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## RESOLUTION III OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND THE TIMOR GAP TREATY

James K. Kenny

*Abstract:* Australia and Indonesia signed the Timor Gap Treaty in 1989 as a means to jointly benefit from the petroleum reserves in the Timor Sea between East Timor and northwestern Australia without permanently resolving their dispute over seabed delimitation. The Treaty utilizes rights granted by the 1982 United Nations Convention on the Law of the Sea (UNCLOS III, 1982). Resolution III of the UNCLOS III provides the benefit of the Convention's rights to United Nations-recognized non-self-governing peoples, which includes the East Timorese people. Under Resolution III, the East Timorese are entitled to all of the Convention's rights, including sovereignty over natural resources in the exclusive economic zone (EEZ). The Timor Gap Treaty violates international law by using the UNCLOS III's rights to exploit petroleum reserves within the East Timorese people's EEZ, a seabed area reserved to the East Timorese under Resolution III. Australia and Indonesia cannot assume the benefits of the UNCLOS III without also respecting its obligations. The International Court of Justice may adjudicate the validity of the Timor Gap Treaty in a pending case, *East Timor* (Portugal v. Australia).

### INTRODUCTION

On December 11, 1989, Australia and Indonesia signed the Timor Gap Treaty,<sup>1</sup> creating a Joint Development Zone (JDZ) for petroleum development in the Timor Sea. The JDZ temporarily resolved a seventeen-year conflict between the two states concerning seabed delimitation.<sup>2</sup> Following Indonesia's 1975 invasion and forcible annexation of the former Portuguese colony of East Timor,<sup>3</sup> the major issue of contention between Australia and Indonesia concerned jurisdiction over the seabed between Australia and East

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<sup>1</sup> Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in the Area Between the Indonesian Province of East Timor and Northern Australia, Dec. 11, 1989, 29 I.L.M. 469 (entered into force Feb. 9, 1991)[hereinafter Timor Gap Treaty].

<sup>2</sup> The distance between the northwest coast of Australia and Indonesian East Timor in the Timor Sea is approximately 400 nautical miles. Ernst Willheim, *Australia-Indonesia Sea-Bed Boundary Negotiations: Proposals for a Joint Development Zone in the "Timor Gap"*, 29 NAT. RESOURCES J. 821, 822 (1989).

<sup>3</sup> Roger S. Clark, *The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 Yale J. World Pub. Ord. 2, 9 (1980); see also Anthony Bergin, *The Australian-Indonesian Timor Gap Maritime Boundary Agreement*, 5 INT'L J. ESTUARINE & COASTAL L. 383, 384 (1990).

Timor.<sup>4</sup> Australia claimed it to the maximum extent of its broad continental shelf, while Indonesia claimed jurisdiction over the seabed extending to the median line in the Timor Sea under the 1982 United Nations Convention on the Law of the Sea (the Convention).<sup>5</sup>

Both Australia and Indonesia utilized rights provided under the Convention to establish their respective claims to the disputed seabed and their joint right to reach a temporary compromise in creating the JDZ.<sup>6</sup> By using the Convention, however, Indonesia and Australia also receive correlative duties under the Convention as well as rights. One of the duties is the responsibility of states to implement the Convention for the benefit of non-self-governing peoples recognized by the United Nations (U.N.).<sup>7</sup> Resolution III of the Convention contains this duty; the Third United Nations Conference on the Law of the Sea passed Resolution III as an integral part of the Convention.<sup>8</sup> Resolution III declares that the rights of the Convention "shall be implemented for the benefit of the people of the [non-self-governing] territory with a view to promoting their well-being and development."<sup>9</sup> The U.N. General Assembly recognized the East Timorese as a non-self-governing people and called for an act of self-determination in East Timor.<sup>10</sup>

The East Timorese people's Resolution III rights will likely be asserted against the Timor Gap Treaty by Portugal in its pending case against

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<sup>4</sup> The disputed seabed area is called the Timor Gap. Willheim, *supra* note 2, at 822.

<sup>5</sup> *Id.* at 826-28; Asnani Usman, *The Timor Gap in the Delimitation of the Continental Shelf Boundary between Indonesia and Australia*, 14 *INDON. Q.* 375, 381-83 (1986) [hereinafter *Delimitation*]; United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, 21 *I.L.M.* 1261 [hereinafter *Convention*]. The Convention took nine years to write and covers all major aspects of the law of the sea, including: conservation, fishing, navigation, overflight, pollution, resource exploration and exploitation, scientific research, and shipping. The Convention is not yet in force.

<sup>6</sup> Australia and Indonesia rely on contrasting interpretations of Article 76 of the Convention concerning definition of the continental shelf, and upon Article 83 concerning dispute resolution between states with opposite coasts. See Willheim, *supra* note 2, at 827-28, 831; *Delimitation*, *supra* note 5, at 381-83. Indonesia has ratified and Australia has signed the Convention. U.N. Div. for Ocean Affairs and the Law of the Sea, *Status of the U.N.C.L.O.S.*, 20 *LAW OF THE SEA BULL.* 1, 1, 3 (1992) [hereinafter *Status*]. Signing a treaty means that a state is considering ratification, see Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 603 (3rd ed. 1979), but it does not oblige the state to ratify the treaty, Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 *NETH. INT'L L. REV.* 5, 10 n.20 (1985). Ratification is the method by which a nation gives its consent to be bound by a treaty. *Id.* at 9.

<sup>7</sup> Final Act of the Third U.N. Conference on the Law of the Sea, Dec. 10, 1982, Resolution III(1)(a), U.N. Doc. A/CONF.62/121, 21 *I.L.M.* 1245, 1257 [hereinafter *Final Act*].

<sup>8</sup> *Id.* at 1252.

<sup>9</sup> *Id.* at 1257.

<sup>10</sup> See *infra* text accompanying notes 25-27, 32, 37-44.

Australia before the International Court of Justice.<sup>11</sup> Portugal asserts that the Treaty violates the East Timorese people's rights to self-determination and permanent sovereignty over natural resources.<sup>12</sup> This case may provide the opportunity for a definitive pronouncement on Resolution III's effect upon the Treaty.

An evaluation of the legality of the Timor Gap Treaty under the Convention, however, need not await the outcome of Portugal's case. Existing international law provides sufficient guidance for an analysis of the rights and duties of those parties claiming the seabed in the Timor Gap. This Comment reviews the history of East Timor and the United Nations' reactions to Indonesia's 1975 invasion. Directly following is the conference history of Resolution III, which is necessary to interpret the Resolution's ambiguous language and properly define Australia's and Indonesia's obligations under it. The final sections analyze Resolution III's relationship to the Treaty and suggest means by which Resolution III could be enforced. This Comment concludes that the Timor Gap Treaty abrogates international law by exploiting the natural resources of the non-self-governing peoples of East Timor in violation of Resolution III.

## I. POLITICAL HISTORY OF EAST TIMOR

### A. *East Timor and the Indonesian Invasion*

East Timor encompasses approximately 7,000 square miles on the eastern half of the island of Timor,<sup>13</sup> with a population exceeding 700,000.<sup>14</sup> Portugal controlled East Timor as a colony from the early 1500's<sup>15</sup> until 1975.<sup>16</sup> As Portugal sought to decolonize its worldwide colonial territories in 1974-75, nationalist movements within Portuguese East Timor fought a civil war during the autumn of 1975 for control of the colony.<sup>17</sup> When Portugal withdrew its colonial administration from East Timor during the fighting,<sup>18</sup>

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<sup>11</sup> East Timor (Port. v. Austl.), 1991 I.C.J. 9 (Order of May 3).

<sup>12</sup> Communiqué, International Court of Justice, No. 91/6, 2 (Feb. 22, 1991).

<sup>13</sup> *Timor at a Glance*, N.Y. TIMES, Aug. 23, 1975, at A4.

<sup>14</sup> Steven Erlanger, *East Timor, Reopened by Indonesians, Remains a Sad and Terrifying Place*, N.Y. TIMES, Oct. 21, 1990, at A18.

<sup>15</sup> *Timor at a Glance*, *supra* note 13.

<sup>16</sup> *Talks Fail to End Timor Civil War*, N.Y. TIMES, Aug. 24, 1975, at A4; John G. Taylor, INDONESIA'S FORGOTTEN WAR: THE HIDDEN HISTORY OF EAST TIMOR 51 (1991).

<sup>17</sup> Clark, *supra* note 3, at 5, 7.

<sup>18</sup> *Indonesia Bids Portugal Let Her Hold Timor Talks*, N.Y. TIMES, Aug. 30, 1975, at A3.

Indonesia affirmed its adherence to the principle of decolonization and self-determination for Portuguese East Timor.<sup>19</sup>

Following the announcement of the creation of a new state by socialist forces within East Timor on November 28, 1975, and the counter-declaration by minority political parties proclaiming the integration of East Timor with Indonesia on November 30,<sup>20</sup> however, Indonesia invaded the island on December 7, 1975.<sup>21</sup> In response to the attack, Portugal severed diplomatic relations with Indonesia and condemned Indonesia's armed aggression.<sup>22</sup> Portugal asserted it was the administrative power in East Timor and was responsible for decolonizing the territory.<sup>23</sup> Portugal also insisted that the East Timorese people had a right to self-determination, and that negotiations should be held to reach a peaceful solution.<sup>24</sup>

The U.N. General Assembly responded to Indonesia's actions by passing a resolution on December 12, 1975, which deplored "the military intervention of the armed forces of Indonesia in Portuguese Timor" and demanded that Indonesia "withdraw without delay . . . in order to enable the people of the Territory [sic] freely to exercise their right to self-determination and independence."<sup>25</sup> On December 22, the U.N. Security Council unanimously adopted Resolution 384, which affirmed East Timor's right to self-determination and called on Indonesia to withdraw from the territory.<sup>26</sup> After a review of the situation on April 22, 1976, the Security Council passed Resolution 389, which reaffirmed the right of the East Timorese to self-determination and called upon Indonesia to withdraw its forces.<sup>27</sup> Indonesia ignored the U.N.'s requests and continued to incorporate East Timor into Indonesia.<sup>28</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Clark, *supra* note 3, at 7-8; Thomas M. Franck & Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT'L L. & POL. 331, 346 (1976).

<sup>21</sup> David A. Andelman, *Indonesians Hold Portuguese Timor After Incurion*, N.Y. TIMES, Dec. 8, 1975, at A1.

<sup>22</sup> *Portugal Severs Ties to Indonesia*, N.Y. TIMES, Dec. 8, 1975, at A9; Marvine Howe, *Portugal Assails Indonesian Move*, N.Y. TIMES, Dec. 10, 1975, at A13.

<sup>23</sup> *Portugal Severs Ties to Indonesia*, *supra* note 22.

<sup>24</sup> *Id.*

<sup>25</sup> The vote was 72 to 10, with 43 abstentions. The resolution recognized Portugal as the administering power in East Timor. G.A. Res. 3485(XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 118, U.N. Doc. A/10034 (1976).

<sup>26</sup> S.C. Res. 384, U.N. SCOR, 30th Sess., at 10, U.N. Doc. S/INF/31 (1976).

<sup>27</sup> S.C. Res. 389, U.N. SCOR, 31st Sess., at 18, U.N. Doc. S/INF/32 (1977).

<sup>28</sup> Clark, *supra* note 3, at 10.

Indonesia set up an undemocratically elected government in East Timor.<sup>29</sup> That government requested integration with Indonesia,<sup>30</sup> a request granted by Indonesia's formal annexation of East Timor on July 17, 1976.<sup>31</sup> Following the annexation, the U.N. General Assembly rejected Indonesia's integration of East Timor, called for the withdrawal of Indonesian forces, and again reaffirmed the East Timorese people's right to self-determination and independence.<sup>32</sup>

The Indonesian invasion and occupation was brutal.<sup>33</sup> From 1975–1980, between 100,000 to 200,000 East Timorese died due to execution, disease, starvation and combat,<sup>34</sup> from a population of 650,000.<sup>35</sup> Indonesia retains control of East Timor today and maintains an aggressive military presence in the territory.<sup>36</sup>

### B. *The General Assembly's Actions After the 1976 Annexation*

In 1977 the U.N. General Assembly, by a vote of 67 to 26, with 47 abstentions, again rejected the annexation of East Timor and reiterated the right of the East Timorese to self-determination.<sup>37</sup> In 1978,<sup>38</sup> 1979,<sup>39</sup> and 1980,<sup>40</sup> the General Assembly passed resolutions similar to the 1977 resolution.<sup>41</sup> Support for the East Timorese in the General Assembly gradually deteriorated, and in 1981 the General Assembly passed a resolution that merely called upon the involved parties in East Timor to cooperate with

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<sup>29</sup> *Id.* at 14–18; Hamish McDonald, *East Timor Body Asks to be Part of Indonesia*, WASH. POST, June 1, 1976, at A17.

<sup>30</sup> Paul D. Elliott, *The East Timor Dispute*, 27 INT'L & COMP. L.Q. 238, 239–240 (1978).

<sup>31</sup> *East Timor Becomes Indonesian Province*, N.Y. TIMES, July 18, 1976, at A7.

<sup>32</sup> G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 39, at 125, U.N. Doc. A/31/39 (1977).

<sup>33</sup> Taylor, *supra* note 16, at 79–88, 100–110; Erlanger, *supra* note 14. See generally Jill Jolliffe, EAST TIMOR: NATIONALISM AND COLONIALISM (1978).

<sup>34</sup> Erlanger, *supra* note 14; *East Timor: Time for Accounting*, CHRISTIAN SCI. MONITOR, Apr. 24, 1992, at 20.

<sup>35</sup> *Timor at a Glance*, *supra* note 13. A larger percentage of the population died in East Timor than in Pol Pot's Cambodia. Erlanger, *supra* note 14; *East Timor: Time for Accounting*, *supra* note 34.

<sup>36</sup> Indonesian soldiers massacred more than 100 demonstrators on Nov. 12, 1991. *Toll in Indonesia is Put at 100*, N.Y. TIMES, Nov. 30, 1991, at A6; Peter Wise, *Up to 60 Killed in East Timor*, WASH. POST, Nov. 13, 1991, at A21. Widespread arrests have recently occurred in East Timor. *100 Timorese Arrested Before Australian Visit*, FOREIGN BROADCAST INFO. SERVICE, East Asia, No. 92–207, Oct. 26, 1992, at 40 (NewsBank).

<sup>37</sup> G.A. Res. 32/34, U.N. GAOR, 32nd Sess., Supp. No. 45, at 169, U.N. Doc. A/32/45 (1978).

<sup>38</sup> G.A. Res. 33/39, U.N. GAOR, 33rd Sess., Supp. No. 45, at 181, U.N. Doc. A/33/45 (1979).

<sup>39</sup> G.A. Res. 34/40, U.N. GAOR, 34th Sess., Supp. No. 46, at 206, U.N. Doc. A/34/46 (1980).

<sup>40</sup> G.A. Res. 35/27, U.N. GAOR, 35th Sess., Supp. No. 48, at 219, U.N. Doc. A/35/48 (1981).

<sup>41</sup> Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in INTERNATIONAL LAW 411* (1988).

the United Nations to reach self-determination.<sup>42</sup> The 1981 resolution passed by a vote of 54 to 42, with 46 abstentions.<sup>43</sup> A resolution with similar wording passed in 1982 by a vote of 50 to 46, with 50 abstentions.<sup>44</sup>

After 1982, not enough support was available in the General Assembly to adopt any resolutions concerning the East Timorese right to self-determination.<sup>45</sup> Further, the Security Council has not addressed the question of self-determination for East Timor since its April 1976 resolution.

### C. *Australia's Recognition of Indonesian East Timor*

Australia supported Indonesia by voting against resolutions on East Timor in the General Assembly after 1978 because Australia felt that for all practical purposes, East Timor was part of Indonesia.<sup>46</sup> In January 1978, Australia granted *de facto* recognition to Indonesia's control of East Timor.<sup>47</sup> Australia sought to resolve the Timor Gap dispute in order to exploit its continental shelf for petroleum resources by entering into seabed delimitation negotiations with Indonesia in February 1979.<sup>48</sup>

Australia initially had reservations about supporting Indonesia so soon after the invasion of East Timor.<sup>49</sup> Any reservations were apparently overridden, however, by Australia's choice to pursue its economic interest in gaining access to the Timor Gap.<sup>50</sup> Entry into the negotiations, which sought to establish seabed boundaries between Australia and Indonesian-occupied East Timor, signified *de jure* recognition by Australia of the incorporation of East Timor into Indonesia.<sup>51</sup>

Australia and Indonesia held negotiations concerning the Timor Gap on an irregular basis between 1979 and 1989.<sup>52</sup> Indonesia first proposed the

<sup>42</sup> G.A. Res. 36/50, U.N. GAOR, 36th Sess., Supp. No. 51, at 200, U.N. Doc. A/36/51 (1982).

<sup>43</sup> *East Timor Question*, 1981 U.N.Y.B. 1182, 1185, U.N. Sales No. E.84.I.1.

<sup>44</sup> G.A. Res. 37/30, U.N. GAOR, 37th Sess., Supp. No. 51, at 227, U.N. Doc. A/37/51 (1983).

<sup>45</sup> Hannikainen, *supra* note 41, at 412.

<sup>46</sup> *Self-determination: East Timor*, 10 AUSTR. Y.B. INT'L L. 272, 273 (1987).

<sup>47</sup> *See Recognition. Incorporation of Territory. Baltic States. East Timor*, 8 AUSTR. Y.B. INT'L L. 278, 279 (1983).

<sup>48</sup> Keith Suter, *Australia's New Policy on Recognizing Governments*, AUSTR. Q., at 59-60 (Autumn 1989); Clark, *supra* note 3, at 8 n.29; Taylor, *supra* note 16, at 170.

<sup>49</sup> Taylor, *supra* note 16, at 168.

<sup>50</sup> *Id.* at 170.

<sup>51</sup> Suter, *supra* note 48, at 60.

<sup>52</sup> Negotiations were held in February 1979, May 1979, November 1980, October 1981, February 1984, November 1984, October 1985, and September 1988 to December 1989. Asnani Usman, *The Timor Gap Treaty*, 19 INDON. Q. 102, 103 (1991).

idea of a joint development zone as a temporary solution in May 1979.<sup>53</sup> Australia agreed to the idea during the October 1985 meeting.<sup>54</sup> Negotiations halted between 1986 and 1988 due to a decline in relations between Australia and Indonesia, but by September 1988, relations had improved,<sup>55</sup> and the two states finally reached an agreement on October 25, 1988.<sup>56</sup> They signed the Timor Gap Treaty on December 11, 1989<sup>57</sup> and the exploration contracts in December 1991.<sup>58</sup>

Although Australia encountered some internal opposition in recognizing Indonesia's control of East Timor, and in concluding the Timor Gap treaty, resistance was minimal.<sup>59</sup> Australia was one of many nations that withdrew support for East Timorese self-determination. International support for self-determination in East Timor waned not only in the General Assembly,<sup>60</sup> but also in the media, where East Timor's remoteness meant that little attention was directed to the suffering of the East Timorese.<sup>61</sup> Indonesia prevented media coverage of the struggle in East Timor by sealing off the island to foreigners from 1975-1989.<sup>62</sup>

#### D. *Indonesia's Position on East Timor*

Indonesia contended in 1976 at the U.N. that it did not violate the right of the East Timorese to self-determination.<sup>63</sup> Indonesia claimed that the East Timorese exercised their right of self-determination in choosing to integrate with Indonesia.<sup>64</sup> Indonesia also argued that cultural, ethnic, geographical and historical ties between Indonesia and East Timor rendered East Timor an

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 105.

<sup>56</sup> *Id.* at 103.

<sup>57</sup> *Id.*

<sup>58</sup> *Timor Gap Oil Contract Awarded to Consortium*, FOREIGN BROADCAST INFO. SERVICE, East Asia, No. 91-240, Dec. 13, 1991, at 46 (NewsBank); Oil drilling in the Timor Gap began in December 1992. Wilson da Silva, *Clouds on Horizon as Timor Gap Drilling Begins*, REUTER LIBRARY REPORT, Dec. 30, 1992, available in LEXIS, Asiapc Library, Allnews File.

<sup>59</sup> See *Recognition. Incorporation of Territory. Baltic States. East Timor*, *supra* note 47, at 279-81; *Indonesia: Race for Sea-bed Oil in Timor Gap*, INTER PRESS SERVICE, Jan. 20, 1992, available in LEXIS, Asiapc Library, Allnews File.

<sup>60</sup> See *supra* text accompanying notes 37-45.

<sup>61</sup> Henry Kamm, *The Silent Suffering of East Timor*, N.Y. TIMES, Feb. 15, 1981, § 6 (Magazine), at 34, 56.

<sup>62</sup> Erlanger, *supra* note 14.

<sup>63</sup> U.N. Office of Public Information, *Indonesia Told to Withdraw Without Delay; Council Issues Call for Further Consultations*, U.N. CHRON., May 1976, at 8, 13.

<sup>64</sup> *Id.*



integral part of Indonesia.<sup>65</sup> Finally, Indonesia asserted that East Timor's economic inviability prevented it from becoming an independent country.<sup>66</sup>

Indonesia asserted that the East Timorese chose to integrate with Indonesia, a valid action under U.N. General Assembly Resolution 1541,<sup>67</sup> which provides that non-self-governing territories can choose to integrate with an independent state.<sup>68</sup> Resolution 1541 requires that the "integration should be the result of the freely expressed wishes of the Territory's peoples acting with a full knowledge of the change in their status."<sup>69</sup> Indonesia argued that these conditions were met by two pertinent acts of the East Timorese people freely choosing integration: 1) the November 30, 1975 declaration of integration by East Timorese political parties inviting Indonesia into East Timor;<sup>70</sup> and 2) the May 31, 1976 resolution of the People's Assembly of Timor requesting integration with Indonesia.<sup>71</sup>

Indonesia maintained that it complied with all of the U.N. resolutions concerning self-determination of non-self-governing territories, which properly made East Timor a part of Indonesia. Thus, any perceived problems were matters internal to Indonesia and shielded from any international interference by U.N. Charter Article 2(7),<sup>72</sup> which renders "internal" matters immune from international action. Therefore, Indonesia had a right to claim the resources of the exclusive economic zone (EEZ) off of East Timor, and it had a concomitant right to enter into a JDZ treaty with Australia concerning those resources.

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<sup>65</sup> Clark, *supra* note 3, at 12; Elliott, *supra* note 30, at 247.

<sup>66</sup> Clark, *supra* note 3, at 12; Elliott, *supra* note 30, at 247-48.

<sup>67</sup> U.N. Office of Public Information, *Varying Views Expressed in Debate on Developments in East Timor*, U.N. CHRON., Oct. 1976, at 20, 21 [hereinafter *Varying Views*].

<sup>68</sup> G.A. Res. 1541, U.N. GAOR, 15th Sess., 1 Supp. No. 16, at 29, U.N. Doc. A/4684 (1961).

<sup>69</sup> *Id.* at 30.

<sup>70</sup> *The East Timor Debate in the U.N. Decolonization Committee*, INDONESIA MIRROR, Nov. 1986, at 1, 3 (Statement of S. Wiryono, Indonesian Deputy Permanent Representative to the United Nations, before the U.N. Decolonization Committee, Aug. 15, 1986); *Varying Views*, *supra* note 67, at 21.

<sup>71</sup> Clark, *supra* note 3, at 13.

<sup>72</sup> The relevant text of U.N. Charter Article 2(7) reads:

"[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State."

## II. RESOLUTION III

Resolution III<sup>73</sup> of the Convention provides the benefit of the Convention's rights to U.N.-recognized non-self-governing peoples in subparagraph (1)(a).<sup>74</sup> The U.N., in its resolutions from 1975-1982 on the problems in East Timor, recognized East Timor as a non-self-governing territory whose people had a right to self-determination.<sup>75</sup> Therefore, the provisions of Resolution III (1)(a) are applicable to the situation in East Timor and require that any rights created by the Convention be implemented for the benefit of the East Timorese people.

### A. *The Operative Paragraph of Resolution III*

Subparagraph (1)(b) of Resolution III states that where there is a dispute between states concerning the sovereignty of a territory, consultations between the disputants are required.<sup>76</sup> During the consultations, the interests of the non-self-governing people of the territory shall be a fundamental consideration.<sup>77</sup> Those interests, however, do not have to be the basis for a decision or even the primary reason for a decision.

The practical reality of a state bringing a claim under Resolution III is that the claimant state would be asserting the non-self-governing people's

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<sup>73</sup> Final Act of the Third U.N. Conference on the Law of the Sea, Dec. 10, 1982, Resolution III, U.N. Doc. A/CONF. 62/121, 21 I.L.M. 1245, 1257 [hereinafter Resolution III]. Resolution III states in relevant part that:

The Third United Nations Conference on the Law of the Sea . . . Bearing in mind the Charter of the United Nations, in particular Article 73,

1. Declares that:

(a) In the case of a territory whose people have not attained full independence or other self-governing status recognized by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development.

(b) Where a dispute exists between States over the sovereignty of a territory to which this resolution applies, in respect of which the United Nations has recommended specific means of settlement, there shall be consultations between the parties to that dispute regarding the exercise of the rights referred to in subparagraph (a). In such consultations the interests of the people of the territory concerned shall be a fundamental consideration. Any exercise of those rights shall take into account the relevant resolutions of the United Nations and shall be without prejudice to the position of any party to the dispute. The States concerned shall make every effort to enter into provisional arrangements of a practical nature and shall not jeopardize or hamper the reaching of a final settlement of the dispute.

<sup>74</sup> *Id.*

<sup>75</sup> See *supra* notes 25-27, 32, 37-41 and accompanying text.

<sup>76</sup> Resolution III, *supra* note 73.

<sup>77</sup> *Id.*

Convention rights against a state that had refused to grant them self-governing status or to allow them a plebiscite to decide their fate. The rights asserted would be the rights guaranteed to all states under the Convention.<sup>78</sup> Where a claimant state establishes a position supporting and endorsing the rights of a non-self-governing people, that position cannot be prejudiced by any other party to the dispute under subparagraph (1)(b).<sup>79</sup> Therefore, assuming all parties to the dispute must follow the Resolution because it is legally binding upon them, where a state asserts a non-self-governing people's rights as its position in the dispute, those people's rights cannot be prejudiced by the other parties to the dispute, whether in the provisional measures or the final settlement.

### B. *The Purpose of Resolution III*

The text of Resolution III lacks clarity in parts. The purpose of the Resolution is clear,<sup>80</sup> but the ambiguity of its operative paragraph<sup>81</sup> reflects the compromise to which the Conference finally arrived. The *travaux préparatoires* (preparatory works) of Resolution III elucidate the framework in which the text is to be interpreted.

Article 31(1) of the Vienna Convention on the Law of Treaties requires that treaties be interpreted according to the plain meaning of their terms and in accordance with their purposes.<sup>82</sup> Article 32 of the Vienna Convention further provides that the preparatory work of a treaty's conference may be used to interpret the treaty.<sup>83</sup> Since Resolution III (1)(b) is ambiguous as to whether the non-self-governing people's rights under the Convention can be

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<sup>78</sup> Resolution III(1)(a) gives the people of a non-self-governing territory the "rights and interests under the Convention."

<sup>79</sup> Resolution III(1)(b), *supra* note 73.

<sup>80</sup> See *infra* note 132 and accompanying text.

<sup>81</sup> Cf. 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 482 (Myron H. Nordquist et al. eds., 1989) [hereinafter Commentary] (indicating limitations in the operative paragraph and the difficulty of forecasting Resolution III's applications).

<sup>82</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980). Article 31(1) reads: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

<sup>83</sup> *Id.* Article 32 reads:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

usurped notwithstanding a state's dispute as to sovereignty, it is useful to explore the negotiations surrounding the passage of the Resolution in order to interpret subparagraph (1)(b).

Resolution III is not a law of the sea subject, as it deals with territories under foreign occupation.<sup>84</sup> It became an issue of political contention,<sup>85</sup> however, at the Third U.N. Conference on the Law of the Sea (UNCLOS III).<sup>86</sup>

The original topic of Resolution III, territories under foreign occupation, began in 1973 in Sub-Committee II of the Sea-bed Committee.<sup>87</sup> The topic originated in two draft articles on the exclusive economic zone, one submitted by Kenya,<sup>88</sup> and the other by a multi-nation group.<sup>89</sup> Until 1974,<sup>90</sup> the topic was discussed on the Second Committee's agenda as part of item 19(a): islands under colonial dependence or foreign domination or control.<sup>91</sup> The territories under foreign occupation did not generate much interest during the Sea-bed Committee discussions,<sup>92</sup> but it became an item of contention during its review at the 38th to 40th meetings of the Second Committee in August 1974.<sup>93</sup>

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<sup>84</sup> Commentary, *supra* note 81, at 480.

<sup>85</sup> *Id.*

<sup>86</sup> The UNCLOS III lasted from December 1973 until December 1982. Final Act, ¶ 7, *supra* note 7, at 1246-47.

<sup>87</sup> Commentary, *supra* note 81, at 480.

<sup>88</sup> "No territory under foreign domination and control shall be entitled to establish an Economic zone," *Draft Articles on Exclusive Economic Zone Concept, Submitted by Kenya*, art. XI, Sea-bed Committee, Sub-Committee II Summary Records A/AC.138/SC.II/L.10, reproduced in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 27 U.N. GAOR, Supp. No. 21, at 180, 182, U.N. Doc. A/8721 (1972).

<sup>89</sup> "No State exercising foreign domination and control over a territory shall be entitled to establish an economic zone or to enjoy any other right or privilege referred to in these articles with respect to such territory." *Algeria et al., Draft Articles on Exclusive Economic Zone*, art. XI, Sea-bed Committee, Sub-Committee II Summary Records A/AC.138/SC.II/L.40, reproduced in III Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 28 U.N. GAOR, Supp. No. 21, at 87, 89, U.N. Doc. A/9021 (1973).

<sup>90</sup> Commentary, *supra* note 81, at 480.

<sup>91</sup> *Id.* The III UNCLOS consisted of three main committees, and throughout the Conference the Second Committee handled the subject of the rights of non-self-governing people eventually drafted into Resolution III.

<sup>92</sup> *Id.*

<sup>93</sup> See 38th, 39th, and 40th meetings of the III UNCLOS Second Committee, August 13-14, 1974, in 2 Third U.N. Conference on the Law of the Sea, Official Rec. 278-89, U.N. Sales No. E.75.V.4 (1975)[hereinafter Official Rec.].

At the Second Committee discussions, eight proposals were advanced relating to item 19(a).<sup>94</sup> The proposals generally asserted that the rights of

<sup>94</sup> Commentary, *supra* note 81, at 480. The proposals included:

1. That nothing in the propositions set herein [referring to the exclusive economic zone] should be construed as recognizing rights of territories under colonial, foreign or racist domination to the foregoing.

*Declaration of the Organization of African Unity on the Issues of the Law of the Sea*, ¶ 10, III UNCLLOS Doc. A/CONF.62/33 (1974), in 3 Official Rec. 63, 64, U.N. Sales No. E.75.V.5 (1975).

2. A strong trend has developed in this Conference to prevent colonial or foreign dominating Powers from reaping the benefits of the economic zones of dependent territories under their control....[T]he rights and benefits of such zones shall belong to, and be exercisable only by, the inhabitants of such territories.

*Statement by the Chairman of the Joint Committee of the Congress of Micronesia*, III UNCLLOS Doc. A/CONF.62/L.6 (1974), in 3 Official Rec. 83, 84.

3. In respect of a territory whose people have attained neither full independence nor some other self-governing status following an act of Self-Determination under the auspices of the United Nations, the rights to the resources of the economic zone created in respect of that territory and to the resources of its continental shelf are vested in the inhabitants of that territory to be exercised by them for their benefit and in accordance with their needs and requirements. Such rights may not be assumed, exercised or profited from or in any way infringed by a metropolitan or foreign power administering or occupying that territory.

*Fiji et al., Draft Articles on Islands and on Territories under Foreign Domination or Control*, art. B, III UNCLLOS Doc. A/CONF.62/C.2/L.30 (1974), in 3 Official Rec. 210, 211.

4. No economic zone must be established by any State which has dominion over or controls a foreign territory in waters contiguous to that territory.

*Bulgaria et al., Draft Articles on the Economic Zone*, art. 10, III UNCLLOS Doc. A/CONF.62/C.2/L.38 (1974), in 3 Official Rec. 214, 215.

5. No economic zone shall be established by any State which has dominion over or controls a foreign island in waters contiguous to that island.

The inhabitants of such islands shall be entitled to create their economic zone at any time prior to or after attaining independence or self-rule. The right to the resources of such economic zone and to the resources of its continental shelf are vested in the inhabitants of that island to be exercised by them for their benefit and in accordance with their needs or requirements

In case the inhabitants of such islands do not create an economic zone, the Authority shall be entitled to explore and exploit such areas, bearing in mind the interests of the inhabitants.

*Turkey: Draft Articles on the Regime of Islands*, art. 3, III UNCLLOS Doc. A/CONF.62/C.2/L.55 (1974), in 3 Official Rec. 230.

6. The rights recognized or established in this Convention shall not be invoked by the colonial or occupying Power in respect of islands and other territories under colonial domination or foreign occupation as long as that situation persists.

*Argentina et al., Draft Article on Islands and Other Territories under Colonial Domination or Foreign Occupation*, III UNCLLOS Doc. A/CONF.62/C.2/L.58 (1974), in 3 Official Rec. 232.

7. Concerning islands under colonial domination, racist regime or foreign occupation, the rights to the maritime spaces and to the resources thereof belong to the inhabitants of those islands and must profit only their own development.

No colonial or foreign or racist Power which administers or occupies those islands shall exercise those rights, profit from them or in any way infringe upon them.

*Algeria et al., Draft Articles on the Regime of Islands*, art. 5, III UNCLLOS Doc. A/CONF.62/C.2/L.62/Rev. 1 (1974), in 3 Official Rec. 232, 233.

8. In respect of a territory whose people have not achieved full independence or some other self-governing status recognized by the United Nations, the rights to the resources of its exclusive economic zone belong to the people of that territory. These rights shall be exercised by such people for

the Convention belonged to the people of non-self-governing territories.<sup>95</sup> Those rights could not be assumed, exercised, profited from or in any way infringed upon by an occupying or foreign nation.<sup>96</sup> The proposals applied to both islands and non-self-governing territories.<sup>97</sup>

The proposals and the ensuing debate indicated support for the principle that people of non-self-governing territories should benefit from the resources of such territories.<sup>98</sup> One representative stated that "[t]he new law of the sea should be based on principles of justice and respect for self-determination and sovereignty and could not serve directly or indirectly to consolidate unjust or unlawful situations."<sup>99</sup> Another representative argued that "[t]he obligations created by . . . [the article concerning territories under colonial or foreign domination] should be as strict as any of the other obligations imposed by the new convention and should be subject to the same enforcement machinery."<sup>100</sup>

Following these discussions the Second Committee reduced the previously submitted eight proposals to four formulas.<sup>101</sup> The four formulas were incorporated into Provision 240 of the Main Trends Working Paper of the Second Committee.<sup>102</sup> The four formulas summarized the eight proposals<sup>103</sup> previously submitted to the Second Committee. By the third session of the Second Committee in 1975, the four formulas were reduced to a single text.<sup>104</sup> The single text expanded the coverage of the proposals

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their benefits and in accordance with their needs and requirements. Such rights may not be assumed, exercised or benefited from or in any way be infringed upon by a foreign Power administering or occupying or purporting to administer or to occupy such territory.

*Gambia et al., Draft Articles on the Exclusive Economic Zone*, art. 11, III UNCLoS Doc. A/CONF.62/C.2/L.81 (1974), in 3 Official Rec. 240, 241.

<sup>95</sup> See *Id.*

<sup>96</sup> *Fiji et al., Draft Articles on Islands and on Territories under Foreign Domination or Control*, art. B, *supra* note 94.

<sup>97</sup> See *supra* note 94.

<sup>98</sup> See 38th, 39th, and 40th meetings of the Second Committee, *supra* note 93.

<sup>99</sup> *Id.* at 286 (statement of Mr. Amato (Uruguay) at the 40th meeting of the Second Committee, August 14, 1974).

<sup>100</sup> *Id.* at 278 (statement of Mr. Templeton (New Zealand) at the 38th meeting of the Second Committee, August 13, 1974).

<sup>101</sup> Commentary, *supra* note 81, at 480.

<sup>102</sup> *Statement of Activities of the Conference during Its First and Second Sessions*, app. I, Working Paper of the Second Committee: Main Trends, provision 240, III UNCLoS Doc. A/CONF.62/L.8/Rev. 1 (1974), in 3 Official Rec. 93, 140.

<sup>103</sup> See *supra* note 94.

<sup>104</sup> Commentary, *supra* note 81, at 480; see C.2/Blue Paper No. 12 (Anonymous), reproduced in 4 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS 152 (Renate Platzöder ed., 1983).

beyond islands to cover all territories.<sup>105</sup> The single text was included in the 1975 Informal Single Negotiating Text (ISNT), a document for the entire Conference which would "take account of all the formal and informal discussions" and "provide a basis for negotiation."<sup>106</sup> The single text became article 136 of the ISNT, which read:

1. The rights recognized or established by the present Convention to the resources of a territory whose people have not attained either full independence or some other self-governing status recognized by the United Nations, or a territory under foreign occupation or colonial domination, or a United Nations Trust Territory, or a territory administered by the United Nations, shall be vested in the inhabitants of that territory, to be exercised by them for their own benefit and in accordance with their own needs and requirements.
2. Where a dispute over the sovereignty of a territory under foreign occupation or colonial domination exists, the rights referred to in paragraph 1 shall not be exercised until such dispute is settled in accordance with the purposes and principles of the Charter of the United Nations.
3. In no case may the rights referred to in paragraph 1 be exercised, profited or benefited from or in any way infringed by a metropolitan or foreign power administering or occupying such territory or purporting to administer or occupy such territory.
4. References in this article to a territory include continental and insular territories.<sup>107</sup>

At the fourth session of the Conference in 1976, the ISNT received an article-by-article reading.<sup>108</sup> Strong opposition to article 136 developed.<sup>109</sup> The Conference then prepared a Revised Single Negotiating Text (RSNT) to "reflect as far as possible the result of the informal negotiations that had taken place" and to serve "as a basis for continued negotiation."<sup>110</sup> Article 136 of

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<sup>105</sup> Commentary, *supra* note 81, at 480.

<sup>106</sup> *Informal Single Negotiating Text* (1975), note by the president of the conference, III UNCLCLOS Doc. A/CONF.62/WP.8, in 4 Official Rec. 137, 137, U.N. Sales No. E.75.V.10 (1975).

<sup>107</sup> *Id.*, art. 136.

<sup>108</sup> Commentary, *supra* note 81, at 481.

<sup>109</sup> *Id.*

<sup>110</sup> *Revised Single Negotiating Text* (1976), note by the president of the conference, III UNCLCLOS Doc. A/CONF.62/WP.8/Rev. 1, in 5 Official Rec. 125, 125, U.N. Sales No. E.76.V.8 (1976).

the ISNT was taken from the numbered articles and placed at the end of the RSNT with the new designation "Transitional Provision."<sup>111</sup> The Chairman of the Second Committee commented in his introductory note that:

The article dealing with territories under foreign occupation or colonial domination resulted in a long debate in the Committee. After reflecting on the debate I did not feel that I should make either major additions to or deletions from the existing text, except to redraft paragraph 2 in less absolute terms.<sup>112</sup>

The new text of the Transitional Provision had the same first paragraph as article 136 of the ISNT, but paragraphs 2, 3, and 4 were changed to read:

2. Where a dispute over the sovereignty of a territory under foreign occupation or colonial domination exists, in respect of which the United Nations has recommended specific means of solution, rights referred to in paragraph 1 shall not be exercised except with the prior consent of the parties to the dispute until such dispute is settled in accordance with the purposes and principles of the Charter of the United Nations.
3. A metropolitan or foreign power administering, occupying or purporting to administer or occupy a territory may not in any case exercise, profit, or benefit from or in any way infringe the rights referred to in paragraph 1.
4. References in this article to a territory include continental territories and islands.<sup>113</sup>

The changed text of paragraph 2 allowed disputing parties to consent to using Convention-granted rights in disputed territories before reaching a final settlement of the dispute.

The text of the RSNT was then incorporated into the Informal Composite Negotiating Text (ICNT)<sup>114</sup> of the sixth session of the Conference in 1977.<sup>115</sup> The Conference placed the Transitional Provision at the end of

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<sup>111</sup> Commentary, *supra* note 81, at 481.

<sup>112</sup> *Revised Single Negotiating Text*, chairman of the second committee introductory note, ¶ 20, *supra* note 110, at 153.

<sup>113</sup> *Id.*, Transitional Provision, at 172-73.

<sup>114</sup> *Informal Composite Negotiating Text* (1977), III UNCLOS Doc. A/CONF.62/WP.10, in 8 Official Rec. 1, U.N. Sales No. E.78.V.4 (1978).

<sup>115</sup> Commentary, *supra* note 81 at 481.



the ICNT,<sup>116</sup> which meant that the Provision applied to all of the Convention's numbered articles.<sup>117</sup> The positioning of the Transitional Provision went unexplained by the Conference,<sup>118</sup> and no formal debate occurred.<sup>119</sup>

The Transitional Provision was next discussed at the Informal Plenary on August 16, 1979.<sup>120</sup> The supporters of the provision argued that "the term 'transitional' is to be understood as referring to the temporary status of the non-self-governing territories for whose benefit the provision is meant, while the provision itself is not transitional but substantive and has to be included in the body of the Convention."<sup>121</sup> Those who opposed the provision asserted that it "introduced political questions which are more appropriately dealt with under the Charter of the United Nations and should not be mixed with the legal questions which are the main concern of the Law of the Sea Convention."<sup>122</sup> The opponents further claimed that the Transitional Provision would conflict with Article 73 of the Charter of the United Nations, and that the provision had no legal basis to vest rights to mineral resources in people.<sup>123</sup> Supporters of the Transitional Provision responded that it actually reaffirmed Article 73, and that "the concept of rights to resources being tied to geographical factors and not to human beings" was "abhorrent."<sup>124</sup> In the end the Informal Plenary accepted the Transitional Provision.<sup>125</sup>

The next action concerning the Transitional Provision occurred in August 1981 when the Group of 77, a negotiating group at the III UNCLOS composed of developing countries,<sup>126</sup> tried to "reinstate the transitional provision among the numbered articles of the Convention."<sup>127</sup> Further action did not take place until March 1982,<sup>128</sup> when, under the direction of

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *President's Note, Informal Plenary on Final Clauses*, ¶ 3(a), III UNCLOS Doc. FC/11 (1979, mimeo.), reproduced in 12 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA: DOCUMENTS 383, 384 (Renate Platzöder ed., 1987).

<sup>122</sup> *Id.*, ¶ 3(b).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*, ¶ 3(c).

<sup>125</sup> *Id.*, ¶ 3(d). However, an argument was advanced that the subject should not be made into a divisive issue that would prevent broad acceptance of the Convention. *Id.* at 385.

<sup>126</sup> Tommy T.B. Koh and Shanmugam Jayakumar, *The Negotiating Process of the Third United Nations Conference on the Law of the Sea*, in 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 29, 81 (Myron H. Nordquist ed., 1985).

<sup>127</sup> *Commentary, supra* note 81, at 482.

<sup>128</sup> *Report of the President on the Question of Participation in the Convention* (1982), III UNCLOS Doc. A/CONF.62/L.86, in 16 Official Rec. 197, U.N. Sales No. E.84.V.2 (1984).

Conference President Koh, a compromise was reached in order to avoid a threatened deadlock.<sup>129</sup> The notes of President Koh describe the agreement:

There did not seem to be any controversy regarding the principle upon which the transitional provision is based, i.e. that the peoples of the territories mentioned therein should be the beneficiaries of the resources of such territories. However, the language [of the Transitional Provision] used to express this principle, as well as the question of its placement with regard to the convention, continued to be problematic. It was suggested that the transitional provision could become a resolution of the Conference. This idea seemed to present the best compromise.<sup>130</sup>

The Transitional Provision was thus redrafted into Resolution III and placed in Annex I of the Final Act of the Conference.

Placing the Transitional Provision as a resolution to the Final Act indicates that the Conference viewed the substance of Resolution III as a moral statement, and not an enforceable provision of the Convention. However, Resolution III was passed by the Conference, along with the Convention, as an integral whole.<sup>131</sup> Therefore, Resolution III is as legally binding as the Convention itself.

The *travaux préparatoires* of Resolution III elucidate the basic principle behind the resolution: non-self-governing peoples should benefit from the resources of their territories.<sup>132</sup> This basic principle is consistent with one of the objects of the Convention, the equitable utilization of ocean resources by all peoples of the world.<sup>133</sup> The predecessor drafts of Resolution III contained strong language asserting the basic principle of the Resolution, however, the drafting of the Transitional Provision toned down the stridency of the language. Paragraph 3 of the Transitional Provision was forcefully worded, but was diluted during the compromise, and ultimately became Resolution III(1)(b). Resolution III's effect upon occupying states is

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<sup>129</sup> Commentary, *supra* note 81, at 482.

<sup>130</sup> Report of the President on the Question of Participation in the Convention, ¶ 19, *supra* note 128, at 199.

<sup>131</sup> Final Act, *supra* note 7, at 1252; 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 448 (Myron H. Nordquist ed., 1985).

<sup>132</sup> Report of the President on the Question of Participation in the Convention, ¶ 19, *supra* note 128, at 199.

<sup>133</sup> Convention, pmb1, *supra* note 5, at 1271.

still not clear, but the basic principle behind the Resolution serves as a framework in which to interpret it, namely that U.N.-recognized non-self-governing peoples are entitled to the Convention's rights, including sovereignty over the natural resources in their exclusive economic zone.

### C. *The U.N. Charter's Effect on Resolution III*

The Resolution, in limiting its operation to states in subparagraph (1)(a), appears to provide no avenue for a non-self-governing people to bring claims on their own behalf to a negotiations forum. The non-self-governing people could act through the United Nations Trusteeship Committee. But placing a territory in the care of the Committee is a voluntary action of the administering state,<sup>134</sup> and Portugal, the administering state in East Timor, never did so.<sup>135</sup>

Non-self-governing territories do have another means of redress through U.N. Charter Article 73 and U.N. Resolutions 1541 and 1514.<sup>136</sup> Article 73 obliges U.N. members that "have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government . . . to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."<sup>137</sup> Article 73(e) requires members to provide to the U.N. statistical information on the economic, social, and educational conditions in the members' non-self-governing territories.<sup>138</sup> Resolution 1541,<sup>139</sup> the Declaration on the Granting of Independence to Colonial Countries and Peoples, expanded upon Charter Article 73. It enumerated a set of guidelines, similar to the trusteeship system, for the administration of non-self-governing territories.<sup>140</sup>

The General Assembly, in Resolution 1514, adopted the day before Resolution 1541, stated that all peoples have the right to self-determination, that "repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence," and that "[i]mmediate steps shall be taken . . . to

<sup>134</sup> U.N. Charter art. 75, art. 77(1)(c).

<sup>135</sup> See Jean-Pierre L. Fonteyne, *The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position*, 45 AUSTL. J. INT'L AFF. 170, 170, 172 (1991).

<sup>136</sup> See Franck & Hoffman, *supra* note 20, at 332-33.

<sup>137</sup> U.N. Charter art. 73, pmbl. & (b).

<sup>138</sup> *Id.*, ¶ (e).

<sup>139</sup> G.A. Res. 1541, *supra* note 68.

<sup>140</sup> *Id.*

transfer all powers to the peoples of those territories, without . . . any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom."<sup>141</sup> Complete independence is not the only route to self-determination, as the General Assembly provided in Resolution 1541, which allows for integration by a non-self-governing territory into another state as one form of self-determination.<sup>142</sup> The primary requirement for integration is a plebiscite that allows the free expression of the "[t]erritory's peoples acting with full knowledge of the change in their status."<sup>143</sup>

East Timor is a U.N.-recognized non-self-governing territory.<sup>144</sup> Resolution 1541, interpreting Article 73's obligations, and Resolution 1514 advance rights to non-self-governing peoples,<sup>145</sup> such as the East Timorese. Australia and Indonesia, as members of the U.N., are obligated to respect Article 73.<sup>146</sup> Article 73 is specifically mentioned in Resolution III as a context in which to approach the meaning of the Resolution.<sup>147</sup> Thus, Australia and Indonesia must respect Resolution III and the rights it gives to non-self-governing peoples as a duty imposed by the U.N. Charter. Although Resolution III, as illuminated by Article 73 and Resolutions 1541 and 1514, has no provisions for enforcing compliance, it does provide guidance as to the rights of non-self-governing peoples and the obligations of states with respect to those rights.

#### D. *The Legal Status of Resolution III Within the Final Act*

Resolution III is contained in the Final Act of the Convention. The text of the Convention does not indicate what legal weight the Final Act is to carry. Literature dealing with final acts is limited.<sup>148</sup> A final act typically describes the workings and decisions of its conference<sup>149</sup> and is normally

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<sup>141</sup> *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., 1 Supp. No. 16, at 66, 67, U.N. Doc. A/4684 (1961).

<sup>142</sup> G.A. Res. 1541, princ. IX(a) & (b), *supra* note 68, at 30.

<sup>143</sup> *Id.*, princ. IX(b).

<sup>144</sup> See *supra* text accompanying notes 25–27, 32, 37–44.

<sup>145</sup> See *supra* text accompanying notes 136–143.

<sup>146</sup> Parties to the U.N. Charter are bound by its provisions. See Brownlie, *supra* note 6, at 12.

<sup>147</sup> See Resolution III, *supra* note 73.

<sup>148</sup> John K. Gamble & Maria Frankowska, *The Significance of Signature to the 1982 Montego Bay Convention on the Law of the Sea*, 14 OCEAN DEV. & INT'L L. 121, 138 (1984).

<sup>149</sup> 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, *supra* note 131, at 445.

signed by all the participants in the conference.<sup>150</sup> Final acts are usually not a part of the treaty.<sup>151</sup> Although contained in the Final Act, the Conference passed Resolution III as an integral part of the Convention,<sup>152</sup> and thus Resolution III enjoys the same status as the Convention and is binding on states to the same extent as the Convention.<sup>153</sup>

### E. *The Convention's Status and the Interim Obligation*

The Convention does not come into force until twelve months after the sixtieth ratification or accession.<sup>154</sup> Currently, 54 states have ratified or acceded to the Convention.<sup>155</sup> Under the Vienna Convention of the Law of Treaties,<sup>156</sup> before the Convention comes into force there may be a binding interim obligation upon states which have ratified the Convention or signed it without having yet indicated a rejection of it.

The General Assembly has called upon all nations to "refrain from taking any action directed at undermining the Convention or defeating its objectives and purposes."<sup>157</sup> Under Article 18 of the Vienna Convention on the Law of Treaties, "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty."<sup>158</sup> Some scholars advocate that the Vienna Convention rises to the level of customary international law, and thus binds all states.<sup>159</sup> Others hold that the interim obligation of signatory states between signature and ratification or rejection described in Article 18 is not an enforceable obligation, but rather a

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* A final act is "neither a treaty nor a legally binding document, and there is no established mechanism for enforcement of its provisions." John Donnelly & Elizabeth Miller, *Ratification of the Human Rights Treaties: Toward Giving Legal Effect to the Helsinki Final Act*, 5 GEO. MASON U. L. REV. 185, 185 (1982).

<sup>152</sup> Final Act, ¶ 42, *supra* note 7, at 1252.

<sup>153</sup> See *supra* note 131 and accompanying text.

<sup>154</sup> Convention, art. 308, *supra* note 5, at 1327.

<sup>155</sup> U.N. Div. for Ocean Affairs and the Law of the Sea, *Status of the U.N.C.L.O.S.*, 22 LAW OF THE SEA BULL. 1, 2 (1993).

<sup>156</sup> Vienna Convention on the Law of Treaties, *supra* note 82, at 331.

<sup>157</sup> G.A. Res. 38/59A, U.N. GAOR, 38th Sess., Supp. No. 47, at 48, U.N. Doc. A/38/47 (1984).

<sup>158</sup> Vienna Convention on the Law of Treaties, *supra* note 82, at 336.

<sup>159</sup> See Louis B. Sohn, *Unratified Treaties as a Source of Customary International Law*, in REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIPHAGEN 231, 244 n.42 (Statement of Myres McDougal) (Adriaan Bos & Hugo Siblesz eds., 1986); T.O. Elias, *THE MODERN LAW OF TREATIES* 26 (1974); Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263, 288 (1980).

moral obligation.<sup>160</sup> The only consensus on Article 18 seems to be that it creates an expectation among other states that the signatory state will not violate the objects and purposes of the convention until the state shall have ratified or rejected the convention.<sup>161</sup> One hundred fifty-four states signed the Convention as of March 1992,<sup>162</sup> including Australia and Indonesia.<sup>163</sup> Additionally, Indonesia has ratified the Convention.<sup>164</sup>

Article 18 thus appears to impose upon both Australia and Indonesia an obligation not to defeat an object or purpose of the Convention. Australia may not defeat the object or purpose of a treaty which it signs until it has ratified or rejected the treaty because it is a party to the Vienna Convention.<sup>165</sup> Being a party to the Vienna Convention obliges Australia to respect Article 18, even if Article 18 is not part of customary international law. Thus, Australia and Indonesia have at least a moral obligation not to defeat the objects or purposes of the Convention.

To be encompassed by Article 18's interim obligation, Resolution III must be an object or purpose of the Convention.<sup>166</sup> The purpose of Resolution III, the creation of an obligation on states not to exploit the Convention-granted rights of non-self-governing territories to the detriment of the peoples of those territories, was an issue of major contention at the III UNCLOS.<sup>167</sup> The Conference viewed the rights of non-self-governing peoples as a primary consideration of the Convention, as seen in the Preamble, which states that the Convention "takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries."<sup>168</sup> The Conference designed the Convention to "promote the economic and social advancement of all peoples of the world."<sup>169</sup> Resolution III followed these goals of the Convention in advancing the rights of non-self-governing peoples, and thus its inclusion shows a concern on the part of the Conference that it be an object or purpose of the Convention. Because Resolution III is an object or purpose of the Convention, Australia and Indonesia have an interim obligation under the

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<sup>160</sup> See Joni S. Charne, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. & ECON. 71, 104 (1991).

<sup>161</sup> *Id.* at 110, 114; McDade, *supra* note 6, at 47.

<sup>162</sup> *Status*, *supra* note 6, at 5.

<sup>163</sup> *Id.* at 1, 3.

<sup>164</sup> Indonesia ratified the Convention on March 2, 1986. *Id.* at 3.

<sup>165</sup> Vienna Convention on the Law of Treaties, art. 18, *supra* note 82, at 336.

<sup>166</sup> See *supra* text accompanying note 158.

<sup>167</sup> Commentary, *supra* note 81, at 482.

<sup>168</sup> Convention, pmb., *supra* note 5, at 1271.

<sup>169</sup> *Id.*

customary law of Article 18 of the Vienna Convention not to violate Resolution III. Additionally, Indonesia, by ratifying the Convention,<sup>170</sup> accepted the provisions of Resolution III, and thus incurs a moral obligation not to defeat Resolution III prior to its coming into force.<sup>171</sup>

### III. RESOLUTION III AND EAST TIMOR

Under subparagraph (1)(a) of Resolution III, states have a duty to ensure that the rights and interests of the Convention are implemented for the benefit of non-self-governing peoples.<sup>172</sup> States also have an obligation through Article 73 of the U.N. Charter to respect Resolution III and the rights and interests of the Convention that it guarantees to non-self-governing peoples.<sup>173</sup> Resolution III also provides that where a state asserts a non-self-governing people's rights as its own position in a dispute over the sovereignty of a territory to which the resolution applies and to which the U.N. has recommended a specific means of settlement, the state's position—and thus the non-self-governing people's rights—cannot be prejudiced by any other state party to the dispute.<sup>174</sup> However, states must respect Resolution III only to the extent that they are bound to the Convention.<sup>175</sup>

Australia has an obligation under Article 18 of the Vienna Convention both through customary and conventional international law to respect Resolution III until and unless it rejects the Convention.<sup>176</sup> Indonesia not only has an obligation to respect Resolution III under Article 18 as customary law because of its signature to the Convention, but also because it has ratified the Convention.<sup>177</sup>

The Timor Gap Treaty violates Resolution III by exploiting the natural resources of the East Timorese. Under the Convention, East Timor, as the coastal state, has jurisdiction over a 200-mile wide exclusive economic zone (EEZ) off of its coast.<sup>178</sup> Within the EEZ, the East Timorese have "sovereign rights for the purpose of . . . exploiting . . . the natural resources . . . of the

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<sup>170</sup> *Status*, *supra* note 6, at 3.

<sup>171</sup> *See supra* text accompanying notes 158–161.

<sup>172</sup> *See supra* text accompanying notes 73–75.

<sup>173</sup> *See supra* text accompanying notes 144–147.

<sup>174</sup> *See supra* part II.A.

<sup>175</sup> *See supra* text accompanying notes 152–53.

<sup>176</sup> *See supra* part II.F.

<sup>177</sup> *Id.*

<sup>178</sup> Convention, art. 55, 56, 57, *supra* note 5, at 1280.

sea-bed and its subsoil."<sup>179</sup> Therefore, the Convention gives to the East Timorese the right to control the petroleum resources located in the seabed of their EEZ. Large petroleum reserves exist inside of East Timor's EEZ, especially in the area of the Timor Gap.<sup>180</sup> Indonesia and Australia, in devising the Timor Gap Treaty to exploit these petroleum reserves, have violated the rights of the East Timorese to control their natural resources. If Indonesia or Australia wants to negotiate a JDZ for the exploitation of oil in the Timor Gap, they must negotiate with East Timorese, or at least with Portugal, the U.N.-recognized administering power of East Timor.

There appears to be at least a moral duty for states to respect Resolution III where the state has ratified the Convention or signed but not specifically rejected it.<sup>181</sup> This moral duty disappears if Indonesia validly controls East Timor.<sup>182</sup> But the General Assembly has recognized, and has not since denied, the right of the East Timorese to self-determination.<sup>183</sup> Because of this, the obligations of Resolution III concerning East Timor remain in effect for all signatories to the Convention, including Indonesia and Australia. Thus the Timor Gap Treaty is void because it assumes rights under the Convention<sup>184</sup> that do not exist for either Indonesia or Australia to exploit. Those rights are reserved to the non-self-governing people of East Timor.

#### IV. PORTUGAL'S CASE AGAINST AUSTRALIA AND POSSIBLE ENFORCEMENT OF RESOLUTION III

Resolution III obligates Indonesia and Australia to implement the rights and interests of the Convention that are possessed by the East Timorese for the benefit of these non-self-governing people. By implication Resolution III also forbids Indonesia and Australia from exploiting those rights for themselves, although no enforcement procedure is created by Resolution III. A state, however, could assert as its own position the rights of the East Timorese in a dispute with Indonesia in order to utilize the provisions of Resolution III (1)(b), which would mandate that the position of any state to

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<sup>179</sup> *Id.*, art. 56.

<sup>180</sup> Petroleum reserves in the Timor Gap region are estimated to contain between five hundred million and five billion barrels of oil, which ranks the Timor Gap area as one of the twenty-five largest oil deposits in the world. *Delimitation*, *supra* note 5, at 386.

<sup>181</sup> See *supra* text accompanying notes 158-61, 170-71.

<sup>182</sup> See *supra* p. 13.

<sup>183</sup> See *supra* text accompanying notes 25-27, 32, 37-44.

<sup>184</sup> Convention rights utilized by the Timor Gap Treaty include Articles 55, 56, 57, and 77, which define the extent of the EEZ and the coastal state's rights to exploit resources within the EEZ. Further, the Treaty uses provisional arrangement rights under Article 83 to create the JDZ.



the dispute could not be prejudiced.<sup>185</sup> Portugal has disputed Indonesia's sovereignty over East Timor<sup>186</sup> and might be willing to assert that Indonesia is infringing on the East Timorese people's rights to their natural wealth and resources under the Convention.<sup>187</sup>

Portugal's case against Australia in the International Court of Justice (I.C.J.) provides a forum for the adjudication of the sovereignty disputes over East Timor, including violations of Resolution III. Portugal's case contests Indonesia's sovereignty over East Timor, bringing into effect Resolution III (1)(b), which requires that Indonesia and Australia not prejudice Portugal's position in the dispute supporting the rights of the people of East Timor over their natural resources.<sup>188</sup> Indonesia's and Australia's actions in entering and implementing the Timor Gap Treaty evidence their violation of Resolution III. The I.C.J. may give effect to Resolution III if it reaches the merits of Portugal's claim.

If Portugal's case against Australia reaches the merits, it provides the most likely vehicle for finding Australia's and Indonesia's Timor Gap Treaty in violation of international law, including Resolution III.<sup>189</sup> Such a finding by the I.C.J. would not only invalidate the Treaty, but it would put political pressure on Australia and Indonesia to recognize the East Timorese people's rights to self-determination and control of their natural resources. Condemnation from the I.C.J. would at the least be an embarrassment to both countries,<sup>190</sup> and might provide the impetus for the U.N. to take action concerning East Timor. Although the U.N. does not need to wait for the decision in Portugal's case in order to proceed against Indonesia, given the current U.N. ambivalence toward the predicament of the East Timorese

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<sup>185</sup> Resolution III (1)(b), *supra* note 73.

<sup>186</sup> See *supra* note 11 and accompanying text.

<sup>187</sup> Some of Portugal's claims have been publicized, *Portugal Brings a Case Against Australia*, Communiqué, International Court of Justice, No. 91/6, (Feb. 22, 1991); however, any claims under Resolution III were not mentioned. Because written pleadings in the I.C.J. are not made public until at least the beginning of oral argument, Rules of Court, Article 53(2), *reprinted in* Shabtai Rosenne, *THE WORLD COURT* 283 (4th ed. 1989), and oral argument has not yet taken place, Portugal's use of Resolution III as a claim is unknown.

<sup>188</sup> See *supra* text accompanying note 79.

<sup>189</sup> Alternative methods of redress for East Timorese rights under Resolution III include the U.N. asking the I.C.J. for an advisory opinion on the situation in East Timor, U.N. Charter art. 96(1); Statute of the I.C.J. art. 65(1), and a state bringing suit in the I.C.J. asserting that Australia and Indonesia have violated the East Timorese people's *erga omnes* rights of self-determination and permanent sovereignty over natural resources, Fonteyne, *supra* note 135, at 174.

<sup>190</sup> Derrick Wilde & Sasha Stepan, *Treaty Between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area Between the Indonesian Province of East Timor and Northern Australia*, 18 MELANESIAN L.J. 18, 28 (1990).

people, an I.C.J. ruling adverse to Australia and Indonesia may be the only way to stir the U.N. to take meaningful action.

## V. CONCLUSION

Resolution III provides the Convention's rights over the EEZ to U.N.-recognized non-self-governing peoples, such as the East Timorese. Australia's and Indonesia's Timor Gap Treaty violates the East Timorese people's Convention rights by exploiting the natural resources in East Timor's EEZ. The Timor Gap Treaty violates international law by utilizing EEZ rights under the Convention that do not exist for either Australia or Indonesia to use. Those rights are reserved to the non-self-governing people of East Timor, although without U.N. intervention, it is unlikely East Timor will ever exercise those rights.

