup> Self-determination has 'happened'. It is no longer interesting. To be sure, the actual process of exercising self-determination encountered some regrettable 'operational' difficulties.<sup>14</sup> But these were due to the unpredictable excesses of disgruntled militias and 'rogue' members of the Indonesian security forces. As such, they lie firmly beyond the remit of the international lawyer. Today, there are simply far more pressing and exciting issues to engage the Timor-minded legal scholar. Should there be war crimes trials or a truth commission? How best can we foster Timorese civil society based on the rule of law and human rights?<sup>15</sup> Or what precisely is the legal status of East Timor during the United Nations-administered transitional phase?

<sup>10</sup> This was 'requested' by Indonesia on 12 September 1999 and authorized by Security Council Resolution 1264 (1999), 15 September 1999. Security Council Resolution 1264 is thus an interesting hybrid. In the preamble, the Security Council welcomes Indonesia's readiness to accept an 'international peacekeeping force', yet paragraph 3 makes clear that the establishment of the multinational force is more accurately characterized as a (non-consensual) Chapter VII peace-enforcement action rather than (consensual) peacekeeping. The Australian-led multinational force was deployed on 20 September 1999. It finally handed over to UNTAET peacekeeping troops on 22 February 2000.

<sup>11</sup> 19 October 1999. This was pursuant to Article 6 of the Agreement Between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor (hereinafter the 'General Agreement'), A/53/951, Annex 1 of the 'Report of the Secretary-General', S/1999/513 (the Agreement is reproduced in Hedman, *supra* note 3; and is available on the UN website, [www.un.org/peace/etimor/etimor.htm](http://www.un.org/peace/etimor/etimor.htm)). Article 6 of the General Agreement provides: 'If the Secretary-General determines, on the basis of the result of the popular consultation and in accordance with this Agreement, that the proposed constitutional framework for special autonomy is not acceptable to the East Timorese people, the Government of Indonesia shall take the constitutional steps necessary to terminate its links with East Timor thus restoring under Indonesian law the status East Timor held prior to 17 July 1976.' The decision of the Indonesian People's Consultative Assembly to repeal the law was welcomed in Security Council Resolution 1272 (1999), 25 October 1999 and in General Assembly Resolution A/54/194, 15 December 1999. For the background to the 1976 law, see e.g. Clark, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression', in CHIR and IPJET (International Platform of Jurists for East Timor), *International Law and the Question of East Timor* (1995) 65, at 69–73.

<sup>12</sup> UNTAET was established by the Security Council on 25 October 1999. Security Council Resolution 1272 (1999), 25 October 1999. Its initial mandate was to January 2001. On 31 January 2001, the Security Council decided to extend the current mandate of UNTAET until 21 January 2002. Security Council Resolution 1338 (2001), 31 January 2001.

<sup>13</sup> This is certainly the view of the General Assembly which decided to conclude its consideration of the agenda item 'The Question of East Timor' and include a new agenda item entitled 'The Situation in East Timor During its Transition to Independence'. General Assembly Resolution A/54/194, 15 December 1999, para. 3. The question has, of course, been more famously asked of the right of self-determination in general. See Sinha, 'Is Self-Determination Passé?', 12 *Columbia Journal of Transnational Law* (1973) 260.

<sup>14</sup> See Part 4 below.

<sup>15</sup> In November 1999, ECOSOC requested the United Nations High Commissioner for Human Rights to prepare a comprehensive programme of technical cooperation in human rights focusing on capacity-building and reconciliation.

It is the premise of this article, however, that neither the 'indeterminacy' nor the 'politically redundant' objection is well founded. First, by way of a formalist defence, it will be shown that, contrary to its populist characterization as excessively indeterminate, the right of self-determination has a discernible core content which provides a normative yardstick against which to measure the international community's treatment of East Timor's legal claim.

Secondly, it is submitted that, far from being passé, a formal analysis of the East Timor Story in the light of the international legal rules on self-determination is both timely and necessary. For more than 20 years, following in the pioneering footsteps of scholars such as Thomas Franck<sup>16</sup> and Roger Clark,<sup>17</sup> international lawyers<sup>18</sup> have brought the force of international legal norms to bear upon the 'Question of East Timor'.<sup>19</sup> This article aims to do the reverse: to bring the force of the East Timorese debacle to bear upon international law. In other words, I wish to resist the appeal of the imminent, cast a retrospective eye, and explore what, if anything, the unhappy — genocidal<sup>20</sup> — story of East Timor has to tell us about the 'moral hygiene'<sup>21</sup> of the international law of self-determination.

Following on from the introduction, the argument will proceed in three parts. In Part 2, I will consider the legal basis for East Timor's right of self-determination and argue that this should be characterised as a case of decolonization. The applicable legal rules are thus readily identifiable as those that emerged during the decolonization practice of the United Nations. In Part 3, I will confront the 'indeterminacy objection' and argue that, contrary to conventional accounts, the right of self-determination has a discernible core content which confers on beneficiary peoples such as the East Timorese two distinct sets of entitlements: self-determination as process, and self-determination as substance. Finally, having established the basic legal framework, in Part 4, I will compare two moments of high-level institutional engagement with (the two aspects of) East Timor's self-determination entitlement: the case brought by Portugal against Australia before the International Court of Justice in 1995; and the United Nations-sponsored 'popular consultation' of August 1999. It will be argued that the institutional shift from the International Court of Justice to the UN was also characterized by a shift from formalism to pragmatism, and that

<sup>16</sup> Franck and Hoffman, 'The Right of Self-Determination in Very Small Places', 8 *New York Journal of International Law and Policy* (1975–1976) 331.

<sup>17</sup> The seminal article is Clark, "'The Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression', 7 *Yale Journal of World Public Order* (1980–1981) 2.

<sup>18</sup> For example, the International Platform of Jurists for East Timor (IPJET) founded in 1991 by Pedro Pinto Leite has organized a number of international law conferences and published two edited collections: CIIR/IPJET, *International Law and the Question of East Timor*, supra note 11; and IPJET, *The East Timor Problem and the Role of Europe* (1998).

<sup>19</sup> For a sceptical account of such efforts in the context of IPJET, see Kennedy, 'An Autumn Weekend: An Essay on Law and Everyday Life', in D. Danielson and K. Engle (eds), *After Identity: A Reader in Law and Culture* (1995) 191.

<sup>20</sup> See e.g. M. Jardine, *Genocide in Paradise* (1999).

<sup>21</sup> The phrase is David Kennedy's, *Lectures* (1999).

both institutions — the formalist International Court of Justice, the pragmatic United Nations — failed to uphold the international legal rights of the East Timorese.

## 2 East Timor’s Right to Self-Determination: Decolonization in a Secessionist Era

As has been established elsewhere,<sup>22</sup> the existence of East Timor’s right to self-determination under international law is unassailable. As a Portuguese colony from 1856<sup>23</sup> and a UN-designated non-self-governing territory since 1960, East Timor qualified under the ‘first phase’ right of self-determination, which emerged during the decolonization period of the 1960s.<sup>24</sup> Neither the (unlawful) Indonesian invasion in December 1975, nor its subsequent (unlawful) annexation,<sup>25</sup> could dislodge East Timor’s vested entitlement. Thus, as affirmed by the International Court of Justice in 1995,<sup>26</sup> despite its *de facto* transition from Portuguese colony to Indonesian province, East Timor remained, *de jure*, a non-self-governing territory<sup>27</sup> with the right of self-determination under the law applicable to decolonization.<sup>28</sup>

But, if it can readily be established that the legal basis for East Timor’s right of self-determination lay in its relations with Portugal (colonialism) rather than with

<sup>22</sup> See e.g. Clark, *supra* note 17; Franck and Hoffman, *supra* note 16; and A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995) 223–230.

<sup>23</sup> On the history of Portuguese colonialism in East Timor, see generally J.G. Taylor, *Indonesia’s Forgotten War: The Hidden History of East Timor* (1995) 1–15.

<sup>24</sup> See e.g. General Assembly Resolution 1514 (XV) 1960, ‘The Declaration on the Granting of Independence to Colonial Countries and Peoples’; United Nations General Assembly Resolution 1541 (XV) 1960, ‘Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73(e) of the Charter’. See further *Legal Consequences for States of the Continued Presence of South Africa in Namibia/South West Africa Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 31.

<sup>25</sup> For discussion of the background to the ‘Act of Integration’, see e.g. Clark, *supra* note 17; Taylor, *supra* note 23, at 73–74.

<sup>26</sup> *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 103, paras 31 and 37. It should be noted that the Court restricts itself to affirming that ‘for both parties the territory of East Timor remains a non-self-governing territory and its people has the right of self-determination’ (emphasis added); *ibid.* The Court itself does not make an independent finding.

<sup>27</sup> *Ibid.*

<sup>28</sup> The ICJ in its Advisory Opinion on Namibia held 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 of them.’ *Legal Consequences for States of the Continued Presence of South Africa in Namibia/South West Africa Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) at para. 52.

Indonesia (secession),<sup>29</sup> the question remains: why does it matter? What purpose does it serve to establish that East Timor was a case of decolonization in a secessionist era?

It is submitted that establishing the correct legal basis for East Timor's right of self-determination is no mere academic exercise, but rather entails three practical consequences. In the first place, as recent events in Kosovo<sup>30</sup> and Chechnya<sup>31</sup> demonstrate, the existence of any legal right of secession under international law — even in situations involving gross human rights abuse<sup>32</sup> — remains highly contentious. Meagre doctrinal development in favour of a limited right of secession<sup>33</sup> has manifestly not been matched by any corresponding shift in state practice. Accordingly, had the East Timorese based their claim on a purported right of secession triggered by, say, Indonesian human rights abuse, they may have faced the initial obstacle that such a right does not in fact exist. Secondly, establishing colonialism as the correct legal basis *should* have allowed the international community and third states to emphasize the *sui generis* nature of the East Timorese claim as a means of countering domestic Indonesian fears/accusations that allowing East Timor to

<sup>29</sup> This point is also dealt with by Gerry Simpson. See Simpson, 'The Politics of Self-Determination in the Case Concerning East Timor', in CIIR/IPJET, *International Law and the Question of East Timor*, *supra* note 11, at 258.

<sup>30</sup> The Security Council resolutions on Kosovo consistently affirmed the territorial integrity of the Federal Republic of Yugoslavia. See e.g. Security Council Resolution 1160 (1998), 31 March 1998, especially para. 5; Security Council Resolution 1244 (1999), 10 June 1999. The resolutions call for 'substantial autonomy', and 'meaningful self-administration' rather than, say, 'secession' or 'meaningful self-determination' (which would require an exercise of free choice including the option of independent statehood; see below). But compare the Report of the Independent International Commission on Kosovo, October 2000. This concludes that 'the Security Council Resolution's commitment to FRY sovereignty and Kosovo autonomy may not be incompatible in theory but they have become incompatible in practice', and recommends that Kosovo be granted 'conditional independence'. The Commission's report, 'Report of the Independent Commission on Kosovo', can be found at [www.kosovocommission.org](http://www.kosovocommission.org).

<sup>31</sup> See e.g. 'Statement by the High Commissioner for Human Rights on the Situation in Chechnya, Russian Federation', HR/99/104, 16 November 1999.

<sup>32</sup> For the thesis that secession should be available as a remedy of last resort for gross human rights abuse, see e.g. L.C. Buchheit, *Secession: The Legitimacy of Self-Determination* (1978). For an early statement of this possibility in the context of the Aaland Island question, see League of Nations, 'Report Presented to the Council of the League by the Commission of Rapporteurs', Council Doc. B7/21/68/106, 16 April 1921, at 28.

<sup>33</sup> United Nations General Assembly Resolution 2625 (XXV) 1970, 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with Charter of the United Nations', has been interpreted by commentators as providing a possible legal basis for a right of secession. See e.g. White, 'Self-Determination: Time for a Reassessment', 28 *Netherlands International Law Review* (1981) 161. This interpretation has, however, found only limited doctrinal support. See the *obiter* statements in *Katangese Peoples' Congress v. Zaire*, Communication No. 75/92, 3 *International Human Rights Reports* (1996) at 136, para. 6; *Reference Re Secession of Quebec*, Supreme Court of Canada reproduced in (1998) 37 ILM 1340, para. 134; and Part 9, 'The Future Status of Kosovo', of 'Report of the Independent Commission', *supra* note 30, at [www.kosovocommission.org/reports/13-future.html](http://www.kosovocommission.org/reports/13-future.html).

exercise its right of self-determination would lead inexorably to the break up of the Indonesian State.<sup>34</sup>

Finally, and perhaps more crucially for present purposes, it is only in the colonial context that there exists a sufficient level of international consensus on the rules governing the exercise of the right of self-determination to protect the East Timorese against the indeterminacy objection outlined earlier. Beyond colonialism, the right of self-determination is plagued by an excess of indeterminacy both in terms of scope and content. By contrast, the rules relating to the exercise of the right of self-determination in the colonial context are — as we shall see — relatively settled. Identifying colonialism as the proper basis for East Timorese self-determination is thus important because it precludes the argument that the right of self-determination is so indeterminate that it provides no meaningful, normative yardstick against which to measure the international community's treatment of the East Timorese claim.

### 3 The Content of East Timor's Right of Self-Determination

As observed by an international meeting of experts in 1989, the contemporary debate in international law is no longer about the existence of the right of self-determination but about its content.<sup>35</sup> The point appears to be amply borne out if we consider that, in contemporary political discourse, self-determination is variously invoked to mean: independent statehood, autonomy, negotiations, limited self-government, land rights, self-management, and democratic governance (to name but a few). For the East Timorese, however, it is unlikely that this caricature of the right of self-determination as meaning all things to all peoples bears scrutiny. While the post-colonial dialogue unquestionably labours under a high degree of normative confusion, a review of international practice in the decolonization period reveals that the rules relating to the exercise of self-determination by a non-self-governing territory — such as East Timor — are both determinate and discernible. In elucidating this content, it is useful to distinguish between two core sets of entitlements: self-determination as process, and self-determination as substance.

#### A *Self-Determination as Process*

If we consider the standard definition of self-determination in international law, it is clear that it is depicted as the right of a people to a particular process: the right of all peoples freely to 'determine their political status and freely pursue their economic, social and cultural development'.<sup>36</sup> Thus the most fundamental right conferred on a people by virtue of the right of self-determination is the right of a people freely to

<sup>34</sup> Similarly, West Irian is a *sui generis* case based on a flawed decolonization process. On the failure of the United Nations to ensure a proper act of self-determination in West Irian, see e.g. R. Sureta, *The Evolution of the Right of Self-Determination* (1973) 143–151; Cassese, *supra* note 22, at 82–86.

<sup>35</sup> UNESCO *International Meeting of Experts on the Further Study of the Concept of the Rights of Peoples* (1989) para. 19.

<sup>36</sup> General Assembly Resolution 1514 (XV) 1960, at para. 2.

determine the destiny of its territory. Its essence is free choice.<sup>37</sup> Early resolutions, such as the historic United Nations General Assembly Resolution 1514 on the Granting of Independence to Colonial Countries and Peoples,<sup>38</sup> which stressed objective outcomes (independent statehood)<sup>39</sup> rather than subjective process (free and genuine expression of the will of the people)<sup>40</sup> were thus hastily superseded.

What is striking, however, about the international legal definition of self-determination is how little it tells us about its operational content. Self-determination is depicted as a right to a process — the right of a people freely to choose — yet questions abound as to the procedures to be adopted. What exactly amounts to a *free* choice? How is the ‘free choice’ to be ascertained? In the context of assessing the international community’s treatment of the East Timorese self-determination entitlement, these questions take on a specific guise: does self-determination require a referendum to be held? If so, how widely must the self-determination options be framed? And must they include the option of independent statehood?

Of course, these questions are nothing new. It was precisely such problems of process that dogged United Nations debates over the decolonization of the Western Sahara in 1974–1975 and led the General Assembly to request an Advisory Opinion from the International Court of Justice.<sup>41</sup> Indeed, it was the need to assist the General Assembly in determining the process of self-determination in the Western Sahara that was central to the ICJ’s decision to comply with the request for an Advisory Opinion.

This point has long been neglected. According to the standard account,<sup>42</sup> the General Assembly’s request for an Advisory Opinion on the legal status of the Western Sahara at the time of its colonization<sup>43</sup> presented the International Court of Justice with a potential stand-off between the historic rights of States on the one hand (Morocco and Mauritania) and a people’s right to self-determination on the other (the Western Sahara). Indeed, the Opinion is much vaunted for its pithy pronouncements on the alleged triumph of peoples’ rights over states’ rights in this normative zero-sum game.<sup>44</sup> But a closer reading of the judgment reveals that, on the Court’s own

<sup>37</sup> See e.g. *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12, paras 55 and 59; and *infra*.

<sup>38</sup> General Assembly Resolution 1514 (XV) 1960.

<sup>39</sup> *Ibid.*, at para. 5. Its sister resolution, United Nations General Assembly Resolution 1541 (XV) 1960, also implicitly favours independent statehood as an outcome. Thus, although it provides that self-determination can be achieved by three means — independent statehood, free association or integration — it is procedurally weighted in favour of independent statehood.

<sup>40</sup> General Assembly Resolution 2625 (XXV) 1970; and *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12, para. 55. For discussion of this point, see generally Cassese, *supra* note 22, at 89.

<sup>41</sup> See General Assembly Resolution 3292 (XXIX), 13 December 1974, at para. 3. For discussion of the background to this resolution, see *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12, paras 60–69.

<sup>42</sup> See e.g. Cassese, *supra* note 22, at 214–218.

<sup>43</sup> The General Assembly requested an Advisory Opinion on the following two questions: ‘I. Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no one (*terra nullius*)? If the answer to the first question is in the negative, II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?’

<sup>44</sup> For example, Judge Dillard famously stated that: ‘It is for the people to determine the destiny of the territory and not the territory the destiny of the people.’ See Separate Opinion of Judge Dillard, at 122.

interpretation, what was at issue in the decolonization of the Western Sahara was not so much a choice between the *historic rights of third states* versus the *self-determination of peoples* but, rather, a choice as to the procedures to be adopted in the self-determination process. Ascertaining the existence of historic ties between Western Sahara, and Morocco and the Mauritanian entity was relevant only to the extent that such ties would inform — not supplant — that self-determination process.

This becomes evident if we consider the fate of the Spanish objection that the Court should refuse the General Assembly's request for an Advisory Opinion on the grounds that it lacked object and purpose. Spain argued that, as the United Nations had already determined the method of decolonization applicable to the Western Sahara (a consultation of the indigenous population by means of a referendum), the questions posed by the General Assembly were irrelevant, and any answer by the Court would be to no practical effect.<sup>45</sup>

In dispensing with the Spanish objection, the Court agreed that the decolonization process to be accelerated in the Western Sahara (as envisaged by the General Assembly) was to be based on the right of self-determination: 'the right of the population of Western Sahara to determine their future political status by their own freely expressed will.'<sup>46</sup> Significantly, it also concluded that the right of self-determination was thus 'not affected' by the General Assembly's request for an Advisory Opinion, but, rather, constituted 'a basic assumption of the questions put to the Court'.<sup>47</sup> However, the Court nevertheless went on to reject Spanish claims that the application of the right of self-determination to the decolonization process in the Western Sahara rendered the two questions in the Advisory Opinion without object and purpose.<sup>48</sup> The right of self-determination, said the Court, leaves a 'measure of discretion' to the General Assembly as to the 'forms and procedures' by which it is to be realized.<sup>49</sup> 'Various possibilities' exist with respect to 'consultations between the interested States' and the 'procedures and guarantees' required for ensuring the free expression of the will of a people.<sup>50</sup> The function of an Advisory Opinion on the nature of historic ties between the Western Sahara and Morocco and the Mauritanian entity would thus be to assist the General Assembly in determining the procedures to be adopted in the self-determination process.<sup>51</sup>

<sup>45</sup> *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12, at para. 48.

<sup>46</sup> *Ibid.*, at para. 70.

<sup>47</sup> *Ibid.* The Court's conclusion that it had 'not found ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the principle of self-determination through the free and genuine expression of the will of the people of the Territory' must be read in the light of these earlier findings that the right of self-determination was not prejudiced by the request for the Advisory Opinion. *Ibid.*, at paras 162 and 70.

<sup>48</sup> *Ibid.*, at paras 71–73.

<sup>49</sup> See *ibid.*, at para. 71.

<sup>50</sup> *Ibid.*, at para. 72. See further Separate Opinion of Judge Dillard, at 122.

<sup>51</sup> *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12, at para. 72. That a finding of the existence of historic ties might, for example, inform the wording of the referendum question was recognized as a possibility by Morocco in the oral pleadings (Hearing, 26 June 1975). See the statements from Moroccan counsel quoted in the Separate Opinion of Judge Singh, at 79. For further discussion of this point, see Separate Opinion of Judge Dillard, at 122.

For present purposes of elucidating the content of the right of self-determination under international law, two points bear emphasis here. First, in concluding that the decolonization process in the Western Sahara was to be based on ‘the right of the population of Western Sahara to determine their future political status by their own freely expressed will’,<sup>52</sup> it is clear that the Court conceived of the right of self-determination exclusively in terms of a right to a process. Thus, it famously defined the principle of self-determination as ‘the need to pay regard to the freely expressed will of peoples’.<sup>53</sup> Similarly, the Separate Opinions reveal an overwhelming judicial consensus that it is the freely expressed will of the people that constitutes the ‘basic pillar’ of the right of self-determination.

Secondly, while the Advisory Opinion is unequivocal that the right of self-determination requires the freely expressed will of the people, it is less illuminating on the crucial question of *how* that free will is to be ascertained. Indeed, as we have seen, in dispensing with the Spanish objection, the Court made it clear that the question of how to realize the right of self-determination was to be left open as a matter within the discretion of the General Assembly.<sup>54</sup>

It is clear, however, that the Court did not intend the General Assembly’s discretion to be unfettered. In the first place, any ‘forms and procedures’ adopted must be such as to ensure ‘a free and genuine expression’<sup>55</sup> of the will of the people. Secondly, the Court expressly endorsed certain provisions of General Assembly Resolution 1541<sup>56</sup> — i.e., ‘informed and democratic processes’ — as giving effect to the ‘essential feature’ of the right of self-determination.<sup>57</sup> Finally, the Court expressly stipulated that ‘consulting the inhabitants’ was a ‘requirement’ of self-determination with which the General Assembly had dispensed only where ‘a certain population did not constitute a “people” entitled to self-determination’ or where it was deemed ‘totally unnecessary, in view of special circumstances’.<sup>58</sup>

In short, taking the Opinion as a whole, it is difficult to avoid the conclusion that, in the absence of special circumstances, the free choice of a people must be ascertained

<sup>52</sup> *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12, at para. 70.

<sup>53</sup> *Ibid.*, at para. 59. See also *ibid.*, at para. 55: ‘the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.’

<sup>54</sup> *Ibid.*, at para. 71.

<sup>55</sup> *Ibid.*, at para. 55.

<sup>56</sup> General Assembly Resolution 1541 (XV) 1960, Principles VII and IX.

<sup>57</sup> *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12, at para. 57.

<sup>58</sup> *Ibid.*, at para. 59. The Court did not elaborate on the meaning of ‘special circumstances’, but in his Separate Opinion Vice-President Ammoun gave as a prime example of ‘special circumstances’ the ‘legitimate struggle for liberation from foreign domination’. See Separate Opinion of Judge Ammoun, at 99. For Judge Singh, ‘the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary’. Separate Opinion of Judge Singh, at 81.

through ‘informed and democratic processes’ such as a referendum or a plebiscite.<sup>59</sup> Moreover, while Judge Dillard expressly rejected Spanish arguments that the right of self-determination *necessarily* requires the option of independent statehood,<sup>60</sup> surely all that this means is that what amounts to a ‘free choice’ is not to be universally predetermined but rather must be judged according to the particular political desires of the particular people.<sup>61</sup> Nonetheless, there is a substantial body of United Nations practice in the decolonization period that favours independent statehood as the preferred self-determination option.<sup>62</sup> And in the particular context of East Timor, where a liberation movement enjoying the support of the majority of its people had been engaged in a 25-year struggle for independent statehood, it seems incontrovertible that the test of ‘free choice’ could only be satisfied where that referendum or plebiscite offered independent statehood ‘as a legal possibility’.<sup>63</sup>

## B *Self-determination as Substance*

From a self-determination perspective, it is worth emphasizing that in the *Western Sahara Advisory Opinion*, the ICJ was faced exclusively with questions over process: first, relating to decolonization (to be based on self-determination); and, secondly, self-determination (to be based on a free choice of the population of the Western

<sup>59</sup> But compare, Separate Opinion of Judge Dillard, at 122–123. Since 1954, there has been a substantial United Nations practice of organizing or supervising self-determination referenda and plebiscites in the decolonization context. For a comprehensive list of UN activities, see Cassese, *supra* note 22, at 76–78. More recent self-determination practice outside the colonial context also favours the referendum as a means of ascertaining the free will of the people. The Badinter Arbitration Committee, for example, initially refused Bosnia-Herzegovina’s application for recognition as a state, instead recommending a ‘referendum of all the citizens of [Bosnia-Herzegovina] without distinction, carried out under international supervision’. See Conference on Yugoslavia, Arbitration Commission, ‘Opinion No. 4 on International Recognition of the Socialist Republic of Bosnia-Herzegovina by the European Community and its Member States’, (1992) 31 ILM 1501, at 1503. Similarly, in 1991, the provisional government of Eritrea decided to delay issuing a declaration of statehood until a referendum on independence had been held.

<sup>60</sup> Judge Dillard, at 122–123.

<sup>61</sup> ‘On the contrary, it may be suggested that self-determination is satisfied by a free choice not by a particular consequence of that choice or a particular method of exercising it.’ *Ibid.*, at 123.

<sup>62</sup> For a list of relevant practice, see H.G. Espiel, ‘The Right of Self-Determination: Implementation of United Nations Resolutions’ (Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities), E/CN.4/Sub.2/405/Rev.1, paras 253 and 256.

<sup>63</sup> In French Togoland in 1957, the General Assembly refused to endorse the outcome of a referendum where the referendum question had not included the option of independent statehood. Cf. Southern Camerouns. See Sureda, *supra* note 34, at 51 and 304–306. That the right of self-determination should include the option of independent statehood where a people has been involved in a liberation struggle has been affirmed by the General Assembly which expressly endorsed the right of the Palestinians to self-determination ‘without excluding the option of a State’. General Assembly Resolution A/Res./53/136, 9 December 1998. In 1999, the European Union went further and affirmed the right of the Palestinians to self-determination ‘including the option of a State’. Declaration of the European Union Summit, Berlin, 25 March 1999. Compare the Declaration of the European Union, Cardiff, 16 June 1998. Early resolutions on East Timor also refer to ‘self-determination and independence’. See e.g. General Assembly Resolution 32/34, 28 November 1977.

Sahara). It is hardly surprising then that the (soon-to-be-textbook) definitional legacy of the *Western Sahara Advisory Opinion* should also depict self-determination exclusively in terms of a process: the right of a people to a free choice over its political and territorial destiny.

Yet, whatever the Court's definitional emphasis on self-determination as process, it should be obvious that the right to a process does not exhaust the content of the right of self-determination under international law. To confer on a people a right of 'free choice' in the absence of more substantive entitlements — to territory, natural resources, etc. — would simply be meaningless. Clearly, the right of self-determination cannot be exercised in a substantive vacuum.

This is both implicit and explicit in the law. For example, implicit in any recognition of a people's right to self-determination is recognition of the legitimacy of that people's claim to a particular territory and/or set of resources.<sup>64</sup> Despite its textbook characterization as part of human rights law, the law of self-determination has always been bound up more with notions of sovereignty and title to territory than what we traditionally consider to be 'human rights'. More explicitly, the various international instruments make specific provision for additional substantive entitlements beyond the basic right of a people to exercise a free choice. And, while its normative contours are yet to be definitively settled, the following can be deduced as a non-exhaustive list of the substantive entitlements conferred on a people by virtue of the law of self-determination in the decolonization context: (a) the right to exist — demographically and territorially — as a people;<sup>65</sup> (b) the right to territorial integrity;<sup>66</sup> (c) the right to permanent sovereignty over natural resources;<sup>67</sup> (d) the right to cultural integrity and development;<sup>68</sup> and (e) the right to economic and social development.<sup>69</sup>

#### 4 East Timor's Right of Self-Determination: Institutional Engagement

It has thus far been established that, far from being excessively indeterminate, the right of self-determination has a discernible core content which confers two distinct

<sup>64</sup> It is this collective and ancestral attachment to the land that is often deemed to distinguish 'peoples' from 'minorities', and self-determination from minority rights. See e.g. Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation', 16 *Yale Journal of International Law* (1991) 177, especially at 189.

<sup>65</sup> This would include the right not to be expelled from the land and not to be demographically manipulated through, say, the implantation of settlers. For a development of this argument, see Drew, 'Self-Determination, Population Transfer and the Middle East Peace Accords', in S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories* (1997) 119, at 133.

<sup>66</sup> General Assembly Resolution 1514 (XV) 1960, para. 6.

<sup>67</sup> General Assembly Resolution 1803 (XVI) 1962; Article 1(2) of the International Covenant on Civil and Political Rights 1966 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); United Nations Council for Namibia, Decree on the Natural Resources of Namibia, (1974) 13 ILM 1513; Australia–Republic of Nauru, Settlement of the Case in the International Court of Justice Concerning Certain Phosphates Lands in Nauru, 20 August 1993, (1993) 32 ILM 1471.

<sup>68</sup> Universal Declaration of the Rights of Peoples, Algiers, July 1976, Articles 2, 9, 13, 14 and 15.

<sup>69</sup> This is expressly included in the standard definition of the right to self-determination.

sets of entitlements: self-determination as process and self-determination as substance. Thus, as a colonial people, the East Timorese were entitled, not only to a particular process (one that embodied a free choice over their political and territorial destiny), but — pending that process — a number of additional substantive rights (e.g. the right to territorial integrity, demographic integrity, natural resources etc.).<sup>70</sup>

Now, usefully for pedagogical purposes — though not, as it turned out, for the East Timorese — both aspects of the East Timorese self-determination entitlement encountered high-level institutional engagement: *self-determination as substance* (natural resources) in the case brought by Portugal against Australia to the International Court of Justice in 1995; *self-determination as process* in the United Nations-sponsored ‘popular consultation’ of August 1999. In considering each of these institutional moments by turn, it will be shown that, contrary to popular perception, there was as much a failure to implement the legal rules on self-determination in the United Nations-run popular consultation as in the ill-fated Portuguese application to the International Court of Justice. From a self-determination perspective, an excavation of ‘what-went-wrong’ in relation to both aspects of the East Timorese self-determination entitlement — in these two distinct institutional settings — reveals deficiencies in the structure of the international legal order with ramifications for the law of peoples<sup>71</sup> that extend beyond the territorial — or moral — boundaries of East Timor.

### ***A Self-Determination as Substance: The International Court of Justice and the Case Concerning East Timor***

The first moment of institutional engagement to be considered is a highly legalistic one — the *Case Concerning East Timor (Portugal v. Australia)* before the International Court of Justice in 1995.<sup>72</sup> The background is well known.<sup>73</sup> In 1989, Australia entered into a treaty with Indonesia — the Timor Gap Treaty<sup>74</sup> — for the purpose of jointly exploring and exploiting the hydrocarbon resources of an area of East Timor’s continental shelf lying between East Timor and Australia (the Timor Gap). Portugal, in its capacity as continuing Administering Power (as recognized by some rather dated United Nations resolutions<sup>75</sup>) brought an action against Australia<sup>76</sup> alleging

<sup>70</sup> On the relationship between process and substance pending the realization of self-determination, see Drew, ‘The East Timor Popular Consultation: Self-Determination Denied’, in Hedman, *supra* note 3, at 5–6.

<sup>71</sup> I use this term to denote the body of international law applicable to *peoples* rather than, say, states, individuals or international organizations. Compare e.g. J. Rawls, *The Law of Peoples* (1999).

<sup>72</sup> *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 103.

<sup>73</sup> See the various essays dedicated to discussing the background and prognosis of the *East Timor* case in CIIR/IPJET, *International Law and the Question of East Timor*, *supra* note 11.

<sup>74</sup> Australia/Indonesia Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, (1990) 29 ILM 469.

<sup>75</sup> See e.g. General Assembly Resolution 3485 (XXX), 12 December 1975; and Security Council Resolution 384 (1975), 22 December 1975. For discussion, see *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 103, para. 15.

<sup>76</sup> No action could be brought against Indonesia as it had not accepted the compulsory jurisdiction of the International Court of Justice.

*inter alia* a breach both of its own rights as the Administering Power and the rights of the East Timorese people — namely, to self-determination and permanent sovereignty over natural resources. The outcome was as predictable<sup>77</sup> as it was disappointing. The case was dismissed on jurisdictional grounds.<sup>78</sup> The Court held — implicitly applying the *Monetary Gold* doctrine<sup>79</sup> — that it could not entertain the case ‘in the absence of the consent of Indonesia’, as any determination as to the legality of Australia’s conduct would require a prior determination regarding the conduct of a third party not before the Court — Indonesia.<sup>80</sup>

The decision has been the subject of much subsequent discourse and criticism.<sup>81</sup> Elsewhere,<sup>82</sup> for example, it has been argued that the ‘configuration’ of the *East Timor* case was clearly distinguishable from that of *Monetary Gold Removed from Rome* and that the ICJ erred in departing from its earlier jurisprudence in the *Phosphates Lands* case.<sup>83</sup> There is no intention to re-engage in the jurisdictional niceties of the *Monetary Gold* debate here. Rather, it is my intention to revisit the case from a self-determination perspective — beyond the narrow, statist, jurisdictional framework of the judgment — with a view to assessing what, in its wider aspects, the case reveals about the state of the international law of peoples.

### 1 The Elevation of Self-Determination as Process Over Self-Determination as Substance

The first issue highlighted by the case, of concern to the self-determination enthusiast, is the tendency to elevate self-determination *as process* over self-determination *as substance*. Consider, for example, the Australian arguments on the merits. In response to the Portuguese claim that, by negotiating and concluding the Timor Gap Treaty, Australia had infringed the rights of the East Timorese to self-determination, Australia argued that its conclusion and implementation did not:

hinder any act of self-determination of the people of East Timor . . . Whatever the choice made, the conclusion of the Treaty does not prevent the exercise at some later date of the right of the

<sup>77</sup> Early warning of the potential procedural bar to the Portuguese case was given by Iain Scobbie at the IPJET conference in Lisbon in 1991. See Scobbie, ‘The East Timor Case: The Implications of Procedure for Litigation Strategy’, 9 *Oil and Gas Law and Taxation Review* (1991) 273; and Scobbie, ‘The Presence of an Absent Third: Procedural Aspects of the East Timor Case’, in CIIR/IPJET, *International Law and the Question of East Timor*, *supra* note 11, at 223.

<sup>78</sup> *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 103, para. 28.

<sup>79</sup> *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom, and United States of America)*, ICJ Reports (1954) 19. For discussion of this doctrine — and the argument that this conclusion could have been avoided — see Scobbie and Drew, ‘Self-Determination Undetermined: The Case of East Timor’, 9 *Leiden Journal of International Law* (1996) 185, at 195–207.

<sup>80</sup> Indonesia had not lodged an application to intervene under Article 62 of the ICJ Statute.

<sup>81</sup> See e.g. Chinkin, ‘The East Timor Case (Portugal v. Australia)’, 45 *International and Comparative Law Quarterly* (1996) 712, at 724–725; and Scobbie and Drew, *supra* note 79.

<sup>82</sup> Scobbie and Drew, *supra* note 79, at 195–197.

<sup>83</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Reports (1992) 240. For a discussion, see Scobbie and Drew, *supra* note 79, at 207–208.

people of East Timor freely to choose their future political status in accordance with arrangements approved by the UN.<sup>84</sup>

In other words, as exploiting oil resources presented no obvious impediment to the process of exercising a future free choice, Australia had breached none of its international duties in relation to East Timor's right of self-determination.

This argument is clearly misconceived. It portrays self-determination as no more than a one-off right of a people to participate in a *process* — a free, political choice — and ignores its core content of *substantive* entitlements (in this instance, the right of the Timorese to their oil). As Higgins argued in the oral pleadings, the effect of the Australian argument would be to empty the right of self-determination of any meaningful content.<sup>85</sup> Clearly, once it is recognized that self-determination entails substantive entitlements beyond the basic right to exercise a free choice, arguments that rely on such an artificial separation of process from substance are rendered logically untenable.

Now, it could, of course, be countered that the Australian arguments tell us more about the litigation strategy of a particular respondent state than they do about any general trend in the international practice relating to the law of peoples. A wider review of state practice, however, reveals that the tendency to see *self-determination as process* as exhaustive of the legal content of the right of self-determination is confined neither to Australian courtroom posturing nor to East Timor. For example, Israeli settlements in the West Bank and Gaza Strip, which strike at the very core of the Palestinian self-determination entitlement — territory, resources, demography — are routinely debated in institutional fora without any recourse to the law on self-determination. Instead, Israeli settlement activity has been variously characterized as contrary to the Fourth Geneva Convention,<sup>86</sup> individual human rights<sup>87</sup> and the all-important peace process.<sup>88</sup>

It is my contention that the institutional failure to characterize settlements as a violation of the Palestinian right of self-determination belies a general misconception of self-determination as a right to a process devoid of substantive content. The consequences for the discourse on the peace process are manifest. Once the right of

<sup>84</sup> Australian Counter Memorial, para. 374. Australia further argued that 'a State can only breach the obligation to respect the right of a people to self-determination if its conduct prevents or hinders the exercise of the people of a non-self-governing territory of their right freely to determine their political status'. *Ibid.*, at para. 375.

<sup>85</sup> Judge Higgins refers to this as 'legal deconstructionism'. See R. Higgins, Final Oral Argument, CR 95/13.

<sup>86</sup> See e.g. Security Council Resolution 452 (1979), 20 July 1979; Security Council Resolution 465 (1980), 1 March 1980; General Assembly Resolution A/Res/ES-10/6; United Nations International Meeting on the Convening of the Conference on Measures to Enforce the Fourth Geneva Convention in the Occupied Palestinian Territory Including Jerusalem, Cairo, 14 and 15 June 1999, <http://domino.un.org/UNSIPAL>.

<sup>87</sup> See e.g. Commission on Human Rights Resolution E/CN4/Res./2000/8, 17 April 2000. For state practice, see e.g. the view of the United Kingdom at UKMIL, 59 *British Yearbook of International Law* (1988) 574–575; UKMIL, 64 *British Yearbook of International Law* (1993) 724.

<sup>88</sup> For numerous views of states to this effect, see e.g. Security Council debates, 'The Situation in the Occupied Arab Territories', 30 June 1998, S/PV 3900, 30 June 1998; General Assembly Resolution 53/55, 3 December 1998; and the European Union Declaration, Brussels, 22 May 2000.

self-determination has been conceptually stripped of its core entitlements to territory and resources, it becomes possible — for states, institutions and commentators alike — to assert both the *inalienable, jus cogens* character of the Palestinian right to self-determination, *and* declare the future of Israeli settlements as a matter for political negotiation;<sup>89</sup> to affirm the primacy of the right of self-determination, including the option of a state, *and* envisage a future for Israeli settlements on the West Bank.<sup>90</sup>

Viewed in this contemporary light, how then as international lawyers do we respond to the Australian argument that the East Timorese right of self-determination emerged unscathed from the negotiation and conclusion of a treaty dedicated to the exploration and exploitation of East Timorese oil? Do we dismiss it as the courtroom strategy of a creative litigation team charged with representing a miscreant state? Or do we acknowledge that it reflects a more general trend in contemporary practice that unduly and selectively elevates self-determination as process over self-determination as substance, with deleterious consequences for the territory and resources of peoples from East Timor to the West Bank?

## 2 The Elevation of the Substantive Rights of Peoples over the Procedural Rights of Peoples

A second issue highlighted by the *East Timor* case concerns the relationship between the substantive rights of peoples and procedural rights of access (for peoples).<sup>91</sup> As noted earlier, the decision to dismiss the East Timor case on jurisdictional grounds has drawn criticism from many quarters. Christine Chinkin, for example, has argued, rightly, that the outcome of the case reveals an inherent structural bias in the international law system that favours procedural requirements over substantive principles — i.e. the procedural rights of absent third states over the substantive rights of peoples.<sup>92</sup> I want to take this analysis one step further and argue that from a self-determination perspective the case highlights a second structural bias in the international system: the elevation of *substantive* rights of *peoples* over *procedural* rights of *peoples*. Thus, while on a normative level, the right of self-determination has been declared by the International Court of Justice to be an obligation *erga omnes*,<sup>93</sup> and is

<sup>89</sup> For an astonishing example of this, see e.g. Special Rapporteur Felber, 'Report on the Human Rights Situation in the Occupied Palestinian Territories Occupied Since 1967', E/CN.4/1995, 19 December 1994.

<sup>90</sup> See e.g. Cassese, 'The Israel-PLO Agreement and Self-Determination', 4 *European Journal of International Law* (1993) 564, at 569.

<sup>91</sup> It should be stressed at the outset that here I am using the terms 'substantive' and 'procedural' to distinguish substantive legal principle from procedural rights such as *locus standi*. This is not to be confused with my earlier characterization of the content of the right of self-determination as comprising two distinct elements: *self-determination as process* and *self-determination as substance*. I am grateful to Thomas Franck for pointing out the potential for terminological confusion here.

<sup>92</sup> Chinkin, *supra* note 81, at 724–725.

<sup>93</sup> *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 103, para. 29.

frequently cited as a candidate for the elusive *jus cogens* status,<sup>94</sup> when it comes to issues of enforcement or procedural rights of access, the law on self-determination remains resolutely impoverished.<sup>95</sup>

Now it may, of course, simply be regarded as trite to point out that the East Timorese did not themselves have standing under the ICJ Statute to bring their case to the International Court of Justice: that behind the case of *Portugal v. Australia* there was the shadow case of *the East Timorese People v. the Republic of Indonesia*. But, as international lawyers, are our critical faculties bound by the non-precedential injunctions of the ICJ Statute?<sup>96</sup> How then do we regard Portugal's efforts to frame a case about East Timor in terms of its own — and vicarious — interests? Do we applaud the legal creativity of the Portuguese litigation team while admiring the sheer *chutzpah* of a state with a dubious colonial past? Or do we lament the strictures of an international legal order that make resort to such legal acrobatics necessary? In his separate opinion, Judge Vereshchetin argues that the East Timorese people constituted an equally absent 'third party'.<sup>97</sup> Do we muse on the irony that in *this* particular case the rights of an absent *state* (Indonesia) were upheld while those of the absent *people* (the East Timorese) remained *per force* beyond the jurisdictional reach of the Court? Or does it remind us that peoples have perennially been absent from the cases bearing their names — from *South West Africa* to the *Western Sahara*?<sup>98</sup>

Perhaps we console ourselves that the explanation for the procedural exclusion of peoples lies in international law's statist past as reflected in the (now outdated) 1945 Statute of the International Court of Justice. But what then of other ostensibly non-statist institutions? The current spate of litigation against Turkey in the European Court of Human Rights arising out of the systematic persecution of the Kurdish people<sup>99</sup> demonstrates the limitations of litigating violations of peoples' rights through the prism of a human rights convention dedicated solely to the protection of the individual. On the standard account, the omission of a substantive provision on

<sup>94</sup> The *jus cogens* nature of self-determination was not argued by Portugal in the *East Timor* case, as this would have inevitably called into question the validity of the Timor Gap Treaty — thus (properly) triggering the application of the *Monetary Gold* doctrine. Article 53 of the 1969 Vienna Convention on the Law of Treaties. For the view that self-determination has attained *jus cogens* status, see e.g. Espiel, *supra* note 62, at paras 70–87; and Commission on Human Rights, Resolution E/CN.4/RES/2000/4, 7 April 2000.

<sup>95</sup> For the opposite view, that procedural rights of peoples (participation and process) are elevated over substantive rights in the context of the indigenous debate, see Tennant, 'Indigenous Peoples, International Institutions, and the International Legal Literature 1945–1993', 16 *Human Rights Quarterly* (1994) 1, at 45–55.

<sup>96</sup> Article 59 of the ICJ Statute 1945.

<sup>97</sup> *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 103, Judge Vereshchetin, Separate Opinion, at 135.

<sup>98</sup> Thus, even in Advisory Opinions, the directly affected people — the Sahrawi — were excluded from the Court whereas even the most indirectly affected states were eligible to take part in the oral proceedings. See the Letter from the Registrar, 25 March 1975. In the end, Morocco, Mauritania, Zaire, Algeria and Spain elected to be represented in the oral proceedings before the Court.

<sup>99</sup> For a critical account of Western inaction in the face of 'ethnic cleansing' against the Kurds in Turkey, see N. Chomsky, *The New Military Humanism: Lessons from Kosovo* (1999) 51–63.

peoples' rights in early human rights instruments such as the European Convention on Human Rights, has been remedied in later, third generation provisions such as the pivotal Article 1 — on self-determination of peoples — in the International Covenant on Civil and Political Rights.<sup>100</sup> Yet, the ill-fated attempts of representatives of indigenous peoples — the Grand Captain of the Mikmaq<sup>101</sup> and the Chief of the Lubicom Lake Band<sup>102</sup> — to bring claims against Canada under the Optional Protocol in respect of alleged violations of Article 1, remind us that the absence of an effective procedural mechanism for peoples to enforce the substantive right of self-determination is as much a feature of (third generation) human rights instruments<sup>103</sup> as of the (statist) International Court of Justice.

Alternatively, if responsibility for the procedural exclusion of peoples from international fora lies as much with our human rights present as with our statist past, perhaps we seek comfort in the prospect of an inevitably more people-inclusive future. On this reasoning, just as the substantive law of self-determination of peoples made its pilgrim's progress from political postulate to legal super-norm,<sup>104</sup> so too, with time, our international legal structures can be reformed to accommodate, procedurally, the claims of peoples. All we need is more — and better — law.<sup>105</sup> In *Katangese Peoples' Congress v. Zaire*<sup>106</sup> for example, a communication submitted by a representative of a people (the President of the Katangese Peoples' Congress) alleging a denial of self-determination under Article 20(1) of the African Charter on Human and Peoples' Rights<sup>107</sup> was received and considered (albeit negatively) by the African Commission on Human and Peoples' Rights.<sup>108</sup> Could not the procedure of the African Commission be mobilized in support of a more general reform project?

Yet the critical scholarship of Nathaniel Berman teaches us to treat with caution the view of history as the inexorable march of legal progress.<sup>109</sup> In his body of work on

<sup>100</sup> Article 1 of the ICCPR. For commentary, see D. McGoldrick, 'Commentary on Article 1', in *The Law of the Covenant* (2002 forthcoming).

<sup>101</sup> Communication No. 78/1980, in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. 2, October 1982–April 1988, at 23.

<sup>102</sup> *Ominayak v. Canada*, Communication No. 167/1984, Views of the Human Rights Committee, 26 March 1990, UN Doc. C/38/D/167/1984 (1990).

<sup>103</sup> For criticism, see e.g. Turpell, 'Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition', 25 *Cornell International Law Journal* (1992) 579, at 583–590.

<sup>104</sup> A. Cristescu, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments* (1981) 17–24.

<sup>105</sup> Kennedy, *supra* note 21.

<sup>106</sup> *Katangese Peoples' Congress v. Zaire*, Communication No. 75/92, *supra* note 33.

<sup>107</sup> Article 20(1) of the African Charter of Human and Peoples' Rights 1981.

<sup>108</sup> Rules of Procedure of the African Commission on Human and Peoples' Rights, 6 October 1995, at [www.oau-oua.org/oau\\_info/rules.htm](http://www.oau-oua.org/oau_info/rules.htm). The Commission considered that there were no violations under the African Charter.

<sup>109</sup> Contesting the 'progress narrative' is a characteristic of the so-called 'New Approaches to International Law' (NAIL) stream of international legal scholarship. Cass, 'Navigating the New Stream: Recent Critical Legal Scholarship in International Law', 65 *Nordic Journal of International Law* (1996) 337. For a critique of 'history as progress' see e.g. Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9, at 91–101.

the legal history of nationalism,<sup>110</sup> Berman demonstrates the perennial ambivalence with which the international community has engaged the nationalist passions of peoples.<sup>111</sup> On this account, it is surely worth recalling that the system of minority protection under the League of Nations was criticized *inter alia*<sup>112</sup> for its failure to provide *locus standi* to minority groups both at the Council of the League of Nations<sup>113</sup> and at the Permanent Court of International Justice.<sup>114</sup> Viewed in this historical light, how then do we regard the procedural exclusion of peoples such as the East Timorese from international law fora such as the ICJ?<sup>115</sup> Is it merely an oversight on the part of an international legal order otherwise dedicated to building a normative law of peoples? Or does it reflect a more deep-rooted ambivalence<sup>116</sup> about the place of

<sup>110</sup> See e.g. Berman, 'Modernism, Nationalism and the Rhetoric of Reconstruction', 4 *Yale Journal of Law and Humanities* (1992) 351; Berman, "'But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law', 106 *Harvard Law Review* (1993) 1792; Berman, 'Between Alliance and Localisation: Nationalism and the New Oscillationism', 26 *New York University Journal of International Law and Politics* (1994) 449; and Berman, 'The International Law of Nationalism: Group Identity and Legal History', in D. Wippman (ed.), *International Law and Ethnic Conflict* (1998) 25.

<sup>111</sup> Berman, 'Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework', 33 *Harvard Journal of International Law* (1992) 353.

<sup>112</sup> The view of the minorities states was of course the opposite: that the League system had conceded 'too much to minority groups'. I.L. Claude, *National Minorities* (1955) 33.

<sup>113</sup> Although the League established procedures to allow minority groups to petition the Council directly, this was of no legal effect unless endorsed by a member of the League Council. See Tittoni Report of 22 October 1920, Report 1, *League of Nations Official Journal* 8, 9 (1920). For an explanation of the decision not to accord *locus standi*, see Report of the Committee Instituted by the Council Resolution of 7 March 1929, *League of Nations Official Journal Spec. Supp.* (1929) 73. An important exception was the Geneva Convention Concerning Upper Silesia 1922. For discussion, see Berman, "'But the Alternative is Despair'", *supra* note 110, at 1897.

<sup>114</sup> A draft Article of the Polish Treaty, proposed by Lord Robert Cecil in 1919, which would have allowed Polish national minorities a direct right of appeal to the Permanent Court of International Justice, was rejected by the UK and France. See J. Robinson, O. Karback *et al.*, *Were the Minorities Treaties a Failure?* (1943) 135–138. See also, on this point, Berman, "'But the Alternative is Despair'", *supra* note 110, at 1860, especially note 295; and P. Thornberry, *International Law and the Rights of Minorities* (1991) 38–54.

<sup>115</sup> An important exception is of course the Working Group on Indigenous Populations established by ECOSOC Resolution 1982/34, 7 May 1982. For discussion, see Maivan Clech Lam, 'Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims for Self-Determination by Nations', 25 *Cornell International Law Journal* (1992) 603, at 619–620. It was precisely this lack of institutional access for peoples generally in the international system that led to the founding of the Unrepresented Peoples' Organization (UNPO) in 1991. See <http://www.unpo.org>.

<sup>116</sup> Berman, 'Modernism, Nationalism and the Rhetoric of Reconstruction', *supra* note 110. This is also reflected in the proposal of the Committee on Economic, Social and Cultural Rights to exclude questions relating to the right of self-determination from the individual right to submit communications under the proposed draft optional protocol to the International Covenant on Economic Social and Cultural Rights. It was stated that this could involve a 'grave danger of the procedure being misused'. 'Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Communications in Relation to the International Covenant on Economic, Social and Cultural Rights', Annex to E/CN.4/1997/105, 18 December 1996, para. 24. Chris Tennant's argument, that in the context of indigenous rights the opposite is true and there is a prioritization of procedural rights — participation and process — over substantive rights (i.e. no recognized right to self-determination), merely confirms the existence of the ambivalence. Tennant, *supra* note 95.

nationalist claims in international law that has survived ostensible 'progress' at both doctrinal and institutional levels: from minority rights, to peoples' rights; and from the paternalistic League of Nations, to the more 'enlightened' United Nations?

### **B Self-Determination as Process: The United Nations and the August 1999 Popular Consultation**

The second institutional encounter I wish to consider is between East Timor's right to self-determination as process, and the United Nations-sponsored popular consultation of August 1999.<sup>117</sup> This may seem a strange choice of moment for critical scrutiny. If the encounter with the International Court of Justice was widely hailed as a disappointment, the popular consultation has been generally celebrated as the implementation of East Timor's long overdue right of self-determination.<sup>118</sup> On this, now standard, account the image of the East Timorese turning out in their droves to vote at United Nations polling stations in the face of threats from marauding militias<sup>119</sup> and Indonesian security forces bears testimony to the tenacity, not only of the East Timorese people, but of the international community faced with a suppression of the 'irrepressible'<sup>120</sup> right of self-determination.

Yet for the self-determination formalist, the United Nations chapter of the East Timor Story is as troubling as its judicial counterpart. Questions abound. Why did the East Timorese require to be tenacious? Why were there 'marauding militias' and illegally occupying Indonesian security forces? In the era of the much-vaunted right of democratic governance<sup>121</sup> are not votes — especially United Nations-sponsored ones — supposed to be conducted in an atmosphere which is 'free and fair'? And given the presence of marauding militias and the Indonesian army, why did the United Nations deploy a civilian mission and not, for example, a military peace-keeping force?

#### *1 The Background to the New York Accords*

For international lawyers, the background to the August 1999 popular consultation should be well known. Since July 1983,<sup>122</sup> the good offices function of the United Nations Secretary-General had been deployed — to little avail — to assist Portugal and Indonesia to find an 'acceptable solution' to the Question of East Timor.

<sup>117</sup> I have argued elsewhere, in advance of the popular consultation, that the proposed arrangements failed to accord with international law. Drew, *supra* note 70.

<sup>118</sup> Portugal, for example, stated that the New York Accords met Portugal's objectives by recognizing the right of self-determination of the East Timorese. See Note Verbale, 2 June 1999 from *Charge d'affaires* of the Permanent Mission of Portugal to the United Nations addressed to the Secretary-General, A/54/121, 3 June 1999.

<sup>119</sup> On the deleterious effects of the militia campaign of intimidation from January 1999 to August 1999, see e.g. 'Question of East Timor, Progress Report of the Secretary-General', A/54/654, 13 December 1999, paras 18–20.

<sup>120</sup> *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports (1995) 103, para. 29.

<sup>121</sup> Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 46.

<sup>122</sup> The General Assembly requested the Secretary-General to initiate consultation with all parties directly concerned with a view to exploring avenues for achieving a comprehensive settlement of the problem. See General Assembly Resolution 37/30, 23 November 1982.

With the fall of General Suharto in Indonesia in May 1998,<sup>123</sup> negotiations intensified,<sup>124</sup> and in October 1998 the United Nations Secretary-General presented Indonesia and Portugal with a detailed draft constitutional framework for ‘wide-ranging autonomy’ in East Timor within the Republic of Indonesia.<sup>125</sup> Dispute over the autonomy plan centred less on the constitutional details than on whether East Timor’s autonomy within Indonesia would constitute a final status (the Indonesian position) or an interim status pending a future act of self-determination by the East Timorese people (the Portuguese and East Timor leadership position).<sup>126</sup>

The deadlock was resolved when — in an astonishing turnaround — on 27 January 1999, President Habibie announced that, if the people of East Timor declined the Indonesian offer of autonomy, Indonesia would be prepared to ‘let East Timor go’.<sup>127</sup> It was this Habibie-led<sup>128</sup> *volte face* in Indonesian policy that paved the way for the conclusion of the historic New York Accords of 5 May 1999 between Portugal, Indonesia and the United Nations.<sup>129</sup>

## 2 *The Structure of the New York Accords*

Hailed by the United Nations Secretary-General as providing an historic opportunity for a ‘just, comprehensive and internationally acceptable solution to the question of East Timor’,<sup>130</sup> the New York Accords comprised three separate agreements. First, the General Agreement,<sup>131</sup> between Portugal and Indonesia, set forth the lynchpin principle: to request the United Nations Secretary-General to conduct a ‘popular consultation’ to ascertain whether the East Timorese people would accept or reject a constitutional framework for autonomy<sup>132</sup> within the Republic of Indonesia. To assist in this task, the Secretary-General was requested to establish an ‘appropriate’ United Nations Assistance Mission for East Timor (UNAMET).<sup>133</sup> UNAMET was duly established by the Security Council on 11 June 1999.<sup>134</sup>

The two supplementary agreements were tripartite — between Portugal, Indonesia and the United Nations — and dealt with the modalities for the popular consultation

<sup>123</sup> Suharto was forced to resign on 21 May 1998. On the economic and political background to the resignation, see Taylor, ‘Indonesia and the Transition in East Timor’, in Hedman, *supra* note 3, at 13.

<sup>124</sup> In June 1998, President Habibie offered a ‘special status’ to East Timor within the Republic of Indonesia. This was rejected by Bishop Belo and Xanana Gusmao. See Taylor, *supra* note 123, at 15.

<sup>125</sup> For background, see ‘Question of East Timor, Progress Report’, *supra* note 119, at para. 3.

<sup>126</sup> *Ibid.*, at para. 2.

<sup>127</sup> ‘Sudden Impact’, *Far Eastern Economic Review*, 11 February 1999, at 19; Taylor, *supra* note 123; ‘Question of East Timor, Progress Report’, *supra* note 119, at para. 4.

<sup>128</sup> On the background to Habibie’s decision, see Taylor, *supra* note 123, at 16.

<sup>129</sup> For further details on the steps leading to the signing ceremony in New York, see ‘Question of East Timor, Progress Report’, *supra* note 119, at paras 5–9.

<sup>130</sup> Report of the Secretary-General, ‘The Question of East Timor’, S/1995/513, 5 May 1999, para. 1.

<sup>131</sup> General Agreement, *supra* note 11.

<sup>132</sup> *Ibid.*, Article 1. The Constitutional Framework was appended to the General Agreement.

<sup>133</sup> *Ibid.*, Article 2.

<sup>134</sup> Security Council Resolution 1246 (1999), 11 June 1999, para. 1.

(the 'Modalities Agreement'<sup>135</sup>) and the security arrangements (the 'Security Agreement'<sup>136</sup>). The Modalities Agreement regulated such operational issues as the date of the ballot, the question to be put to the voters, voter entitlement, the timetable for the consultation process and so forth.<sup>137</sup> The Security Agreement crucially laid down a second lynchpin principle: that a 'secure environment devoid of violence or other forms of intimidation is a prerequisite for the holding of a fair and free ballot'.<sup>138</sup> Curiously, however, given their penchant for human rights abuses against the East Timorese, responsibility for ensuring the security environment was assigned, not to the United Nations, but to the 'appropriate' Indonesian security authorities.<sup>139</sup>

### 3 The New York Accords: Legal Rights or Pragmatic Compromise?

It is my contention that with the shift from the ICJ to the UN — from self-determination as substance, to self-determination as process — the East Timor Story took, what David Kennedy might call, an 'anti-formalist turn'<sup>140</sup> — from legal formalism to institutional pragmatism. This becomes clear if we contest two standard assumptions that underpin discussion/analysis of the popular consultation and the violence that erupted in the wake of the announcement of the pro-independence results on 3 September 1999: first, that the popular consultation amounted to an exercise of the right of self-determination in accordance with the rules of international law; secondly, that the violence of September/October was aberrational and arose only in violation — rather than as a predictable consequence — of the New York Accords.

### 4 The New York Accords and the Right to Free Choice

We have seen that the 'essential feature' of self-determination as process is the right of a people to exercise a free choice. Thus, in order to be certified 'self-determination-compliant' it must be shown that the New York Accords met the test of providing the

<sup>135</sup> Agreement Regarding the Modalities for the Popular Consultation of the East Timorese Through a Direct Ballot (Modalities Agreement), A/53/951, Annex II of the Report of the Secretary-General, S/1999/513, *supra* note 11.

<sup>136</sup> East Timor Popular Consultation Agreement Regarding Security (Security Agreement) A/53/951, Annex III of the Report of the Secretary-General, S/1999/513, *supra* note 11.

<sup>137</sup> For discussion, see Secretary-General Report, S/1999/531, para. 4.

<sup>138</sup> Security Agreement, Article 1.

<sup>139</sup> Article 1 of the Security Agreement provided, *inter alia*, that responsibility for the security environment 'as well as for the general maintenance of law and order rests with the appropriate Indonesian security authorities. The absolute neutrality of the TNI [the Indonesian armed forces] and the Indonesian Police is essential in this regard.' Article 3 of the General Agreement, *supra* note 11, provided that: 'The Government of Indonesia will be responsible for maintaining peace and security in East Timor in order to ensure that the popular consultation is carried out in a fair and peaceful way in an atmosphere free of intimidation, violence or interference from any side' (emphasis added). Part G of the Modalities Agreement provided that 'the Indonesian authorities will ensure a secure environment for a free and fair popular consultation and will be responsible for the security of the United Nations personnel'.

<sup>140</sup> Kennedy, *supra* note 21.

people of East Timor with a true free choice as required by international law. And, while the precise meaning of ‘free choice’ is not expressly defined, it seems obvious that in order to be meaningful the designation ‘free’ must relate to both the *range* of choices offered and the *conditions* under which the choice was to be exercised.

(a) *The range of choices: the ballot question*

The question of the range of choices has been touched on earlier. We have seen that General Assembly Resolution 1541<sup>141</sup> provides for three weighted options: independent statehood, free association, or integration with an independent state. The 1970 Declaration Concerning Friendly Relations<sup>142</sup> reiterates these three options and adds a fourth: ‘or the emergence into any other political status freely determined by a people’.<sup>143</sup> By contrast, on any reasonable interpretation, the question put to the East Timorese people seems unduly circumscribed and weighted in favour of one particular option: autonomy. As provided by the Modalities Agreement,<sup>144</sup> the question put to the East Timorese voters on 30 August 1999 was:

Do you accept the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia? ACCEPT

OR

Do you reject the proposed special autonomy for East Timor, leading to East Timor’s separation from Indonesia? REJECT

Thus, rather than present the East Timorese with a range of positive choices in neutral terms — say, integration with Indonesia, autonomy within Indonesia or independent statehood — the ballot question effectively offered a single choice — autonomy — on a take-it-or-leave-it basis. Independent statehood was not offered as a positive option in its own right, but rather put in a cameo appearance as ‘East Timor’s separation from Indonesia’, and as a negative consequence of rejecting ‘special autonomy’.

But perhaps it will be objected that this line of argument is excessively formalistic. It cannot seriously be suggested that the East Timorese were unaware of the true self-determination options on offer: *the Republic of Indonesia (integration) v. the Republic of East Timor (independence)*. UNAMET ran a faultless electoral educational programme<sup>145</sup> and the East Timorese themselves clearly grasped the point and voted in their droves. Yet, as international lawyers, how do we view the United Nations Secretary-General’s decision to sign up to an agreement where a ‘popular consultation’ on ‘special autonomy’ displaced the traditional ‘referendum’ on ‘self-

<sup>141</sup> United Nations General Assembly Resolution 1541 (XV) 1960. Resolution 1541 is expressly recalled in the preamble of Security Council Resolution 1236 (1999), 7 May 1999.

<sup>142</sup> United Nations General Assembly Resolution 2625 (XXV) 1970.

<sup>143</sup> *Ibid.*

<sup>144</sup> Modalities Agreement, Part B.

<sup>145</sup> On UNAMET public information activities in advance of the ballot, see e.g. UN Secretary-General Report, Question of East Timor, S/1999/803, 20 July 1999, para. 8. On 12 October 2000, UNAMET was (deservedly) awarded the Elie Wiesel Ethics Award for its role in facilitating the popular consultation.

determination',<sup>146</sup> and where the positive desire for independent statehood of the vast majority of East Timorese was expressed in the negative language of rejection? Are we pragmatic in the face of *realpolitik*? Do we point out that the actual wording of the ballot question isn't what is important, that for Indonesia a 'popular consultation' was the only politically palatable option, and that in any event it all came right in the end? Or do we at least acknowledge that self-determination is about *process*, not outcomes, and that in signing up to the New York Accords the United Nations departed from its own decolonization practice, which, as we have seen, favours independent statehood as a self-determination option?

(b) *The conditions for the choice: the security environment*

But even if we accept that, while the language may have been disappointing, the ballot question put to the East Timorese on 30 August 1999 nonetheless offered a range of political options sufficient to constitute a 'free choice' under international law (though we would have to agree that those East Timorese who favoured the *status quo* — full integration without autonomy — were effectively disenfranchised) the New York Accords manifestly failed at the second free choice hurdle: the conditions under which that choice was to be exercised.

It is axiomatic that the exercise of a free choice through a referendum or a plebiscite requires conditions conducive to a fair and free vote.<sup>147</sup> And, *prima facie*, this is recognized by the New York Accords. As we have seen, Article 1 of the Security Agreement provided that the prerequisite for holding a 'fair and free ballot' was a 'secure environment devoid of violence or other forms of intimidation'.<sup>148</sup> The task of vouchsafing that secure environment fell to the United Nations Secretary-General. Thus Article 3 of the Security Agreement provided that, prior to the start of registration of voters, the Secretary-General shall 'ascertain, based on the objective evaluation of the United Nations mission, that the necessary security situation exists for the peaceful implementation of the consultation process'.<sup>149</sup> Guidance as to what exactly would constitute 'the necessary security situation' was provided in the accompanying Secretary-General's report:

the bringing of armed civilian groups under strict control and the prompt arrest and prosecution of those who incite or threaten to use violence, a ban on rallies by armed groups while ensuring the freedom of association and expression of all political forces and tendencies, the redeployment of Indonesian military forces and the immediate institution of a process of laying down of arms by all armed groups to be completed well in advance of the holding of the ballot.<sup>150</sup>

<sup>146</sup> In her study of the inter-war plebiscites, Sarah Wambaugh draws a distinction between 'popular consultations' and the 'regular plebiscite'. See S. Wambaugh, *Plebiscites Since the World War* (1933) Preface and Appendix.

<sup>147</sup> See e.g. Security Council Resolution 628 (1989), 16 January 1989, in relation to Namibia.

<sup>148</sup> Security Agreement, Article 1.

<sup>149</sup> *Ibid.*, Article 3.

<sup>150</sup> Report of the Secretary-General, The Question of East Timor, S/1999/513, *supra* note 11, para. 6. UNAMET was also mandated to monitor 'the fairness of the political environment' and to ensure 'the freedom of all political and other non-governmental organizations to carry out their activities'. Security Council Resolution 1246 (1999) 11 June 1999, para. 4.

The ballot was originally scheduled for Sunday 8 August 1999.<sup>151</sup> However, on 22 June, following reports of widespread intimidation and violence against pro-independence supporters by pro-integration militias, the Secretary-General rightly determined that the ‘necessary security situation’ did not exist and postponed the start of the registration process for three weeks.<sup>152</sup> Indonesia and Portugal agreed to a two-week postponement of the ballot.<sup>153</sup> On 14 July 1999, following reports of further militia violence and intimidation, including a series of attacks against UNAMET convoys and personnel, the Secretary-General again determined that he was unable to attest to the necessary security situation.<sup>154</sup> But this time, ‘undeterred by the intimidation’, he decided that the registration process should nevertheless begin.<sup>155</sup> Finally, on 28 July 1999, the Secretary-General informed the Security Council that the date of the consultation had been postponed to 30 August 1999.<sup>156</sup> No subsequent determination that the ‘necessary security situation’ existed was ever made.

But if, for the Secretary-General, the thorny political question<sup>157</sup> in the lead-up to the ballot was whether the security situation on the ground measured up to Article 1 of the Security Agreement (and, if not, whether to go ahead anyway), for the self-determination formalist the question is whether the security arrangements in the Accords measured up to what is required by international law. In other words, did the terms of the New York Accords provide for conditions conducive to an exercise of a *free* choice? And it is my contention, as argued in advance of the ballot,<sup>158</sup> that the

<sup>151</sup> Modalities Agreement, Part A. This was later moved to Saturday, 7 August 1999 at the behest of the Indonesians.

<sup>152</sup> Report of the Secretary-General Question of East Timor, S/1999/705, 22 June 1999, paras 12 and 19; ‘Question of East Timor, Progress Report’, *supra* note 119, at para. 21.

<sup>153</sup> *Ibid.*, at para. 20.

<sup>154</sup> See Letter to Security Council, 14 July 1999, S/1999/788. For details of the various attacks against UNAMET, see ‘Question of East Timor, Progress Report’, *supra* note 119, at para. 21.

<sup>155</sup> Letter to Security Council, 14 July 1999, S/1999/788. Registration began on 16 July 1999. See UN Secretary-General Report, Question of East Timor, S/1999/803, 20 July 1999, para. 1. The Secretary-General states that the decision to commence registration was based on ‘positive assurances’ by the Indonesians that the security situation would improve. *Ibid.*, at para. 25. On 26 July 1999, the Secretary-General again wrote to the Security Council: ‘The security conditions remained inadequate with ongoing intimidation by armed militia groups . . . and the inability of tens of thousands of internally displaced persons to return to their homes in safety. Further action to bring armed groups under control is essential.’ But he nonetheless took the decision to continue with the registration of voters. See Letter Dated 26 July 1999 from the Secretary-General Addressed to the President of the Security Council, S/1999/822, 26 July 1999.

<sup>156</sup> See Letter Dated 28 July 1999 from Secretary-General Addressed to the President of the Security Council, S/1999/830, 28 July 1999. As a consequence, the Security Council authorized a one-month extension of UNAMET’s mandate until 30 September 1999. Security Council Resolution 1257 (1999), 3 August 1999.

<sup>157</sup> The Secretary-General made explicit the dilemma: ‘The prospect of achieving greater security through delaying the process or indeed halting it had to be weighed carefully against the risk of depriving the people of East Timor of the historic opportunity afforded by the Agreements. It was by no means certain that should the timetable shift by too great a margin the consultation would be held at all.’ ‘Question of East Timor, Progress Report’, *supra* note 119, at para. 24.

<sup>158</sup> Drew, *supra* note 70.

Accords' injunction that there be an environment 'devoid of intimidation'<sup>159</sup> was always going to be thwarted, not only by the *external* situation on the ground — the marauding militias, the Indonesian military — but also by two failings integral to the Agreements.

First, there was no obligation on Indonesia to withdraw<sup>160</sup> — or even to redeploy — its military forces in the lead-up to the ballot. Although Indonesian troop redeployment was listed by the Secretary-General as one of the main elements of the 'necessary security situation'<sup>161</sup> any corresponding treaty provision in the New York Accords is conspicuous only by its absence. That the 'neutralization' of a territory — including the removal of the armed forces of the former power — is an essential condition for a free vote has long been established in international practice — from the League of Nations supervised plebiscites of the inter-war period<sup>162</sup> to the more recent decolonization practice of the United Nations. As regards the latter, for example, the UN settlement plan for Namibia<sup>163</sup> provided for a reduction in South African Defence Forces (SADF) to 1,500 troops (who were to be confined to base), and the withdrawal of SADF troops began seven months ahead of the elections.<sup>164</sup> Similarly, MINURSO's mandate in Western Sahara includes verifying Moroccan troop reduction and monitoring the confinement of Moroccan and POLISARIO troops to designated areas ahead of the self-determination referendum.<sup>165</sup> By contrast, in East Timor, Indonesia retained a military presence of an estimated 18,000 troops throughout the period of the popular consultation.<sup>166</sup>

The second failing of the New York Accords was that there was no provision for the deployment of a United Nations peacekeeping force to ensure security and monitor the vote. Rather, as we have seen, Article 1 of the Security Agreement, paradoxically, assigned responsibility for the security situation to the 'appropriate Indonesian

<sup>159</sup> Security Agreement, Article 1.

<sup>160</sup> A recommendation for withdrawal of 'some' Indonesian forces from East Timor in the period leading up to the consultation was rejected by Indonesia. See 'Question of East Timor, Progress Report', *supra* note 119, at para. 11.

<sup>161</sup> Report of the Secretary-General, The Question of East Timor, S/1999/513, *supra* note 11, para. 6.

<sup>162</sup> Thus Wambaugh wrote of the inter-war plebiscites that: 'It is . . . a great advance that in all European plebiscites . . . the principle of neutralization was so far recognized that in *every case the troops of the former owner were evacuated and an international commission was established to administer the plebiscite*, with complete power over the administration of the area.' Wambaugh, *supra* note 146, at 443. Even before the Second World War, Wambaugh reports that troop evacuation — though not the neutral commission — had become established practice in conducting plebiscites. *Ibid.*, at 444. See also for discussion, Berman, 'Modernism, Nationalism and the Rhetoric of Reconstruction', *supra* note 110.

<sup>163</sup> Approved in Security Council Resolution 435 (1978), 29 September 1978.

<sup>164</sup> 26 *UN Chronicle* (June 1989) 12.

<sup>165</sup> Similarly, MINURSO's mandate in the Western Sahara includes verifying Moroccan troop reduction and monitoring the confinement of Moroccan and POLISARIO troops to designated areas ahead of the referendum. MINURSO's mandate was most recently extended in Security Council Resolution 1349 (2001), 27 April 2001.

<sup>166</sup> According to Xanana Gusmao, 12 battalions of Indonesian troops entered East Timor from West Timor in the aftermath of the announcement of the vote in favour of independence. Report of the Security Council Mission to Jakarta and Dili 8–12 September 1999, S/1999/976, para. 3. Phased Indonesian troop withdrawal began only after the deployment of INTERFET on 20 September 1999.

authorities'. This is simply unfathomable.<sup>167</sup> As a matter of historical record, the Indonesian military's penchant for human rights abuse against the East Timorese had been matched only by its flagrantly pro-integrationist agenda. Although official confirmation<sup>168</sup> was lacking at the time of concluding the New York Accords, there was nonetheless a wealth of evidence<sup>169</sup> to support the claims of East Timorese and other observers<sup>170</sup> that the Indonesian military was responsible for the pro-integration militias, which, from January 1999, had been wreaking such havoc in the territory. In short — as borne out by the direct involvement of the Indonesian military and police in the September 1999 violence<sup>171</sup> — to assert the need for a security environment devoid of intimidation and violence, and then to assign responsibility for securing that environment to Indonesia, was positively oxymoronic.<sup>172</sup>

Moreover, again it is out of step with United Nations practice in self-determination situations involving military occupation and armed conflict, which favours the deployment of a United Nations peacekeeping force to monitor the ballot.<sup>173</sup> In Namibia, for example, UNTAG included a 4,900-strong military contingent with a mandate *inter alia* to monitor the reduction of SADE, disarm militias and monitor the confinement of arms and ammunition.<sup>174</sup> It is simply unimaginable that the United Nations would have agreed to hold elections in Namibia in the absence of a

<sup>167</sup> The explanation given by the Secretary-General was that Indonesia made it clear that 'it could not accept any dilution of its overall responsibility for security'. See 'Question of East Timor, Progress Report', *supra* note 119, at para. 11.

<sup>168</sup> The Security Council Mission that was deployed in the immediate aftermath of the September 1999 violence reported that it was in no doubt that 'large elements' of Indonesian military and police authorities 'had been complicit in organizing and supporting the action of the militias'. Report of the Security Council Mission to Jakarta and Dili 8–12 September 1999, S/1999/976, para. 3. See also KPP-HAM's report which reveals the existence of a cable sent on 5 May 1999 (the day of the signing of the New York Accords) by the Deputy Chief of Staff of ABRI, Brigadier-General Jhoni Lumintang, instructing the commander of the regional military command in Bali to be prepared to take repressive measures if the decision went in favour of independence, and to prepare for the evacuation of the population. For discussion of this and other documentary evidence collected by Komnas HAM, see Tapol, the Indonesian Human Rights Campaign, 'Ending the Cycle of Impunity: Can the East Timor Investigations Pave the Way?', 24 January 2000.

<sup>169</sup> See generally Hedman, 'The Rise of the Paramilitaries: Violence and the Vote in East Timor', in Hedman, *supra* note 3, at 26. See also Report of the Secretary-General, S/1999/595, 22 May 1999, para. 23.

<sup>170</sup> See e.g. Amnesty International, 'Paramilitary Attacks Jeopardize East Timor's Future', ASA 21/26/99, 16 April 1999; Amnesty International, 'East Timor: ABRI Must Stop the Paramilitary Units', ASA 21/30/99, 17 April 1999. In June 1999, the *Far Eastern Economic Review* revealed the contents of a letter classified as 'very secret' in which the head of a militia requested the local military commander to 'release' 530 million rupiah (US\$71,000) for the purchase of 100 automatic rifles. *Far Eastern Economic Review*, 24 June 1999.

<sup>171</sup> Report of the Security Council Mission to Jakarta and Dili 8–12 September 1999, para. 3.

<sup>172</sup> Drew, *supra* note 70.

<sup>173</sup> See e.g. Security Council Resolution 435 (1978), 29 September 1978, establishing UNTAG to oversee the Namibian independence process and Security Council Resolution 690 (1991), 29 April 1991 establishing MINURSO to administer the — much postponed — Western Sahara referendum. Even outside the decolonization context, there is a growing practice of United Nations deployment of peacekeeping missions to monitor elections.

<sup>174</sup> For details, see 43 *Yearbook of the United Nations* (1989) 789.

peacekeeping force — far less to assign the principal security role to the ‘appropriate’ South African security authorities. Was there a principled basis for distinguishing the situation in East Timor?

As international lawyers, how then do we respond to the news that the United Nations signed up to an agreement that was per se inimical to a free vote ‘devoid of intimidation and violence’? Perhaps we focus on what actually happened: 98.6 per cent of registered East Timorese<sup>175</sup> turned out to vote and the day itself was relatively violence-free.<sup>176</sup> Are we *post facto* pragmatists who applaud<sup>177</sup> the bravery of the East Timorese who — like the United Nations Secretary-General — were clearly ‘undeterred by the intimidation’?<sup>178</sup> Or do we reflect that given the consequences of a vote in favour of special autonomy within Indonesia — the removal of East Timor from the list of non-self-governing territories, its deletion from the international agenda<sup>179</sup> — it was simply unacceptable that a United Nations-sponsored ballot should be conducted under less than optimal conditions? The outcome of the vote was 78.5 per cent in favour of rejecting autonomy.<sup>180</sup> Do we celebrate the pro-independence result, relieved that in the end there was no doubt that it reflected the ‘genuine free expression of the will’<sup>181</sup> of the East Timorese people? Or, do we remind ourselves once again that self-determination is about process not outcomes, and that, in any event, to focus exclusively on the ballot result as the one ‘happy ending’ to the East Timor Story is distorting as it diverts attention away from the other — less happy — outcomes<sup>182</sup> on the ground. The violence that erupted on 3 September 1999 had been predicted by human rights groups and by the East Timorese as the inevitable consequence of the United Nations failure to secure Indonesian troop withdrawal or

<sup>175</sup> 446,953.

<sup>176</sup> While there was no widespread violence, two East Timorese UNAMET staff members were killed by pro-integration militias.

<sup>177</sup> ‘I congratulate the people of East Timor ... for the perseverance and courage they have shown, particularly in the face of large-scale intimidation and violence that characterized the decisive final stages of the process.’ Secretary-General, ‘Question of East Timor, Progress Report’, *supra* note 119, at para. 47.

<sup>178</sup> Letter to Security Council of 14 July 1999, S/1999/788.

<sup>179</sup> According to Article 5 of the General Agreement, *supra* note 11, in the event that the Secretary-General had determined that the East Timorese had voted for special autonomy: ‘the Government of Portugal shall initiate within the United Nations the procedures necessary for the removal of East Timor from the List of Non-Self-Governing Territories of the General Assembly and the deletion of the question of East Timor from the agendas of the Security Council and the General Assembly.’

<sup>180</sup> 344,580; 21.5 per cent voted for autonomy.

<sup>181</sup> This is the test laid down for self-determination by the ICJ in the *Western Sahara Advisory Opinion*, ICJ Reports (1975) 12. For the East Timor popular consultation, an Independent Electoral Commission (consisting of ‘three eminent jurists with extensive experience in the field of electoral processes’) was established to observe the entire consultation process. After a judicial review following complaints of irregularities, it concluded that ‘the popular consultation had been procedurally fair and in accordance with the New York Agreements and consequently provided an accurate reflection of the will of the people of East Timor’. See ‘Question of East Timor, Progress Report’, *supra* note 119, at paras 17 and 31.

<sup>182</sup> It is estimated that 250,000 refugees fled to West Timor. For further details of the ‘humanitarian catastrophe’ that resulted from the September 1999 violence, see ‘Report of the Secretary-General on the United Nations Transitional Administration in East Timor’, 2/2000/53, 26 January 2000, paras 29–39.

deploy peacekeepers.<sup>183</sup> The death of East Timorese and UNAMET personnel, the wholesale destruction of villages and towns, and the ‘humanitarian catastrophe’ of 250,000 East Timorese refugees are directly attributable to these failings of the New York Accords.

##### 5 *From Formalism to Pragmatism: Dispensing with Two Possible Defences*

It can thus be seen that the New York Accords failed to provide for a free choice sufficient to comply with the international legal rules on self-determination as process.<sup>184</sup> As such, contrary to the standard account, it is my contention that they are more accurately viewed as a product of pragmatic compromise rather than any principled application of the rules on self-determination of peoples.<sup>185</sup> Yet perhaps as international lawyers we will only be comforted to learn that the East Timor Accords represented an abdication rather than an application of the international legal rules. Once it is established that the institutional move from the International Court of Justice to the United Nations was characterized by a shift from (legal) formalism to (more political?) pragmatism, could it not be argued that the burden of responsibility for ‘what-went-wrong’ also shifts — from law onto, say, politics? On this analysis, the New York Accords could be seen, not so much as a failure *of* law, but rather a failure to implement law.

One can imagine the following line of argument could be marshalled by international lawyers in defence of our discipline: the failure of the UN and Portugal to ensure Indonesian troop withdrawal or the deployment of United Nations peacekeeping troops under the terms of the New York Accords as required by law, was due to a lack of political will on the part of Indonesia and/or powerful/influential states<sup>186</sup> who were in a position to bring pressure to bear upon Indonesia. Similarly, the Security Council’s eventual decision to deploy a multilateral force in accordance with international law (with Indonesian consent) was due to a change in the political will of Indonesia and/or those same key states (in turn, of course, brought about by the September violence and its extensive media coverage<sup>187</sup>). *Ergo*, international law was no more than an innocent bystander at the Timorese slaughter.<sup>188</sup>

In short, does not establishing that in the United Nations chapter of the East Timor Story there was a failure to comply with the rules on self-determination as process,

<sup>183</sup> The United Nations Secretary-General has stated that the United Nations anticipated ‘some difficulties, some violence’ but not the ‘total and wanton destruction of everything in sight’. See the interview with Kofi Annan in *Far Eastern Economic Review*, 24 February 2000, at 25.

<sup>184</sup> Notwithstanding the references in the New York Accords which ‘recall’ General Assembly Resolutions 1514 (XV) 1960, 1541 (XV) 1960, 2625 (XXV) 1970 and other resolutions affirming East Timor’s right of self-determination.

<sup>185</sup> Compare Note Verbale, 2 June 1999 from Charge d’Affaires of the Permanent Mission of Portugal to the United Nations addressed to the Secretary-General, A/54/121, 3 June 1999.

<sup>186</sup> For example, the United States, the United Kingdom and Australia. On the historical failure of these states in relation to East Timor see Budiardjo, *supra* note 3.

<sup>187</sup> What Kennedy terms ‘the CNN effect’: Kennedy, *supra* note 21.

<sup>188</sup> For the view that East Timor had been a failure of politics rather than law, see Bowring, ‘Self-Determination and the Jurisprudence of the International Court of Justice’, in CIIR/IPJET, *supra* note 11, at 151.

merely serve to absolve international law of any responsibility for the catastrophic consequences of non-compliance?

Yet, even if we accept the existence of a discernible law/politics distinction,<sup>189</sup> it is unclear why the acts (or omissions) of the United Nations Secretary-General or Portugal acting in its capacity as Administering Power under Chapter XI of the United Nations Charter should be characterized as 'political' rather than 'legal' if the purpose is to remove the responsibility of the international legal order. To paraphrase Berman, politics cannot always give international law its alibi.<sup>190</sup> Rather, it is my contention that the failure to adhere to the strict letter of the law in the New York Accords should be viewed, not so much as some aberrational departure *from* international law, but as part of an unacknowledged trend *within* contemporary practice, which (selectively) favours pragmatic negotiation over formal legal entitlement — the all-important *peace process* over self-determination as process.

From the Middle East to the Western Sahara, peace processes are much in vogue. As the New York Accords demonstrate, however, for a people struggling for the right of self-determination the onset of a peace process may be paradoxical. On the one hand, the peace process may work hand in hand with the international legal principles, leading to the implementation of the legal rules on self-determination. On the other hand, the peace process may be invoked to *trump* rather than *translate* the legal framework.<sup>191</sup> Thus, once a peace process is in train, reliance by a people on formal legal entitlements may seem contrary to its pragmatic spirit, which tends to disavow predetermined outcomes in favour of negotiated settlement. Similarly, the peace process may serve to treat the parties as legal — and moral — equivalents, ignoring prior illegalities as much as prior entitlements. For example, since the signing of the Israel/Palestinian Declaration of Principles in 1993,<sup>192</sup> the Security Council has repeatedly failed to adopt resolutions on issues such as Israeli settlement activity, on the basis that this would be to prejudge issues reserved for the final status negotiations.<sup>193</sup> Similarly, Security Council resolutions endorsing the East Timor peace process in advance of the August 1999 popular consultation significantly omitted earlier injunctions in favour of East Timorese self-determination and

<sup>189</sup> For the contrary view, see e.g. Koskeniemi, 'The Politics of International Law', 1 *European Journal of International Law* (1990) 1.

<sup>190</sup> Berman, 'In the Wake of Empire', 14 *American University International Law Review* (1999) 1515, at 1537 and 1545.

<sup>191</sup> After signing the Declaration of Principles on Interim Self-Government, (1993) 32 ILM 1525–1546, in 1993, Israel has consistently argued that the settlements are permitted — not as a matter of international law — but under the terms of the Declaration of Principles. See e.g. General Assembly Plenary Tenth Emergency Special Session, G/A 9399, 17 March 1998.

<sup>192</sup> Declaration of Principles, *supra* note 191.

<sup>193</sup> The final status issues are defined in Article V of the Declaration of Principles, *supra* note 191. The failure of the Security Council to act in the face of ongoing Israeli settlement activity prompted the General Assembly in 1997 to exercise its powers under the Uniting for Peace Resolution 377 (V), 3 November 1950, and convene an emergency session to examine and adopt a resolution calling for a Conference of the High Contracting Parties to the Fourth Geneva Convention of 1949 to be held on 15 July 1999. A/RES/ES-10/6, 9 February 1999, para. 6. This contrasts sharply with the General Assembly's post-1982 neglect of the question of East Timor.

Indonesian troop withdrawal.<sup>194</sup> The failure of the United Nations to comply with the international legal rules in the New York Accords thus flags up an issue of more general concern to the self-determination formalist: the potential for conflict between the commitment to a ‘peace process’ and the formal rules of international law.<sup>195</sup>

Alternatively, however, perhaps among international lawyers, there are others who would view the departure from formal legal rules in the New York Accords as cause for celebration rather than consolation. Have we not already seen from the *Case Concerning East Timor* that the formal legal rules and structures are inhospitable to the claims of peoples struggling for the implementation of the legal right of self-determination? On this analysis, the adoption of a flexible, more pragmatic approach to nationalist conflict could be seen, not so much as a violation of peoples’ rights, but rather as a welcome or necessary corrective to the statist strictures of the formal international legal order.<sup>196</sup>

But, whatever the limitations of the existing legal structures, the moral of the East Timor Story is that the ‘pragmatic’ may be every bit as statist and procedurally exclusive of peoples as the ‘formal’. Notably, there was no direct participation of the East Timorese leadership in the UN-sponsored peace process.<sup>197</sup> The signature of Xanana Gusmao or any other representative of the East Timorese people on the New York Accords is conspicuous only by its absence.<sup>198</sup> By contrast, Indonesia — the

<sup>194</sup> Compare e.g. Security Council Resolution 384 (1975), 22 December 1975; and Security Council Resolution 1236 (1999), 7 May 1999.

<sup>195</sup> This tension was also evident in the breakdown of the Israel/Palestinian negotiations at the Camp David summit in July 2000.

<sup>196</sup> Brilmayer, ‘The Institutional and Instrumental Value of Nationalism’, in Wippman, *supra* note 110, at 58.

<sup>197</sup> For details of the negotiations leading to the New York Accords, see ‘Question of East Timor, Progress Report’, *supra* note 119, at paras 2–13. Prior to January 1999, ‘consultations’ with the East Timorese leadership took place *outside* the framework of the tripartite ‘negotiations’ between the UN, Indonesia and Portugal. According to the Secretary-General’s own account of events, the UN intensified its consultations with East Timorese leaders, including Xanana Gusmao in October 1998. But the historical record is silent as to consultations with the East Timorese in the lead-up to the May Accords following the Indonesian change in policy in January 1999. Rather, talks were between Foreign Minister Gama of Portugal, Foreign Minister Alatas of Indonesia and the UN Secretary-General. See generally ‘Question of East Timor, Progress Report’, *supra* note 119, at paras 3 and 6–9. The East Timorese leadership was not present at the signing ceremony in New York on 5 May 1999. The feeling of exclusion on the part of the East Timorese leadership was reflected in a number of public statements in the lead-up to the signing of the New York Accords. For example, in March 1999, in a radio interview, Ramos Horta, the exiled Nobel Laureate, openly questioned ‘how it was possible to carry out an open and democratic direct consultation where the Indonesian Army is still on the ground’. He went further in a press conference in Hong Kong: ‘I will publicly oppose it, denounce it, if the UN, the international community, wants to impose a vote on the future of the country with Indonesian troops on the ground.’ These and statements to similar effect by Bishop Belo are quoted in Merson, ‘Reversing the Tide’ (student research paper, School of Law, University of Glasgow, 1999, on file with the author). Allegations of exclusion of the East Timorese leadership have persisted during the United Nations Transitional phase. See Xanana Gusmao, Letter of Resignation as President of East Timor’s National Council, 28 March 2001.

<sup>198</sup> Compare e.g. Agreement Between the Kingdom of Morocco and the Frente Popular para la Liberacion de Saguia el-Hamra y de Rio de Oro; Settlement Plan for the Western Sahara approved by Security Council Resolutions 658 (1990) of 27 June 1990 and 690 (1991) 21 April 1991. See also the Israel/Palestinian Declaration of Principles, *supra* note 191.

UN-designated aggressor state with its illegitimate interests in the fate of East Timor — was directly represented.<sup>199</sup> With the institutional shift from the International Court of Justice to the United Nations, — from self-determination as substance to self-determination as process, from formalism to pragmatism — how ironic that the ‘presence of the absent third’<sup>200</sup> (the East Timorese people) should continue to cast its shadow.

## 5 Conclusion

What then does East Timor have to tell us about the ‘moral hygiene’<sup>201</sup> of international law? Its story is not a happy one. Since the beginning of the Indonesian occupation in 1975, an estimated 200,000 of its people have died. At time of writing, approximately 100,000 refugees remain stranded in Indonesian refugee camps in West Timor,<sup>202</sup> and Indonesian-backed militias continue to operate in the camps.<sup>203</sup> Such was the level of destruction in the aftermath of the popular consultation<sup>204</sup> that it

<sup>199</sup> Thus preambular paragraph 6 of the General Agreement, *supra* note 11, notes the Portuguese position that an ‘autonomy regime should be transitional not requiring recognition of Indonesian sovereignty over East Timor or the removal of East Timor from the list of Non-Self-Governing Territories of the General Assembly pending a final decision on the status of East Timor by the East Timorese people through an act of self-determination under United Nations auspices’. But, clearly, Article 5 of the General Agreement, *supra* note 11, endorsed the Indonesian position that autonomy was to be implemented as an ‘end solution’.

<sup>200</sup> Scobbie, ‘The Presence of the Absent Third: Procedural Aspects of the East Timor Case’, in CIIR/IPJET, *International Law and the Question of East Timor*, *supra* note 11, at 223.

<sup>201</sup> Kennedy, *supra* note 21.

<sup>202</sup> On 6–7 June 2001, Indonesia held a two-day registration exercise in which all refugees in the camps in West Timor were offered the choice between repatriation to East Timor and permanent resettlement in Indonesia. According to the Indonesians, 98.02 per cent of the refugees voted for permanent resettlement in Indonesia. Given the presence of the Indonesian military and pro-Indonesian militias in the camps in West Timor, however, this result cannot safely be regarded as reflecting the free will of the East Timorese refugees. For an expression of concern regarding the effect of militia activity on East Timorese refugees, see Security Council Resolution 1338 (2001), 31 January 2001.

<sup>203</sup> In September 2000, following the murder of three UN personnel by militias operating in the camps in West Timor, the Security Council adopted a resolution ‘insisting’ that Indonesia take immediate steps to disarm and disband the militias, and calling on Indonesia to take immediate measures to allow the repatriation of refugees to East Timor. Security Council Resolution 1319 (2000), 8 September 2000. For an update on the humanitarian and political situation in both East Timor and West Timor, see Report of the Security Council Mission to East Timor and Indonesia, 9–17 November 2000, S/2000/1105. See also e.g. Report of the Secretary-General on the United Nations Transitional Administration in East Timor, S/2000/738; Statement of the President of the Security Council, 3 August 2000, S/PRST/2000/26; Security Council Resolution 1272 (1999), 25 October 1999. In January 2001, the Security Council again underlined the need for UNTAET ‘to respond robustly to the militia threat in East Timor’. Security Council Resolution 1338 (2001), 31 January 2001.

<sup>204</sup> For a bleak picture of life in East Timor six months after the popular consultation, see e.g. Mayman, ‘Fighting for Survival’, *Far Eastern Economic Review*, 24 February 2000, at 34.

was always anticipated it would take at least two years before East Timor would at last be able to assert full independence.<sup>205</sup>

I have dealt with only two institutional moments in the struggle to protect and implement the East Timorese right of self-determination under international law. In the International Court of Justice it failed because of law — too much procedural law for states and not enough procedural law for peoples. With the institutional shift to the United Nations, East Timorese rights were not implemented due to a failure to comply with law — the international legal rules on self-determination as process — and a willingness to subsume legal entitlements to the vagaries of institutional pragmatism and the much vaunted peace process.

If decolonization is the normative high point of the law on self-determination, what future for an international law of peoples?

<sup>205</sup> August 2001 was the original target date for independence but at time of writing the timetable is under review and there is currently no agreed date (though elections for a Constituent Assembly are scheduled for 30 August 2001). In January 2001, UNTAET's initial mandate (to January 2001) was extended to 31 January 2002. See Security Council Resolution 1338 (2001), 31 January 2001, at para. 2. Indeed, the Secretary-General has been consistent in warning against arbitrary timetables for independence. In February 2000, he instructed his Special Representative to draw up criteria in consultation with the Timorese leadership to determine when 'The East Timorese are ready to assume full control of their destiny'. He added, however, that 'they and we must be patient, for that moment is still some way off'. See 'Briefing to the Security Council', 29 February 2000. The very existence of such criteria signals an implicit return to the ideology of the trusteeship in the UN Charter. See e.g. 'Report of the Secretary-General on the United Nations Transitional Administration in East Timor', S/2000/53, 26 January 2000, at para. 41, which states: 'A key objective is to ensure that the East Timorese themselves become the major stakeholders in their own system of governance and public administration, first by intensive consultation through NCC and district advisory councils, and then through *early and progressive development* of their capacity to carry out all necessary functions' (emphasis added). Similarly, in May 2001, the Secretary-General comments: 'East Timor has continued to make progress on the path to independence. Nevertheless, a great deal remains to be done until that objective is reached and more will need to be accomplished thereafter to ensure that the new State can exist on its own . . . I would favour a prudent approach, which seeks to safeguard the international community's considerable investment in East Timor's future.' See 'Interim Report of the Secretary-General on the United Nations Transitional Administration in East Timor', S/2001/436, 2 May 2001. Such statements are at odds with the more radical injunctions of the 'Colonial Declaration', which, for example, states that: 'Inadequacy of political preparedness shall not be used as a pretext for delaying independence.' General Assembly Resolution 1514 (1960) (the 'Colonial Declaration'), at para. 5.