

INVOKING STATE RESPONSIBILITY FOR AIDING THE COMMISSION OF INTERNATIONAL CRIMES — AUSTRALIA, THE UNITED STATES AND THE QUESTION OF EAST TIMOR

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[This paper discusses the International Law Commission's Draft Articles on State Responsibility ('Draft Articles'), focusing in particular on the International Law Commission's recent adoption of a compromise position, which abandons the international crimes–delicts distinction. The concept of international crimes can be seen as relatively immature; thus its informing legal principles — norms of jus cogens and obligatio erga omnes — are analysed in order to establish a legal framework for the consideration and classification of wrongful acts. The legal conditions imposing responsibility for assisting in the commission of an internationally wrongful act, provided for in art 16 of the Draft Articles are then considered. The paper then applies the legal framework of responsibility to two case studies, both involving East Timor as the injured State and Indonesia as the state directly responsible. Firstly, Australia's complicity in the denial of the East Timorese peoples' right to self-determination through the provision of political assistance to Indonesia is considered. Secondly, an assessment is made of the international responsibility of the United States for the provision of military assistance facilitating Indonesia's act of aggression against the territory of East Timor. The case studies highlight the deficiencies in the formulation of the Draft Articles through an analysis of their operation in practice, rather than at a purely theoretical level. The paper concludes that while the Draft Articles have the potential to make a valuable contribution to the international legal system, its deficiencies must be addressed. If such problems are not remedied, the Draft Articles risk being an ineffective method of protecting fundamental international interests, thereby undermining the international legal order.]

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Diplomacy is the antithesis of justice.¹

I INTRODUCTION

At its first session in 1949, the International Law Commission ('ILC') chose the law of state responsibility as a topic suitable for codification and development. At its 53rd session in 2001, the topic remains on the ILC's agenda — slowly progressing towards conclusion. The passage of over 50 years has witnessed remarkable changes in the international sphere. Developments in the area of international criminal law,² in particular, signal a maturation of international legal principles and constitute a new high-water mark in the

¹ Geoffrey Robertson, *Crimes against Humanity* (1999) xvii.

² Recent developments include: the negotiation and conclusion of the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM 999, (not yet in force) ('*Rome Statute*'); extradition proceedings in the United Kingdom against General Pinochet: see, eg, *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827; the establishment of ad hoc tribunals for the former Yugoslavia, *Statute of the International Tribunal for the Former Yugoslavia*, SC Res 827, 48 UN SCOR (3217th mtg) (1993), 32 ILM 1203 ('*ICTY Statute*') and Rwanda, *Statute of the International Tribunal for Rwanda*, SC Res 955, 49 UN SCOR (3453rd mtg), UN Doc S/Res/955 (1994), 33 ILM 1598 ('*ICTR Statute*'); the recommendation for an international criminal tribunal in Cambodia, *Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135*, 18 February 1999; and the announcement that the United Nations would conduct an international inquiry into human rights atrocities committed in East Timor: SC Res 1264, UN SCOR (4045th mtg), UN Doc S/RES/1264 (1999).

international relations of states. The Draft Articles on State Responsibility,³ once completed, will have a valuable contribution to make to this process. The codification of normative standards regarding obligations owed by states, and the attendant responsibility for breach, will bring a sense of completeness to the international legal order. Just as impunity for the commission of serious crimes by individuals will no longer be tolerated by the international community, so too will the injurious acts of states be denounced.

Disagreements among states over the Draft Articles abound, with some suggesting that the controversial or difficult provisions be deleted to facilitate agreement.⁴ The position of successive Special Rapporteurs reporting on state responsibility has been, however, to retain controversial provisions, preferring instead to redraft them in the hope of reaching a perfect compromise. Perhaps the most controversial of all provisions was that contained in art 19 of the Former Draft Articles, which had established a distinction between responsibility for international crimes and delicts. At its 52nd session in 2000 the ILC adopted the recommendation of Special Rapporteur Crawford to abandon the text of art 19 and adopt in its place a ‘compromise approach’.⁵

In Part I of this article the state responsibility regime under the Draft Articles will be discussed, with particular focus on the compromise approach. This approach of the ILC appears to be driven by the relative immaturity of the concept of international crimes. The informing legal principles of international crimes — norms of *jus cogens* and obligations owed *erga omnes* — will be examined in order to establish a legal framework for the consideration and classification of internationally wrongful acts. The new provision on serious breaches of international obligations will be contrasted with the old hierarchy of criminal and delictual responsibility, in order to ascertain which more accurately reflects the informing international legal principles. This will form the backdrop for consideration of the legal conditions for ‘indirect’ responsibility, or international responsibility for assisting in the commission of an internationally wrongful act, provided for in arts 16–18 of the Draft Articles (arts 27 and 28 in the Former Draft Articles).

Part II of this paper attempts to apply this legal framework of responsibility for assisting the commission of an internationally wrongful act to two different scenarios. Both case studies involve East Timor as the injured state and Indonesia as the state directly responsible. However, the ‘assisting’ states differ. Firstly, Australia’s complicity in the denial of the East Timorese people’s right to

³ ILC, Draft Articles on State Responsibility as contained in ILC, *Report of the International Law Commission on the Work of its 52nd Session*, UN Doc A/55/10 (2000) (‘Draft Articles’). The earlier version of the Draft Articles was contained in ILC, *Report of the International Law Commission on the Work of its 48th Session*, UN Doc A/51/10 (‘Former Draft Articles’).

⁴ See generally ILC, *State Responsibility: Comments and Observations Received from Governments*, UN Doc A/CN.4/492 (1999).

⁵ See generally ILC, *Report of the International Law Commission on the Work of its 52nd Session*, UN Doc A/55/10 (2000) [28]–[405] (‘2000 ILC Report’).

self-determination through the provision of political assistance to Indonesia will be considered. Secondly, an assessment will be made of the United States' responsibility for the provision of military assistance which facilitated Indonesia's act of aggression against East Timor. Through consideration of the case studies, the adequacy (and deficiencies) of the Draft Articles will be assessed from a practical perspective, rather than at a purely theoretical level.

PART I: THE STATE RESPONSIBILITY REGIME

II THE INTERNATIONAL LAW OF STATE RESPONSIBILITY

While the ILC has abandoned the terminology of international crimes in its Draft Articles, for the sake of clarity it is necessary to distinguish between the concepts of 'international crimes' and 'crimes under international law'. 'International crime' is a term which may conjure up many images. Its popular usage may cover a range of subject areas, from trans-border crime, to a crime at international law committed by an individual, to an internationally wrongful act resulting in state responsibility. However, 'crime' is a misleading word to use in the context of state responsibility as it raises the idea of penal, rather than pecuniary, sanctions. The term 'international crimes', in the context of State responsibility, is often used to refer to wrongs committed by states of such a severity that they concern the world community as a whole and invoke state responsibility at international law to make reparation for the wrong.⁶ Crimes under international law, however, are those committed by individuals which trigger individual responsibility.⁷ It is feasible that the international responsibility of a state may result from the commission of a crime under international law. For example, if an individual commits a crime against another

⁶ For a discussion of the distinction between international crimes and individual criminal responsibility as well as an argument that international delicts are very similar to domestic torts, see Beth Stephens, 'Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?' (1997) 60 *Albany Law Review* 579. *Contra* Ian Brownlie, *Principles of Public International Law* (4th ed, 1990) 434, who argues instead that international tort is a misleading and inaccurate term, and that 'international responsibility' is more appropriate as it refers to both treaty breaches and breaches of other international obligations; Michael Volkovitch, 'Righting Wrongs: Towards a New Theory of State Succession to Responsibility for International Delicts' (1992) 92 *Columbia Law Review* 2162, 2167-8, who argues that tort is suitable only in the domestic context. Marina Spinedi defines crimes under international law as 'individual actions, committed by private individuals or State organs considered to be so serious that the States are authorized, and often even obliged, to judge and punish them, on the basis of their internal law, waiving the ordinary rules of jurisdiction': Marina Spinedi, 'International Crimes of State: The Legislative History' in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State* (1989) 7, 138.

⁷ See, eg, the jurisprudence of the ICTY and the ICTR in which the individual criminal culpability of defendants has been determined: *Prosecutor v Tadic*, Case No IT-94-1-T (7 May 1997), 36 ILM 913; *Prosecutor v Tadic*, Case No IT-94-1-T (15 July 1999), 38 ILM 1518; 'Judgement', *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 September 1998); 37 ILM 1399; *Prosecutor v Furundzija*, Case No IT-95-17/1-T (10 December 1998), 38 ILM 317.

state while acting as a state organ, then the international responsibility of that state may be invoked on the commission of an internationally wrongful act, depending on the severity of the act.⁸ However, this paper will only deal with straightforward state responsibility issues and will focus on the provision of assistance by one state to another in order to facilitate the commission of an internationally wrongful act.

A *The International Law Commission's Draft Articles on State Responsibility*

At its first session, in 1949, the ILC selected State responsibility amongst the topics which it considered suitable for codification. In response to General Assembly resolution 799 (VIII) of 7 December 1953 requesting the Commission to undertake, as soon as it considered it advisable, the codification of the principles of international law concerning State responsibility, the Commission, at its seventh session in 1955, decided to begin the study of State responsibility[.]⁹

So begins the *2000 ILC Report* on the ILC's progress in the codification of the international law on state responsibility. The ILC's progress, even by international law standards, has been interminably slow. More than half a century after the issue of state responsibility was first raised on the ILC's agenda, the international community seems no closer to a finalised code. At this stage, the ILC is scheduled to complete the second reading of the Draft Articles in 2001 at its 53rd session.

1 *State Responsibility in General International Law*

Disagreement over the theoretical basis of state responsibility persists in judicial and arbitral decisions and in the writings of commentators. Two theories are advanced. One requires objective responsibility: a state will be strictly liable for all acts of its officials, without the need for proof of fault or negligence. The other relies on the notion of subjective responsibility: for a state to be responsible it will be necessary to show some fault or negligence on the part of the state in control of the official(s) concerned. Ian Brownlie contends that the debate over whether state responsibility is founded upon strict liability or fault is 'unreal' because it obscures the true legal issues requiring discussion.¹⁰ He maintains that

the degree of advertence on the part of state officials ... will depend not upon a general principle but upon the precise formulation of each obligation of international law [— the content of the particular duty]. The relevance of fault, the

⁸ The distinction between international crimes and delicts under the Former Draft Articles will be discussed further below pt I(IIb).

⁹ *2000 ILC Report*, above n 5, [28]. See also ILC, *Report of the International Law Commission on the Work of its 51st Session* (1999) UN Doc A/54/10 ('1999 ILC Report'). The *1999 ILC Report* is concerned mainly with Part Two of the *Draft Articles* and will be discussed in the context of the provisions on assistance: see below pt I(IV).

¹⁰ Ian Brownlie, *System of the Law of Nations: State Responsibility: Part I* (1983) 40.

relative 'strictness' of the obligation, will be determined by the content of each rule.¹¹

Justice Huber in the *Spanish Zone of Morocco Claims*¹² stated that 'responsibility is the necessary corollary of a right.'¹³ In *Chorzów Factory (Germany v Poland)*¹⁴ the Permanent Court of International Justice held that it is a principle of international law that 'any breach of an engagement involves an obligation to make reparation.'¹⁵ Therefore the responsibility of a state arises from the violation by that state of an international obligation. The source of the obligation may be found in a treaty or customary international law, and the conduct allegedly in breach of the obligation must be attributable to that state.¹⁶ The question of attribution has been discussed in several decisions of the International Court of Justice ('ICJ') and arbitral tribunals.¹⁷

It should be noted that state responsibility does not cover the internationally wrongful actions of groups of persons not acting on behalf of a state.¹⁸ As D J Harris notes, 'no state is liable for [terrorist] activities in the absence of complicity to the point where international responsibility is engaged'.¹⁹ Thus states are generally not responsible at international law for acts of terrorism committed by groups of nationals, although the groups themselves may be individually responsible.²⁰

¹¹ Ibid.

¹² (1925) 2 RIAA 615.

¹³ Ibid 615.

¹⁴ [1928] PCIJ (ser A), No 17, 29.

¹⁵ Ibid 29. Draft Articles, above n 3, art 1 provides that '[e]very internationally wrongful act of a State entails the international responsibility of that State.'

¹⁶ Draft Articles, above n 3, arts 4, 6–8. See also art 10 concerning the attribution of the conduct of an insurrectional or other movement.

¹⁷ See, eg, *Caire Claim (France v Mexico)* (1929) 5 RIAA 516; *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4; *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt* (1993) 32 ILM 933; *United States Diplomatic and Consular Staff in Tehran (US v Iran) (Merits)* [1980] ICJ Rep 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14 ('Nicaragua'); *Short v Iran* (1987) 16 Iran-US CI 76; *Asian Agricultural Products v Sri Lanka* (1991) 30 ILM 577 ('AAPL v Sri Lanka'); *Sambaggio Case (Italy v Venezuela)* (1903) 10 RIAA 499.

¹⁸ Terrorist activity has led to the negotiation of treaties providing jurisdiction over terrorists: see, eg, the *European Convention on the Suppression of Terrorism*, opened for signature 27 January 1977, 1137 UNTS 93 (entered into force 4 August 1978); *Convention for the Suppression of Unlawful Seizure of Aircraft*, opened for signature 16 December 1970, 860 UNTS 105, 10 ILM 133 (entered into force 14 October 1971); *Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177, 10 ILM 1151 (entered into force 26 January 1973).

¹⁹ D J Harris, *Cases and Materials on International Law* (5th ed, 1998) 514. Harris further notes that states do have a duty to protect aliens from the acts of terrorists or revolutionaries as an aspect of its general duty to protect aliens: at 514. See also *AAPL v Sri Lanka* (1991) 30 ILM 577.

²⁰ Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (2nd ed, 1995) 483.

2 *State Responsibility and the Draft Articles*

While the codification of principles of international law concerning state responsibility first formally appeared on the ILC's agenda in 1955, it was not until 1975 that the ILC accepted a general plan for the study of this area.²¹ At its 27th session, the ILC adopted the plan for the Draft Articles proposed by Special Rapporteur Roberto Ago. The Draft Articles were to have three parts:

Part One would concern the origin of international responsibility; Part Two would concern the content, forms and degrees of international responsibility; and a possible Part Three ... could concern the question of the settlement of disputes and the implementation of international responsibility.²²

The Draft Articles were formulated as 'a neutral set of articles that were not necessarily designed as a convention or a declaration'.²³ The final form of the Draft Articles remains undecided.²⁴

On 26 July 1996 the ILC provisionally adopted the text of the Draft Articles on first reading. The completed draft was transmitted to governments by the Secretary-General for comments and observations.

The 1998 session of the ILC reviewed the comments and observations received from governments as well as the first report of Special Rapporteur James Crawford. During 1998 and 1999, the ILC revised Part One of the Former Draft Articles, which included art 19. Significant amendments were made. However, 'divisive debate'²⁵ continued to surround art 19. In 1998 the ILC resolved that 'draft article 19 would be put to one side for the time being'.²⁶ No substantive changes to art 19 were discussed or proposed in the ILC's work for 1999.²⁷ Thus the issue of international crimes was left to be considered along with Part Two of the Draft Articles in 2000.

At the ILC's 52nd session in 2000 these matters were reconsidered, and a new approach to art 19 and the issue of international crimes was proposed. The *Fourth Report on State Responsibility* by Special Rapporteur Crawford was presented to the ILC at the commencement of its 53rd session in 2001.²⁸ In the report it is noted that 'the issues raised by Part Two, Chapter III, continue to be divisive, just as they were in the old context of article [19].'²⁹

²¹ ILC, [1975] *Yearbook of the International Law Commission* vol II 55–9, UN Doc A/10010/Rev.1 [38]–[51].

²² *Ibid.*

²³ ILC, *Report of the International Law Commission on the Work of its 50th Session*, UN Doc A/53/10 (1998) [224] ('1998 ILC Report').

²⁴ *Ibid.*

²⁵ James Crawford, Pierre Bodeau and Jacqueline Peel, 'The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading' (2000) 94 *American Journal of International Law* 660, 662.

²⁶ 1998 ILC Report, above n 23, [331].

²⁷ 1999 ILC Report, above n 9.

²⁸ ILC (James Crawford, Special Rapporteur), *Fourth Report on State Responsibility*, UN Doc A/CN.4/517 (2001) ('*Fourth Crawford Report*').

²⁹ *Ibid* [43].

B *Former Article 19: The Distinction between International Crimes and Delicts*

In previous versions of the Draft Articles, the basis for the distinction between crimes and delicts appeared to be that certain wrongful acts were viewed as being so serious as to necessitate a different regime of responsibility. Article 19 of the Former Draft Articles bore out this distinction. Article 19(2) provided:

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole[.]

Article 19(4) of the Former Draft Articles was a residual clause, in that any internationally wrongful act that did not fall within art 19(2) was an international delict. Article 19(1) provided that an internationally wrongful act is ‘[a]n act of a State which constitutes a breach of an international obligation’³⁰ — the traditional conceptualisation of state responsibility. Thus art 19 of the Former Draft Articles clearly set up a dichotomy between international crimes and delicts. This differentiation has been the source of much disagreement among states³¹ and has been blamed, in part, for the inability of the ILC to come to an agreement on the codification of state responsibility. Evidently, this has led to the recent adoption of a compromise approach so that the Draft Articles may move closer to completion.

C *The ILC’s Compromise Approach to International Crimes*

In 2000 the ILC adopted a new approach to the intractable problem of international crimes. Article 19 no longer appears in the Draft Articles; neither does the word ‘crime’. In the words of the ILC, this deletion ‘was preferable so as to avoid a lengthy debate on crime by instead focusing on the consequences that arose from serious breaches of international obligations’.³² In deleting art 19, the ILC attained ‘a compromise between the positions of the advocates of a distinct category of the most serious wrongful acts, and of those who regard state responsibility as involving a single, undifferentiated class of internationally wrongful acts.’³³

Special Rapporteur Crawford has emphasised the fact that the deletion of international crimes is more than a mere ‘terminological matter’.³⁴ It apparently reflects a shift away from the dichotomy of delictual and criminal responsibility established by art 19 of the Former Draft Articles. Thus it is now assumed in the

³⁰ Former Draft Articles, above n 3, art 19(1).

³¹ See generally ILC, *State Responsibility: Comments and Observations Received from Governments*, above n 4.

³² *2000 ILC Report*, above n 5, [361].

³³ Crawford, Bodeau and Peel, above n 25, 672.

³⁴ *Ibid.*

Draft Articles that the criteria for the commission of internationally wrongful acts do not vary with the gravity of the breach.

While the ILC removed art 19, it introduced to the Draft Articles a new chapter concerned with serious breaches of obligations owed to the international community as a whole (part two, chapter III). The new art 41 deals with the application of the chapter and provides:

1. This Chapter applies to the international responsibility arising from an internationally wrongful act that constitutes a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation, risking substantial harm to the fundamental interests protected thereby.

Thus in the latest version, part one of the Draft Articles sets up the primary proposition that an internationally wrongful act entails the international responsibility of an offending state. Part two deals with the content of an offending state's international responsibility; the legal consequences of a breach. part two, chapter III sets out the additional legal consequences of a *serious* breach of an obligation owed to the international community as a whole, and essential for the protection of its fundamental interests. In the terminology of art 19 of the Former Draft Articles, such 'serious breaches' would probably constitute international crimes. It is noted in the *2000 ILC Report* that some ILC members disagreed strongly with this formulation, as it 'amounted to reintroducing article 19 through the back door'.³⁵ In the *Fourth Crawford Report*, the Special Rapporteur noted his view that chapter III provides 'a framework for the progressive development, within a narrow compass, of a concept which is or ought to be broadly acceptable'.³⁶ However, the ultimate conclusion in the *Fourth Crawford Report* on chapter III is that the chapter should be retained but is in need of a thorough review.³⁷ It is unlikely that the new text of the Draft Articles will be formally adopted at the ILC's current session, and so they will remain unsettled.

III THE LEGAL BASIS OF INTERNATIONAL CRIMES

While the revised Draft Articles simplify the problems raised by the international crimes–delicts dichotomy, the new formulation does nothing to address the not uncommon view that the notion of international crimes has become part of general international law. The debate over whether there is support in general international law for drawing a distinction between international crimes and delicts has certainly not been resolved by the ILC's abandonment of the term 'international crimes'. In the *1998 ILC Report* it was

³⁵ *2000 ILC Report*, above n 5, [374].

³⁶ *Fourth Crawford Report*, above n 28, [52].

³⁷ *Ibid* [53].

noted that many different views remained concerning ‘the extent to which existing international law provide[s] a foundation for the notion of State crime.’³⁸ Those states pointing to the growing acceptance of the notion of state criminal responsibility referred to the jurisprudence of the ICJ in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,³⁹ and *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)*⁴⁰ (‘*Barcelona Traction Case*’). Further support for the gradual evolution of the notion of state crime can be gleaned from the emergence of treaty law which deems aggression, genocide, war crimes, crimes against peace, crimes against humanity, apartheid and racial discrimination to be exceptionally serious wrongful acts.⁴¹

In 2000 the ILC noted that some States urged the view that ‘[t]he recognition of the existence of a crime arose from the basic proposition that crimes, such as genocide, could be committed by a State, and could not be equated with normal, albeit regrettable, breaches of international obligations.’⁴² The compromise approach of the ILC appears to have its roots in the view expressed by the Special Rapporteur, and is summarised in the *2000 ILC Report*:

While the time was not yet ripe for an elaborated regime of ‘crimes’, there was general agreement that it was appropriate to include the basic concept that there were obligations which States held to the international community as a whole, and which were by definition serious, and their breach therefore concerned all States. While minor breaches of such obligations could occur (e.g. isolated cases of inhuman treatment, not warranting any multilateral response), in other cases the definition of the obligations themselves, such as with genocide and aggression, ensured that the breaches in question would be serious.⁴³

The conclusion of Special Rapporteur Crawford and the text of the ILC’s proposed Draft Articles both reflect the rather conservative view that the concept of international crimes is not yet mature enough to warrant codification.

³⁸ *1998 ILC Report*, above n 23, [262].

³⁹ (*Bosnia and Herzegovina v Yugoslavia (Preliminary Objections)*) [1996] ICJ Rep 595.

⁴⁰ [1970] ICJ Rep 174.

⁴¹ See, eg, *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (‘*Genocide Convention*’); *ICTY Statute*, above n 2; *ICTR Statute*, above n 2; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85, 23 ILM 1074 (entered into force 26 June 1987); ILC, ‘Draft Code of Crimes against the Peace and Security of Mankind’, *Report of the International Law Commission on the Work of Its 48th Session*, UN Doc A/51/10 (1996) (‘*Draft Code of Crimes*’); *Slavery Convention*, opened for signature 25 September 1926, 60 LNTS 253 (entered into force 9 March 1923); *Protocol Amending the Slavery Convention Signed at Geneva on 25 September 1926*, 182 UNTS 51 (entered into force 7 December 1953); *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, opened for signature 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957); *Rome Statute*, above n 2.

⁴² *2000 ILC Report*, above n 5, [362].

⁴³ *2000 ILC Report*, above n 5, [384].

A *What Constitutes an International Crime?*

For many years uncertainty has remained about what constitutes an international crime as propounded in art 19 of the Former Draft Articles. Much of this uncertainty appears to stem from the fact that the principles that have informed the concept of an international crime are themselves imprecisely defined. Further, art 19(3) provided a non-exhaustive list of breaches which constituted an international crime, including:

- (a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
- (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;
- (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

The obligations contained in paragraphs (a)–(c) are generally regarded as peremptory norms, or alternatively, obligations owed *erga omnes*.⁴⁴ Paragraph (d) is more contentious and some commentators do not feel its status as a crime is supported by state practice.⁴⁵

Norms of *jus cogens* and obligations owed *erga omnes* are relatively new to the international arena, yet their importance to the development of international law is unrivalled. While both concepts have been criticised as introducing ‘relative normativity’ to international law,⁴⁶ this is a criticism also levelled at the international crime–delict dichotomy.

⁴⁴ ILC, ‘Report of the International Law Commission on the Work of its 28th Session’ [1975] *Yearbook of the International Law Commission* vol II, pt II [67] (‘1976 ILC Report’):

It is mainly among [*obligatio erga omnes*] that are to be found the rules which the contemporary international legal order has elevated to the rank of *jus cogens*. And it is mainly among the obligations they impose on States that are to be found those obligations whose breach is no longer accepted as an internationally wrongful act like any other.

⁴⁵ See, eg, Antonio Cassese, ‘Remarks on the Present Legal Regulation of Crimes of State’ in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State* (1989) 200, 201.

⁴⁶ See, eg, Prosper Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413. See also Joseph Weiler, Antonio Cassese and Marina Spinedi, ‘Introduction’ in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State* (1989) 1, 3: ‘Even if existing international law has moved away from a homogeneous view of wrongful acts and state responsibility towards a differentiated regime, it is clear that such a movement is still fragmentary, partial and replete with lacunae.’

It would appear uncontroversial to state that, if the notion of international crimes is to have any utility, an essential characteristic will always entail ‘a relationship of responsibility with subjects “non-directly injured”.’⁴⁷ In other words, all international crimes are necessarily obligations owed *erga omnes*, as an international crime infringes the ‘subjective rights of all States to which the norm containing the obligation is addressed.’⁴⁸ However, it is contended here that the concept of norms of *jus cogens* and the category of *obligatio erga omnes* are both wider than the concept of international crimes.

Antonio Gaja argues that two definitions of international crimes are possible. One relates to the nature of the obligation breached, the other to the extent of the breach.⁴⁹ If an international crime refers to the fact that ‘[s]tates other than those directly affected by the breach are given certain rights or are entitled to take some measures which are otherwise unlawful, or else are under an obligation to react’,⁵⁰ the concept can be viewed as broadly analogous to obligations owed *erga omnes*.⁵¹ However, if the position adopted by the ILC in its *1998 ILC Report* is correct, international crimes are merely a sub-category of obligations owed *erga omnes*. This definition views international crimes as referring to the particularly serious consequences of an internationally wrongful act (even in the context of a bilateral relationship). An ‘internationally wrongful act’ is informed by the intersecting concepts of peremptory norms and obligations owed *erga omnes*. As the *1998 ILC Report* notes, there remains a ‘need to examine carefully the relationship between obligations owed *erga omnes*, *jus cogens* norms and exceptionally serious wrongful acts or State crimes when considering the consequences of internationally wrongful acts.’⁵²

A preliminary distinction should be made between peremptory norms and obligations owed *erga omnes*. The concept of *jus cogens* arose largely through the development and codification of treaty law in the *Vienna Convention on the Law of Treaties* (*VCLT*).⁵³ The evolution of the concept of *erga omnes*, however, has occurred predominantly through the decisions of the ICJ and other international tribunals. This distinction is not made to complicate further the complex and difficult interrelationship of these concepts. Rather, it is intended as a caution against tying the concepts together too tightly. *Jus cogens* and *erga*

⁴⁷ Spinedi, above n 6, 136.

⁴⁸ *Ibid.*

⁴⁹ Giorgio Gaja, ‘Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts’ in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State* (1989) 151, 156–8.

⁵⁰ *Ibid.* 156.

⁵¹ See especially *Fourth Report on the Content, Forms and Degrees of State Responsibility*, UN Doc A/CN.4/366.Add.1: ‘beyond the case of international crimes, there are no internationally wrongful acts having an *erga omnes* character.’

⁵² *1998 ILC Report*, above n 23, [281]. The view that further study needs to be undertaken in relation to breaches of peremptory norms was reiterated in the *2000 ILC Report*, above n 5, [363].

⁵³ Opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679, arts 53, 64 (entered into force 27 January 1980).

omnes arose to serve different needs: one in the context of protecting the interests of parties in bilateral treaty relations, the other in the context of protecting the interests of the international community as a whole. The following discussion should serve to highlight the similarities and differences of these crucial international legal concepts, and the manner in which they contribute to our understanding of international crimes.

1 *Obligations Owed Erga Omnes*

As Lauri Hannikainen makes clear, the idea of obligations being owed to the international community as a whole is not a new one.⁵⁴ The traditional view was that ‘only those States whose rights or direct legal interests were violated had the right to react’.⁵⁵ Bound up in this view was the notion that ‘no State could consider itself a judge when a violation of international law was committed by another State, unless its own rights were infringed by this breach of law.’⁵⁶ Hannikainen refers to the alternative theory, presented by writers such as Bluntschli, Heffter and Roxburgh, that there are violations which affect all states equally and give rise to a right in all states to take action against the offending state.⁵⁷ Thus it can be seen that early discussion of the concept of *erga omnes* arose in the context of whether a state that could not demonstrate that a direct legal interest had been affected could, nevertheless, gain standing to bring an action.⁵⁸

Despite early musings on the possibility of obligations owed to the international community as a whole, such views remained sidelined until the ICJ’s famous judgment in the *Barcelona Traction Case*:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, *all States*

⁵⁴ Lauri Hannikainen, *Peremptory Norms in International Law: Historical Development, Criteria, Present Status* (1988) 52–5.

⁵⁵ *Ibid* 52.

⁵⁶ D Anzilotti, *Teoria Generale della Responsabilità dello Stato* (1902) 88–9, cited in Hannikainen, above n 54, 52.

⁵⁷ J C Bluntschli, *Das moderne Völkerrecht der Civilisirten Staaten* (1872) 264–6; A W Heffter, *Das Europäische Völkerrecht der Gegenwart* (8th ed, 1888) 224–5; R F Roxburgh, *International Conventions and Third States* (1917) 33: all cited in Hannikainen, above n 54, 53.

⁵⁸ *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 1 (‘*Reparations Case*’); *Barcelona Traction Case* [1970] ICJ Rep 174.

*can be held to have a legal interest in their protection; they are obligations erga omnes.*⁵⁹

The statement, while obiter dictum, nevertheless represented a departure from the Court's traditional approach to standing. For example, in the *Reparations Case* the Court restated the traditional view that 'only the party to whom an international obligation is due can bring a claim in respect of the breach.'⁶⁰ While the ICJ has referred to the concept of obligations owed *erga omnes* in subsequent decisions, it has not at any stage provided further clarification as to the content and criteria for such obligations.⁶¹

Prosper Weil refers to the Court's declaration as 'sound[ing] the death knell of narrow bilateralism and sanctified egoism for the sake of the universal protection of certain fundamental norms relating, in particular, to human rights.'⁶² André de Hoogh, while embracing the importance of the concept of the development of human rights law in particular, suggests that 'one cannot determine any criterion on which to base the *erga omnes* character of an obligation.'⁶³ In a comprehensive analysis of the development of the concept of obligations owed *erga omnes*, Maurizio Ragazzi provides a framework of five elements essential to the concept. Ragazzi places an important caveat on this framework — it is intended only to be descriptive, and is not a prescriptive formula that must be satisfied in order to be for the obligation to be *erga omnes*.⁶⁴ The dicta of the ICJ in the *Barcelona Traction Case* provides four examples of obligations owed *erga omnes* — the outlawing of acts of aggression, the outlawing of genocide, protection from slavery and protection from racial discrimination⁶⁵ — and it is from a comparison of these obligations that Ragazzi infers his five elements.⁶⁶ They are as follows:

- 1 obligations narrowly defined, rather than ones which are more broadly construed;

⁵⁹ [1970] ICJ Rep 174, [33] (emphasis added).

⁶⁰ *Reparations Case* [1949] ICJ Rep 1, [181]–[182].

⁶¹ See, eg, *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253, 267, where the Court underlined the *erga omnes* character of statements made by French authorities, but did not precisely define the nature of the obligation these statements imposed on France, or which states could claim a violation of their interests. In *United States Diplomatic and Consular Staff in Tehran (US v Iran) (Merits)* [1980] ICJ Rep 4, the Court held that the rules on diplomatic immunity imposed imperative obligations. Presumably this was done to stress the gravity of the violations, rather than their *erga omnes* nature, as the Court did not state that Iranian authorities had infringed the rights of any state other than the United States. In *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90, the Court referred to the *erga omnes* nature of the obligation to accord the right to self-determination.

⁶² Weil, above n 46, 432.

⁶³ André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (1996) 55.

⁶⁴ Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (1997) 134.

⁶⁵ *Barcelona Traction Case* [1970] ICJ Rep 174, [33]–[34].

⁶⁶ Ragazzi, above n 64, 132–4.

- 2 negative obligations (or prohibitions), rather than positive obligations;
- 3 obligations or duties in the strict sense (ie 'what one ought or ought not to do') to the exclusion of other fundamental legal conceptions;
- 4 'obligations deriving from rules of general international law belonging to *jus cogens* and codified by international treaties to which a high number of States have become parties';⁶⁷
- 5 'obligations instrumental to the main political objectives of the present time, namely the preservation of peace and the promotion of fundamental human rights, which in turn reflect basic goods (or moral values), first and foremost life and human dignity.'⁶⁸

Ragazzi analyses a selection of obligations which, in light of his five elements, might be elevated to the status of obligations owed *erga omnes*. Relying heavily on the ICJ's statement in the *Barcelona Traction Case* that obligations *erga omnes* may derive from the 'principles and rules concerning the basic rights of the human person',⁶⁹ Ragazzi focuses on human rights as the most likely source of new obligations. He also considers the law of development and international environmental law, but considers human rights law the 'privileged domain for the evolution of the concept of obligations *erga omnes*'.⁷⁰ Thus the most widely accepted examples of obligations owed *erga omnes* remain only those expressly referred to in the *Barcelona Traction Case*, with the possible addition of the right to self-determination.⁷¹

2 The Development of Norms of Jus Cogens

The ILC, as part of its successive attempts to conclude the *VCLT*, stated in relation to the concept of peremptory norms that 'there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*'.⁷² Norms of *jus cogens* hold the highest position in the hierarchy of international norms, and this status provides the peremptory and non-derogable

⁶⁷ Ibid 133.

⁶⁸ Ibid 133–4 (footnotes omitted). On the same pages, Ragazzi, in supporting this statement, refers to the two opening paragraphs of the *UN Charter*, in which the 'Peoples of the United Nations' are determined to 'save succeeding generations from the scourge of war' and to 'reaffirm faith in fundamental human rights'.

⁶⁹ *Barcelona Traction Case* [1970] ICJ Rep 174, [34].

⁷⁰ Ragazzi, above n 64, 135. Ragazzi also notes, however, that the ICJ seems to have implicitly rejected the conclusion that 'the character *erga omnes* would inhere in all obligations deriving from international customary rules that protect human rights', by restricting its reference to *basic* human rights: at 145. Cf the discussion of this issue by Harris, above n 19, 837, who states: 'The list of kinds of state conduct that is regarded as so fundamentally unacceptable by the international society of states as to be contrary to rules of [*jus cogens*] and obligations *erga omnes* can be seen to be growing and to overlap substantially with the catalogue of acts prohibited by the customary international law of human rights'.

⁷¹ See below pt II(VIB).

⁷² ILC, 'Report of the International Law Commission to the General Assembly' [1966] vol II *Yearbook of the International Law Commission* 247, 247.

status of a *jus cogens* norm; what M Cherif Bassiouni calls ‘compelling law’.⁷³ The purpose of an international peremptory norm is ‘to protect overriding interests and values of the international community of States.’⁷⁴ Any provision contained in a treaty which infringes a norm of *jus cogens* infringes a fundamental interest of the international community and is therefore invalid.

Norms of *jus cogens* are defined in art 53 of the *VCCLT*. For the purposes of the *VCCLT*:

[A] peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Hannikainen identifies four criteria in art 53 for the identification of peremptory norms: they are norms of general international law; they are accepted by the international community of states as a whole; they are non-derogable; and they can only be modified by new peremptory norms.⁷⁵ To the four explicit criteria in art 53, Hannikainen adds a fifth: the universality of peremptory obligations. Hannikainen suggests that the purpose of *jus cogens* — to protect certain overriding interests and values of the international community of states — can only be fulfilled if peremptory norms are owed ‘by all States and other subjects of international law to the international community of states.’⁷⁶

It is evident that the definition of a peremptory norm is rather imprecise and, at first glance, rather circular. In this respect, art 53 of the *VCCLT* and former art 19(2) of the Draft Articles have something in common. While art 53 of the *VCCLT* describes peremptory norms as non-derogable and modifiable only by a norm of the same character, the definition does not provide a method to determine the *existence* of a peremptory norm. The qualifying criterion of acceptance and recognition of the non-derogable status of a norm by the ‘international community of states as a whole’ would obviously require evidence of consistent state practice supported by *opinio juris*. While some authors have argued that this renders the sources of norms of *jus cogens* the same as that of customary international law⁷⁷ or even general principles of law,⁷⁸ others argue that the distinguishing character of peremptory norms is their acceptance as *non-derogable* legal principles.⁷⁹ The standard at which a norm may be accepted is

⁷³ M Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligatio Erga Omnes’ (1996) 59 *Law and Contemporary Problems* 63, 67.

⁷⁴ Hannikainen, above n 54, 4.

⁷⁵ *Ibid* 3.

⁷⁶ *Ibid* 6.

⁷⁷ Anthony D’Amato, *The Concept of Custom in International Law* (1969) 132.

⁷⁸ See, eg, *Statute of the International Court of Justice*, above art 9, which provides that general principles of law are to be derived by selecting concepts recognised by all systems of municipal law — the court should be representative of the ‘main forms of civilisation and of the principal legal systems of the world.’ For a development of this argument, see M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd ed, 1999) 210.

⁷⁹ See, eg, Hans Kelsen, *Principles of International Law* (1952) 408–38.

different from the standard required to hold that a norm protects a fundamental interest in international society that under no circumstances may be violated. According to Gaja, however, what determines the status of a peremptory norm is not non-derogability *per se*, but the ‘explicit acceptance and recognition of the norm as peremptory and not the mere acceptance of a rule as binding in the sense of art 38’ of the *VCLT*.⁸⁰

The concept of *jus cogens* is becoming increasingly prevalent in both state practice and academic literature. However, there is a lack of consensus as to which international legal principles constitute peremptory norms.⁸¹ It is generally accepted that the prohibition against the threat or use of force⁸² and the principle of *pacta sunt servanda* are norms of *jus cogens*.⁸³ Bassiouni contends that legal literature also supports the characterisation of aggression, genocide, crimes against humanity, war crimes, piracy, slavery and torture as norms of *jus cogens*.⁸⁴

3 *The Relationship between Norms of Jus Cogens, Obligations Owed Erga Omnes and International Crimes*

Some commentators argue that all norms of *jus cogens* are necessarily owed *erga omnes* due to the manner in which they come into existence, namely by their acceptance and recognition by the international community of states as a whole. Alternatively, Ragazzi submits that a precondition for the emergence of a principle of international law as an obligation owed *erga omnes* is its acceptance as a norm of *jus cogens*.⁸⁵ Bassiouni agrees that *erga omnes* ‘is a consequence of a given international crime having risen to the level of *jus cogens*. It is not, therefore, a cause of or a condition for a crime’s inclusion in the category of *jus cogens*.’⁸⁶

The relationship between the two concepts has never been clearly articulated by the ICJ. In the absence of judicial clarification, tying the two concepts too closely together should be avoided. It is possible, however, to state confidently that ‘both peremptory rules and obligations *erga omnes* are meant to protect basic moral values, and they both require significant support within the international community.’⁸⁷

⁸⁰ Gaja, above n 49, 46.

⁸¹ Ivan Shearer, *Starke’s International Law* (11th ed, 1994) 48–50; Spinedi, above n 6, 135–7; Gaja, above n 49, 158. See also Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, above n 73, 67–72.

⁸² *UN Charter* art 2(4). See also the ICJ’s discussion in *Nicaragua* [1986] ICJ Rep 14, 190.

⁸³ *VCLT*, above n 53, art 26. See also Shearer, above n 81, 49.

⁸⁴ Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, above n 73, 68.

⁸⁵ Ragazzi, above n 64, 181.

⁸⁶ Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, above n 73, 73.

⁸⁷ Ragazzi, above n 64, 189.

Harris believes that the concepts of *jus cogens*, *erga omnes* and the criminal responsibility of states are to a large degree used to describe similar conduct. He states that:

[A] treaty to commit genocide would be invalid as contrary to [*jus cogens*], and acts of genocide by a state would both be a breach of an obligation owed to all other states *erga omnes* and engage the criminal responsibility of the state.⁸⁸

In characterising the relationship between these three concepts, Harris implies an important distinction. While a treaty concluded to commit acts of genocide will *prima facie* be contrary to a norm of *jus cogens*, a breach of an obligation owed *erga omnes* and the criminal responsibility of that state will only be engaged upon the *act* of genocide. Applying this distinction to international crimes, it is obvious that the responsibility of a state will only be engaged once the crime (whether by act or omission) has been committed. The mere potential to commit an international crime will not engage the responsibility of a state; former art 19 was not designed to pre-empt state actions. Thus the point at which the law of state responsibility for international crimes would become operative under former art 19 differs from the point at which peremptory norms become operative under art 53 of the *VCIL*.

If we return to the idea that the basic purpose underlying the ILC's original discussion of the notion of international crimes was to attach additional consequences to internationally wrongful acts recognised by the international community as 'crimes', we are reminded of the need for a breach to occur before responsibility is engaged. Thus a distinction may exist between the concepts of international crimes and norms of *jus cogens* — the former requires evidence of a breach, while for the latter the possibility of a breach is sufficient.

4 *The Relationship between International Crimes and Serious Breaches of Obligations Owed to the International Community*

It is obvious from the above discussion that the concept of international crimes informs art 41 of the Draft Articles. Much of the language of art 19(2) of the Former Draft Articles — which defined international crimes — has been retained. According to former art 19(2) an international crime results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community. A 'serious breach', as defined in art 41, arises where there is gross or systematic failure to fulfil an obligation owed to the international community as a whole, and is essential for the protection of its fundamental interests.

Importantly, the formulation used in art 41 draws heavily on the traditional expressions of obligations owed *erga omnes* and norms of *jus cogens*. If it is accepted that these two concepts underpin the notion of international crimes,

⁸⁸ Harris, above n 19, 837.

then Special Rapporteur Crawford is perhaps understating the matter when he says that art 41 ‘embod[ies] the values underlying former Article 19’.⁸⁹ Further, the original justification for introducing a hierarchy of responsibility was the need to attach additional consequences to particularly grave breaches of international law. This gave rise to the international crime–delict dichotomy and can be seen as the fundamental basis for the replacement of international crimes with the concept of serious breaches of international obligations. Thus there appears to be an implicit acceptance by the ILC of the need for a hierarchy of responsibility, whether couched in terms of serious breaches of international obligations or crimes. Although all direct references to ‘international crimes’ have been removed from the Draft Articles, the prolonged debates on former art 19, together with the associated development of international legal principles, all dictate that the concept of international crimes will inevitably inform art 41.⁹⁰

IV STATE RESPONSIBILITY FOR AIDING THE COMMISSION OF INTERNATIONALLY WRONGFUL ACTS

It is contended in this article that just as criminal law makes no distinction between the culpability of a principal offender and that of an aider or abettor, those states that assist or are complicit in the commission of a breach of an international obligation owed to the international community as a whole should, be held responsible along with the state directly responsible. The reality of modern warfare and international ‘diplomacy’ means that battles are rarely fought or won by the immediate parties to the conflict alone. Sometimes this situation is overtly recognised. However, the pursuit of foreign policy objectives has on numerous occasions been far more insidious. The actions of the United States in Nicaragua,⁹¹ Guatemala⁹² or even Chile,⁹³ as well as those of the Soviet

⁸⁹ Crawford, Bodeau and Peel, above n 25, 673.

⁹⁰ The ILC noted that if no references to ‘crime’ were retained in the Draft Articles, a study of international crimes could be included in the Commission’s long-term programme of work: *2000 ILC Report*, above n 5, [360].

⁹¹ *Nicaragua* [1986] ICJ Rep 14.

⁹² See generally Rainer Grote, ‘The United Nations and the Establishment of a New Model of Governance for Central America: The Case of Guatemala’ in Jochen Frowein and Rudiger Wolfrum (eds), [1998] *Max Planck Yearbook of United Nations Law* vol 2, 239. See also *Commission for Historical Clarification, Guatemala: Memory of Silence* (24 February 1999), cited in Nehal Bhuta, ‘Justice without Borders? Prosecuting General Pinochet’ (1999) 23 *Melbourne University Law Review* 499, 502.

⁹³ See, eg, United States Senate, *Covert Action in Chile, 1963–1973: Staff Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 94th Congress, 1st Session, 1975; United States Congress, Committee on Foreign Affairs, *United States & Chile during the Allende Years, 1970–3*, 94th Congress, 1st Session, 1975.

Union in various states⁹⁴ throughout the Cold War, all serve as reminders that the appearance of a conflict often belies its reality.

The prevalence of examples of a state's 'participation' in the commission of an internationally wrongful act by another state has been the stimulus for the incorporation in the Draft Articles of provisions referring to such complicity.⁹⁵ Article 16 (art 27 in the Former Draft Articles) states:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

Article 17 is framed in the same terms, but deals with situations where a state 'directs and controls' another state's commission of an internationally wrongful act. Article 18 also deals with coercion in the same terms.

Subparagraph (b) of arts 16–18 makes it clear that if the aid or assistance given by a state is in reality an instance of direct responsibility, then that state will be responsible as the primary offender. Thus if it can be shown that the breach was perpetrated by more than one state, or if there is parallel attribution of a single course of conduct to several states, then those states involved will be directly responsible under part one of the Draft Articles, or if serious, under art 41. Where the level of a state's participation constitutes direction or control

⁹⁴ In relation to Afghanistan in 1978–79 approximately 100 000 Soviet troops entered Afghanistan and assisted the Afghanistan army to fight guerrilla troops opposed to the Soviet-backed government. See the General Assembly resolution condemning the Soviet Union's intervention: GAOR (6th emer spec sess, Supp No 1), UN Doc A/ES-6/7 (1980). The vote was 104 in favour, 18 against, with 18 abstentions. The Security Council, prior to the meeting of the General Assembly, had drafted a resolution deploring the Soviet Union's intervention and calling for the withdrawal of their troops. However, the resolution was, of course, vetoed by the Soviet Union. In relation to Hungary, see generally: *Report of the UN Special Committee on the Problem of Hungary*, 11 UN GAOR, Supp 18, UN Doc A/3592 (1957); see also, 11 UN GAOR, UN Doc A/SPC/SR.41, 189 (1957), which rejected the Soviet argument that the ground for intervention — a 'spontaneous national uprising' — was caused by ex-Nazi leaders and the supply of arms by Western powers.

⁹⁵ In drafting the rules concerning the implication of a state in the internationally wrongful act of another, the ILC agreed on certain essential elements of the basic general rule:

- 1 the aid or assistance must have the effect of making it *materially* easier for the State receiving the aid or assistance in question to commit an internationally wrongful act;
- 2 the aid or assistance must have been rendered with the *intent* to facilitate the commission of that internationally wrongful act by another;
- 3 the conduct by which a State thus participates in the commission by another State of an internationally wrongful act against a third subject must be characterized as *internationally wrongful precisely by reason of such participation*, even in cases where, in other circumstances, such conduct would be internationally lawful;
- 4 the internationally wrongful act of participation through aid or assistance for the commission of an internationally wrongful act by another *must not be confused with this principal offence, and consequently the international responsibility deriving from it must remain separate from that incurred by the State committing the principal offence*.

ILC, 'Report of the International Law Commission on the Work of its 30th Session', [1978] *Yearbook of the International Law Commission* vol II, pt II, 104 ('1978 ILC Report').

over the primary offender, however, the responsibility of the participating state will be engaged under art 17.

Where one state advises or incites another state to commit a breach of an international obligation incumbent on the latter, the ILC does not consider such a course of action to be ‘participation’ in the breach.⁹⁶ Where incitement or advice is accompanied by pressure or coercion, however, such measures cannot remain legally neutral. The ILC concluded that the definition of coercion includes the use or threat of armed force and may include some forms of economic pressure.⁹⁷ The definition accepted does not affect the ILC’s conclusion that there can be ‘no question of attributing to the State that exercises the coercion a share in the wrongful act committed by another State under the effect of that coercion.’⁹⁸ This is because the ‘coercing’ state is implicated so far as ‘to compel the will of the State it coerces, to the point of constraining it to decide to commit an international offence that it would not otherwise commit, and obliging it to behave, in the given case, as a State deprived of its sovereign decision-making capacity.’⁹⁹ Such a situation is envisaged in new art 18 and may be considered an instance of ‘indirect’ responsibility of the participating state.

The final situation considered by the ILC is the case where one state provides aid or assistance to another state in order to facilitate the commission by the latter of an internationally wrongful act. The ILC’s commentary refers to the fact that cases such as these can be defined as ones of ‘complicity’ — the situation where one state facilitates, ‘by its own action, the commission by the other State of the internationally wrongful act in question.’¹⁰⁰ Examples given by the ILC of conduct falling within the ambit of former art 27, and therefore the ambit of new art 16, include the provision of transport, military personnel or weaponry in order to commit an act of aggression, and ‘the provision of weapons or other supplies to assist another State to commit genocide, to support a régime of

⁹⁶ ‘[M]ere incitement of one State by another to commit an internationally wrongful act cannot fulfil the conditions required for its characterization as “participation” in that wrong, in the legal meaning of the term, and therefore will not, as such, have legal status and consequences’: *Ibid* [100].

⁹⁷ *Ibid* [101].

⁹⁸ *Ibid*.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid* [102].

apartheid, or to maintain colonial domination by force.¹⁰¹ The ILC makes clear that assistance is not limited to serious breaches of international obligations; the provisions on secondary responsibility apply regardless of the severity of the internationally wrongful act. Although, it should be noted that the consequences of participation will necessarily vary according to the gravity of the breach and degree of participation. Further, the aid or assistance may take the form of material provisions, or legal or political assistance, such as the conclusion of a treaty enabling the commission of the internationally wrongful act.

The ILC's restrictive interpretation of the articles relating to responsibility in respect of the act of another state would seem to constrain the situations in which arts 16–18 will be applicable, thereby allowing many instances of participation in an internationally wrongful act be unaffected by the law of state responsibility. As the commentary to former art 27 makes clear, it must be *proved* that the aid or assistance provided was intended to facilitate the commission of the internationally wrongful act; intention cannot be presumed.¹⁰² As de Hoogh points out:

This in turn means that it is not enough that a State providing aid or assistance is aware that it could be used (eventually) for unlawful purposes, but rather that it should have knowledge of the intention of the receiving State to use such aid or assistance for the commission of an internationally wrongful act.¹⁰³

¹⁰¹ Ibid [102]. In relation to aggression, see General Assembly Resolution on the Definition of Aggression, GA Res 3314, 29 UN GAOR, Supp No 31, UN Doc A/963 (1974), art 3(f) ('Resolution 3314'). The issue of complicity in an act of aggression in relation to East Timor will be discussed in pt II. In relation to genocide, see the *Genocide Convention*, above n 41, art 3, which includes complicity in the list of punishable acts. In relation to apartheid, see *Convention on the Suppression and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 1015 UNTS 243, art 3 (entered into force 18 July 1976), which provides for the criminal responsibility of individuals, including representatives of the State, who conspire in the commission of acts of apartheid. In relation to the maintenance of colonial domination by force, the denial of the right to self-determination is considered a violation of both a peremptory norm and an obligation owed *erga omnes*: see *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90. The issue of complicity in the denial of the right to self-determination in relation to East Timor will be discussed in pt II below.

¹⁰² *1978 ILC Report*, above n 95, [104]. Crawford concludes '[s]o far as the element of "intention" is concerned ... the relevant State organ(s) must have been aware that the conduct in question was planned, and must further have intended, by the assistance given, to facilitate its occurrence': ILC (James Crawford, Special Rapporteur), *Second Report on State Responsibility: Addendum* (1999), UN Doc A/CN.4/498/Add.1, [178] ('*Second Crawford Report*'). Crawford attempts, in proposing that the test of intention in former art 27 be 'with knowledge of the circumstances of the internationally wrongful act', to clarify the level of awareness necessary to a finding of responsibility of the assisting state: at [186]. However, the *1999 ILC Report*, above n 9, [258], noted many problems in this formulation of intention:

Did it mean that the assisting State must have the intention of facilitating the commission of the internationally wrongful act, or was it sufficient that it had knowledge of the fact that the assisted State would use the aid or assistance to commit an internationally wrongful act? What should be done in cases of uncertainty, e.g., where there was a risk that the assisted State would so act, but it was not certain?

¹⁰³ De Hoogh, above n 63, 125.

A *Proving an Intention to Facilitate the Commission of an Internationally Wrongful Act*

It is not the aim of this paper to engage in a debate about the practical problems of proving the intention of a state (or its organs) in relation to the commission by another state of an internationally wrongful act. However, a few issues are worth mentioning as they arise in relation to the case studies in Part II of this paper. A state wishing to obtain reparation carries the burden of establishing that the ‘participating’ state did intend to facilitate a breach of an international obligation by the other state. Given that decisions regarding the provision of aid or assistance to another state will presumably be made by government officials, it is unlikely that evidence of intent will be proved easily. How does an injured state ascertain whose intention is relevant? Furthermore, it would appear by implication that the high threshold requirements contained in the ‘participation provisions’ (‘with knowledge of the circumstances of the internationally wrongful act’) demand a criminal standard of proof. Thus the burden of proof carried by the injured state is a heavy one. These issues and others will be dealt with more fully in Part II of this paper.

PART II: RESPONSIBILITY FOR THE COMMISSION OF
CRIMES IN EAST TIMOR

The story of what happened in East Timor ... is not a pretty tale. It is a shameful story of a cruel conspiracy against a small and vulnerable people, an episode marked by deceit, hypocrisy, mendacity, and plain irresponsibility. Many would prefer it not to be told, but the truth must be brought out.¹⁰⁴

The intervention of a major power (overtly or otherwise) in the affairs of other states was common to many of the local or regional conflicts that occurred during the Cold War. The actions of the United States in Central America,¹⁰⁵ or those of the Soviet Union in Afghanistan¹⁰⁶ and Hungary,¹⁰⁷ provide well-documented examples of this fact. Some of these interferences are only now being atoned for, no longer justifiable under the rubric of Cold War politics. The case of East Timor provides an interesting example of a small, impoverished country being seen as a disposable victim of the fight against communism. The West’s need for a non-aligned power in South-East Asia made Suharto’s Indonesia the recipient of extensive military, financial and logistical support.¹⁰⁸ Both Australia and the United States were implicated in the Indonesian

¹⁰⁴ James Dunn, *Timor: A People Betrayed* (1983) xiii.

¹⁰⁵ See above nn 91–3 and accompanying text.

¹⁰⁶ See above n 94 and accompanying text.

¹⁰⁷ See above n 94 and accompanying text.

¹⁰⁸ Dunn, *Timor*, above n 104.

incorporation of East Timor.¹⁰⁹ However, neither has admitted responsibility for the devastating consequences of the intervention for the East Timorese people.

After providing a brief history of the situation in East Timor, the responsibility of both Australia and the United States for assisting in the commission of a serious breach of an international obligation — as defined under art 41 of the Draft Articles — will be assessed. There are two main aims in applying the Draft Articles to the actions of the United States and Australia regarding East Timor: firstly, to assess the adequacy (and deficiencies) of the Draft Articles, in particular arts 16 and 41; and secondly, to contrast the application of the articles to two different situations — one involving an omission (the denial of a people's right to self-determination), and the other a positive action (the supply of arms).

V A BRIEF HISTORY OF EAST TIMOR

The island of Timor lies 400 miles from Australia's north-west coast, at the tip of the Indonesian archipelago. Despite war, famine, disease, forced migration and large numbers of refugees, the estimated population of East Timor is 800 000.¹¹⁰ In September 1999, 25 years after the exit of the Portuguese colonial administration and the subsequent incorporation of East Timor into Indonesia, the East Timorese people voted overwhelmingly in favour of independence.¹¹¹ The region descended into violence soon after the announcement of the referendum result. After the declaration of martial law in East Timor the Indonesian military was unable — or unwilling — to control the violence, and President B J Habibie agreed to the introduction of the International Force in East Timor ('InterFET'), a multinational force under the auspices of the United Nations. On 25 October 1999 the United Nations Security Council established the United Nations Transitional Administration in East Timor ('UNTAET'), with

¹⁰⁹ As will be discussed in pt II(VI) of this paper, Australia's involvement centred on providing political support and assistance to Indonesia. This facilitated the forcible denial of the East Timorese people's right to self-determination. As will be discussed in pt II(VII) of this article, the involvement of the United States stems from its extensive provision of military supplies to the Indonesian army before, during, and after the 1975 invasion of East Timor by Indonesia.

¹¹⁰ See generally Security Council, *Political Developments, Killing of UN Peacekeeper, Plight of Refugees, Discussed in Security Council Meeting on East Timor*, Press Release, No SC/6902 <<http://www.un.org/Depts/unsd/mbs/01/626.htm>> at 18 May 2001 (copy on file with author).

¹¹¹ In the UN conducted 'Popular Regional Assembly' (with the consent and assistance of the Portuguese and Indonesian governments) 78.5 per cent of the East Timorese people voted against becoming an autonomous region within the Republic of Indonesia, favouring independence instead: UN Secretary-General, *People of East Timor Reject Proposed Special Autonomy, Express Wish to Begin Transition to Independence, Secretary-General Informs Security Council*, Press Release, UN Doc SG/SM/7119 (3 September 1999). The result was all the more astonishing given a concerted campaign of intimidation and terror orchestrated by pro-Jakarta elements within East Timor: see, eg, Noam Chomsky, 'East Timor Retrospective', 13 October 1999, <<http://www.zmag.org/CrisesCurEvts/Timor/etretrospective.htm>> at 18 May 2001 (copy on file with author).

a mandate including the provision of security and maintenance of law and order, the establishment of an effective administration, and the coordination and delivery of humanitarian assistance, rehabilitation and development assistance.¹¹² In early 2000 InterFET began the military handover to UNTAET, and officially transferred military control on 23 February 2000.¹¹³ However, the time it takes to move towards an independent East Timor is time well spent when compared to the years of subordination and alien rule under which the East Timorese have suffered.

A *Portuguese Rule*

The Portuguese discovered Timor in the early 18th century and shortly after took control of the eastern part of the island. The western part of Timor was administered by the Dutch, along with the majority of what is now the Republic of Indonesia. Both the Dutch and Portuguese carried on a 'flourishing slave trade' in Timor well into the 19th century.¹¹⁴ When Dutch colonial rule ended with Indonesian independence in 1949, West Timor became part of Indonesia and East Timor remained under Portuguese control. Portugal was hardly a paragon of virtue as a colonial ruler: forced labour, torture and intimidation were all used by the administration as methods for maintaining control.¹¹⁵ The dictatorial Salazar regime in Portugal invested little money in developing the colony's infrastructure or economy, and East Timor remained heavily dependent on imports and direct aid.¹¹⁶ Furthermore, Portugal refused to comply with UN policy regarding the administration of non-self-governing territories and did not submit reports to the UN Committee of Twenty-Four for any of its colonies as required by the *UN Charter*.¹¹⁷ Portugal did not admit that any of its overseas colonies were non-self-governing territories, referring to them instead as part of Portugal's metropolitan territory and therefore not subject to the provisions of the *UN Charter*.¹¹⁸ The political stalemate between the UN and Portugal continued until the Portuguese revolution of April 1974 ended Salazar's dictatorial rule. The new Portuguese Government accepted its *UN Charter* obligations and recognised its colonies' right to self-determination.¹¹⁹ Despite

¹¹² SC Res 1272, 54 UN SCOR (4057th mtg), UN Doc S/RES/1272 (1999).

¹¹³ United Nations, *United Nations Transitional Administration in East Timor: A Chronology*, <<http://www.un.org/peace/etimor/Untaetchronology.html>> at 18 May 2001 (copy on file with author).

¹¹⁴ Jill Jolliffe, *East Timor: Nationalism and Colonialism* (1978) 23.

¹¹⁵ *Ibid* 43–5.

¹¹⁶ *Ibid* 53–4.

¹¹⁷ *UN Charter* art 73(e) provides '[m]embers of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government' must 'transmit regularly to the Secretary-General ... statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are respectively responsible'.

¹¹⁸ Roger Clark, 'The "Decolonisation" of East Timor and the United Nations Norms on Self-Determination and Aggression' (1980) 7 *Yale Journal of World Public Order* 2, 3.

¹¹⁹ *Ibid* 5.

the recognition of the East Timorese people's right to self-determination, Portugal had completely withdrawn administration from the island by mid-1975, and displayed neither the will nor the means to implement a decolonisation process on the island.¹²⁰

B *Decolonisation, Invasion and Incorporation*

Upon the exit of Portugal, political turmoil engulfed East Timor. On 28 November 1975 the *Frente Revolucionaria de Timor Leste Independente* ('FRETILIN') unilaterally declared the country's independence.¹²¹ The declaration received no recognition from the international community.¹²² On 7 December 1975 10 000 Indonesian troops entered the island and attacked the capital, Dili. In the year that followed the invasion, an estimated 100 000 people were killed by Indonesian troops.¹²³ The Indonesian invasion was condemned in a series of UN Resolutions, from both the Security Council¹²⁴ and the General Assembly.¹²⁵ However, both the General Assembly and the Security Council refrained from calling the Indonesian invasion a breach of art 2(4) of the *UN Charter*. Prior to the recent negotiations regarding the referendum in East Timor and the introduction of a multinational force to restore peace and security in the region, the UN had not passed a substantive resolution on East Timor since 1982.

¹²⁰ Lord Avebury, 'A Positive Legal Duty: The Liberation of the People of East Timor' in Donald Clark and Roger Williams (eds), *Self-Determination: International Perspectives* (1996) 214, 215–16.

¹²¹ Jolliffe, above n 114, 212.

¹²² *Ibid* 217.

¹²³ Arnold Kohen and John Taylor, *An Act of Genocide: Indonesia's Invasion of East Timor* (1979) 45–6.

¹²⁴ Security Council Resolution 384 (unanimous) requested the Secretary-General to 'send urgently a special representative to East Timor for the purpose of making an on-the-spot assessment of the existing situation': SC Res 384, 30 UN SCOR, UN Doc S/Res/384 (1975). The special representative's efforts proved ineffective due to communication and transportation difficulties exacerbated by the Indonesian and Australian Governments: Jolliffe, above n 114, 276–7.

¹²⁵ The UN General Assembly first considered the issue of Indonesia's invasion on 12 December 1975 with Resolution 3485, which demanded the withdrawal of Indonesian troops and respect for East Timor's right to self-determination and independence: GA Res 3485, 30 UN GAOR, UN Doc A/Res/3485 (1975). The resolution was adopted by a vote of 72 in favour to 10 against, with 43 abstentions. Australia voted in favour of the resolution and the United States abstained. Resolutions condemning Indonesia's actions were passed at each subsequent session of the General Assembly until 23 November 1982. However, the majorities declined over time as did active support: see, eg, GA Res 31/53, 31 UN GAOR, UN Doc A/31/362 (1976) (68 in favour, 20 against, with 49 abstentions); GA Res 32/24, 32 UN GAOR, UN Doc A/32/357 (1977) (67 in favour to 26 against, with 47 abstentions); and GA Res 37/30, 37 UN GAOR, UN Doc A/37/51 (1982) (50 in favour, 46 against, with 50 abstentions). See also GA Res 33/39, 33 UN GAOR, UN Doc A/33/455 (1978); GA Res 34/40, 34 UN GAOR, UN Doc A/34/46 (1979); GA Res 35/27, 35 UN GAOR, UN Doc A/35/48 (1980); GA Res 36/50, 36 UN GAOR, UN Doc A/36/51 (1981).

As the new ‘administering power’ in East Timor, Indonesia should have adhered to UN General Assembly Resolutions 1514¹²⁶ and 1541.¹²⁷ Resolution 1514 provides that ‘[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’ Principle VI of Resolution 1541 provides the legal measure of independence:

A non-self-governing territory can be said to have reached a full measure of self-government by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.

In purported compliance with UN requirements, Indonesia held a ‘Regional Popular Assembly’ in East Timor in May 1976.¹²⁸ The Indonesian Government claimed that the Assembly was ‘elected and composed [of] representatives from all districts of East Timor’.¹²⁹ In reality, only five of the 37 members were elected.¹³⁰ On 31 May 1976 the ‘Regional Popular Assembly’ unanimously requested integration with Indonesia and consequently East Timor was effectively incorporated into Indonesia in July 1976.¹³¹ Despite ongoing FRETILIN military activity and political activism, this situation in East Timor persisted until the end of the Suharto regime in May 1998. Soon after he was instated, President Habibie stated his intention to move towards granting ‘special status’ to East Timor within the Republic of Indonesia. Diplomatic ties with Portugal were restored and the two governments began negotiating a solution to the seemingly intractable problem East Timor posed for both sides.¹³² A referendum was finally proposed, and the subsequent vote in favour of independence was a major step forward for the people of East Timor in completing their decolonisation process.

VI AUSTRALIA’S COMPLICITY IN THE DENIAL OF THE EAST TIMORESE PEOPLE’S RIGHT TO SELF-DETERMINATION

A *Australia’s Involvement in East Timor*

For most of the 20th century Australia has regarded the territory of East Timor as important to Australian defence. Indeed, it was an important battleground during World War II where Australian and East Timorese soldiers fought side by

¹²⁶ *Declaration on the Granting of Independence to Colonial Territories and Peoples*, GA Res 1514, 15 UN GAOR, UN Doc A/4684 (1960).

¹²⁷ GA Res 1541, 15 UN GAOR, UN Doc A/4684 (1960).

¹²⁸ Avebury, above n 120, 217.

¹²⁹ Indonesian News Special Issue, *Synopsis of Events in East Timor, Embassy of the Republic of East Timor* (5 December 1991) 19, cited in Avebury, above n 120, 217.

¹³⁰ Avebury, above n 120, 217.

¹³¹ *Ibid.*

¹³² Jolliffe, above n 114, 291.

side against the invading Japanese. However, Australia's interest in the events in East Timor waned at the end of the Vietnam War, partly due to the Australian public's desire for an end to military and non-military involvement in 'foreign wars'.¹³³ Thus when trouble began in East Timor in 1974 after the withdrawal of the Portuguese administration, Australia's policy was to act as a 'mere observer'. Officially, 'Australia was not a party principal in the future of East Timor'.¹³⁴ However, Jill Jolliffe and Jim Aubrey contend that this policy position was fabricated:

The reality was that, apart from the fact that Australia obviously stood to be affected by the outcome of events, *Australia was always a de facto party principal*, if only by virtue of the power it held to influence events in a different direction, but chose not to exercise.¹³⁵

Australia and Indonesia's relationship throughout the critical years in relation to East Timor has two important aspects. The first is the bilateral aid relationship, including military support and cooperation, which has steadily increased over the past 30 years. The second is the diplomatic relationship, the development of which is illuminated by Australian foreign policy regarding East Timor. Australian policy throughout the critical years of 1974–76 has recently been illuminated by the publication of *Australia and the Indonesian Incorporation of Portuguese Timor 1974-1976* ('*Timor Papers*') by the Australian Department of Foreign Affairs and Trade.¹³⁶

During President Suharto's first decade in power (1966–75), the Australian Government provided Indonesia with AU\$141 million in bilateral aid.¹³⁷ Additionally, Australian defence cooperation with Indonesia, including the training of Indonesian soldiers, also expanded throughout this period. As Aubrey notes, '[d]efence co-operation can include military aid, which ... is difficult to quantify financially.'¹³⁸ However, Aubrey states that estimates place military aid for the period 1972–80 at AU\$50.5 million, including the provision of a significant number of military aircraft, boats and the training of 1200 armed forces officers.¹³⁹

¹³³ Ibid 246.

¹³⁴ Ibid.

¹³⁵ Ibid (emphasis added); see generally Jim Aubrey, 'Viva Timor L'Este: Beyond Silence, Betrayal, Cowardice and Murder' (1999) 40 *Arena Magazine* 25.

¹³⁶ Australian Department of Foreign Affairs and Trade (Wendy Way (ed)), *Documents on Australian Foreign Policy: Australia and the Indonesian Incorporation of Portuguese Timor, 1974–1976* (2000).

¹³⁷ Aubrey, above n 135, 27, also states that for the 'period of 1975 until the 1998 fall of Suharto, Canberra has granted Jakarta \$1.8 billion'. Christine Chinkin notes that '[b]y 1974 Indonesia was the recipient of the largest sums of Australian development aid' and in 1976 the Australian Government announced an economic assistance package for Indonesia totalling AU\$86 million: Christine Chinkin, 'Australia and East Timor in International Law' in Catholic Institute for International Relations and International Platform of Jurists for East Timor, *International Law and the Question of East Timor* (1995) 269, 271.

¹³⁸ Aubrey, above n 135, 26.

¹³⁹ Ibid.

Australian foreign policy regarding East Timor has remained remarkably consistent despite the exit and entry of several governments from both sides of the political divide. Indeed, 'Australian governments all sought to influence the destiny of East Timor.'¹⁴⁰ Gough Whitlam, who was the Prime Minister during the period immediately preceding Indonesia's invasion of East Timor was known internationally as a champion of the right to self-determination for colonised territories.¹⁴¹ Yet, late in 1975 when Whitlam was asked what the Australian Government would do if Indonesia invaded East Timor, he replied: 'absolutely nothing'.¹⁴² Such an apparently contradictory position can perhaps be explained by the fact that the Canberra-Jakarta connection 'took on the character of a special relationship by the early 1970s, reaching its zenith in the first half of the Whitlam Government's term of office'.¹⁴³ The special importance of Australia's relationship with Indonesia continued for the duration of Whitlam's term and was consolidated under the Fraser Government. As this relationship developed, the importance of East Timor in Australian foreign policy receded, in part due to Suharto's repeated assurances that Indonesia had no territorial designs on the Portuguese colony.¹⁴⁴ In a paper prepared for the Australian Parliament in 1974, James Dunn advised against a 'blind' acceptance of the Indonesian position in relation to East Timor:

It may seem tempting to pander to those influential elements within Indonesia, who may wish to incorporate Portuguese Timor, in order to avoid the risk of endangering our present good relations with Jakarta. In the long term, however, this policy seems unlikely to serve Australian interests in the region ... A more positive course ... would be for Australia to seek Indonesia's cooperation in helping bring about the birth of the new state, if it becomes clear that complete independence is what the Timorese want.¹⁴⁵

The Australian Government did not embrace Dunn's recommendations regarding East Timor. Many reasons may be advanced, but the simplest and most enduring is that Whitlam was not interested in any situation capable of

¹⁴⁰ Ibid 25.

¹⁴¹ Prime Minister Whitlam, addressing the UN General Assembly in September 1974, stated '[r]efusal to recognise the inalienable rights of all people to freedom and independence produces tension and conflict, not only between the oppressed and the oppressors, but between other nations which become associated or involved in these just and legitimate struggles': *ibid* 27.

¹⁴² *Ibid* 26.

¹⁴³ Dunn, *Timor*, above n 104, 135. James Dunn was Australian Consul in East Timor from 1962-64 and worked for the Australian Department of Foreign Affairs for a number of years. In 1974 Dunn wrote that '[t]he Australian interest in the future of Timor is conditioned by our preoccupation with Indonesia which, as it were, dominates the foreground in the Australian foreign policy perspective': James Dunn, *Portuguese Timor before and after the Coup: Options for the Future* (27 August 1974), cited in Dunn, *Timor*, above n 104, 140-1.

¹⁴⁴ Dunn, *Timor*, above n 104, 135.

¹⁴⁵ Dunn, *Portugese Timor before and after the Coup*, above n 143.

complicating Australia's sensitive relationship with Jakarta.¹⁴⁶ This overriding policy premise remained a feature of Australian policy towards Indonesia and was a decisive factor in relation to East Timor. In June 1975 Richard Woolcott, Australian Ambassador to Jakarta, sent a dispatch to Don Willesee, Australian Minister for Foreign Affairs, stating his understanding that Australian policy in relation to Portuguese Timor was 'to be guided by the principle that good relations with Indonesia were of paramount importance to Australia.'¹⁴⁷

In September 1974 Whitlam, accompanied by the Australian Ambassador to Indonesia, Bob Furlonger, and his successor, Richard Woolcott, met with President Suharto to discuss, among other things, the future of Portuguese Timor. On a separate occasion they also met with Lieutenant-General Yoga Sugama, an aggressive advocate of the integration of East Timor.¹⁴⁸ The Indonesian Foreign Minister, Adam Malik, was not present; 'he was not a member of the inner group of generals who had in effect taken over all aspects of the handling of the Timor problem.'¹⁴⁹ Various accounts of the meetings, which are not disputed by Whitlam, reported that Australia had indicated a willingness to support the integration of East Timor into Indonesia.¹⁵⁰ The *Timor Papers* include a 'Record of Meeting between Whitlam and Soeharto on 6 September 1974' in which Whitlam is recorded as saying that in his view Portuguese Timor should become part of Indonesia and that this was 'not yet Government policy but that it was likely to become that.'¹⁵¹ Whitlam further noted that 'for the domestic audience in Australia, incorporation into Indonesia should appear to be a natural process arising from the wishes of the people.'¹⁵² Whitlam's policy position was clearly communicated to the Department of Foreign Affairs:

[T]he Prime Minister put his views on this subject frankly in the following way: 'I am in favour of incorporation but obeisance has to be made to self-determination.

¹⁴⁶ Within the Australian Department of Foreign Affairs, there appears also to have been 'consensus that the wishes of the Timorese were, in reality, secondary to the aspirations of the Indonesians, in this case a certain group of generals [within the Indonesian armed forces]': Dunn, *Timor*, above n 104, 141.

¹⁴⁷ 'Dispatch to Willesee' (2 June 1975) in *Timor Papers*, above n 136, 265, 267.

¹⁴⁸ Dunn, *Timor*, above n 104, 141–2.

¹⁴⁹ *Ibid* 142.

¹⁵⁰ See, eg, Hugh Armfield, 'Canberra Aim for Timor: Go Indonesia', *The Age* (Melbourne, Australia), 13 September 1974, 8; Peter Hasting, 'Whitlam Treads Dangerous Ground on Timor' *Sydney Morning Herald* (Sydney, Australia), 16 September 1974, 7; Hamish McDonald, *Suharto's Indonesia* (1980) 195. Note also that a former Minister in the Whitlam Government, John Wheeldan, among others, has consistently asserted that Whitlam indicated to Indonesia that Australia would not oppose the integration of East Timor: Chinkin, above n 137, 274, citing (1991) 62 *Australian Foreign Affairs Record* 760.

¹⁵¹ 'Record of Meeting between Whitlam and Soeharto' (6 September 1974) in *Timor Papers*, above n 136, 95, 95.

¹⁵² *Ibid* 96.

I want it incorporated but I do not want this done in a way which will create argument in Australia which would make people more critical of Indonesia.¹⁵³

It can be said that while Whitlam was insistent on there being a 'valid' act of self-determination to determine the future of Portuguese Timor, his overriding desire for the incorporation of the territory into Indonesia ensured that the concept could merely be paid 'lip service'.¹⁵⁴

The degree of influence Australian foreign policy had on Indonesia's actions in relation to East Timor will always be a matter of contention. However, the Portuguese Government viewed Australia's approach as having helped to 'reinforce integrationist tendencies within Indonesian political circles.'¹⁵⁵ On 14 October 1974 Frank Cooper (Australian Ambassador to Portugal) met with Major General Ali Murtopo (Head of Indonesian Special Operations). Cooper writes that:

Ali said that until Mr Whitlam's visit to Djakarta they had been undecided about Timor. However the Prime Minister's support for the idea of an incorporation into Indonesia had helped them to crystallise their own thinking and they were now firmly convinced of the wisdom of this course.¹⁵⁶

Australia's foreign policy towards East Timor changed little over the next year, despite an increase in parliamentary interest and public calls for increased accountability. A letter from Woolcott to Graeme Feakes (First Assistant Secretary, South Asia Division) recorded a discussion with Andrew Peacock, the future Australian Minister for Foreign Affairs. During this conversation, it appears that Woolcott convinced Peacock that 'an independent Timor [was] unlikely to be in anyone's long-term interests and that Australia's present interests [were] best served by a less obtrusive Australian stance and a measure of political disengagement from the issue.'¹⁵⁷ In August 1975 a now infamous cable was sent by Woolcott to the Department of Foreign Affairs. Woolcott stated at one point:

The situation in Portuguese Timor ... is going to be a mess for some time. From here I would suggest that our policies should be based on disengaging ourselves as far as possible from the Timor question; getting Australians presently there out of Timor; leave events to take their course; *and if and when Indonesia does intervene*

¹⁵³ 'Minute from Woolcott to Renouf' (24 September 1974) in *Timor Papers*, above n 136, 111, 111.

¹⁵⁴ Richard Woolcott is recorded as saying, 'I think it is certain that the Indonesians will now grasp the opportunity to put enough pressure on Fretilin to defeat it and to proceed with the integration of East Timor, albeit with some lip service thereafter to ascertaining the wishes of the people': 'Letter from Woolcott to Feakes' (3 December 1975) in *Timor Papers*, above n 136, 597, 597.

¹⁵⁵ Dunn, *Timor*, above n 104, 143.

¹⁵⁶ 'Cablegram to Canberra' (14 October 1974) in *Timor Papers*, above n 136, 119, 119.

¹⁵⁷ 'Letter from Woolcott to Feakes' (12 May 1975) in *Timor Papers*, above n 136, 259, 259.

*act in a way which would be designed to minimise the public impact in Australia and show privately understanding to Indonesia of their problems.*¹⁵⁸

Thus the Australian policy stance of disengagement from East Timor, and private sympathy with Indonesia, was fixed well before the Indonesian invasion of East Timor in December 1975.

This private sympathy for Indonesia's dilemma continued when the Australian leadership changed hands from Whitlam to Fraser late in 1975. It was acknowledged by Woolcott that 'the Government [was] facing a critical choice between ... our longer term foreign policy interests and what appear to be mounting domestic pressures to adopt attitudes or policies which would be contrary to those interests.'¹⁵⁹

The Indonesian invasion of East Timor on 7 December 1975 caused a public outcry in Australia.¹⁶⁰ Indonesia's use of force in Timor led to expressions of regret from within the Department of Foreign Affairs that more was not done to find a peaceful solution:

In retrospect, I think that those of us who have lived with the Timor situation for the past few months have all been so mindful of the overriding importance of our long term relations with Indonesia that it has in my view inhibited us too much in what we have said to the Indonesians. Had we, for example, pressed the Indonesians much harder on the question of talks, and made it clear that public opinion in Australia and elsewhere simply would not understand any failure of our joint efforts to get the parties together, we might have headed off the tragic sequence of FRETILIN's [Unilateral Declaration of Independence] followed by Indonesia's almost inevitable intervention.¹⁶¹

As early as February 1976, Australian policy makers appear to have been resigned to the fact that '[f]or practical purposes Australia is faced with an Indonesian *fait accompli*.'¹⁶² The Department of Defence guarded against supporting FRETILIN in any way — '[t]he strategic preference [was] for the territory's early integration into Indonesia.'¹⁶³

Australia's military, economic and diplomatic support for the Indonesian Government provides an interesting backdrop to Australia's subsequent decision to accord *de facto*,¹⁶⁴ and then *de jure*,¹⁶⁵ recognition to Indonesia's control of

¹⁵⁸ 'Cablegram to Canberra' (17 August 1975) in *Timor Papers*, above n 136, 313, 314 (emphasis added).

¹⁵⁹ 'Cablegram to Canberra' (3 October 1975) in *Timor Papers*, above n 136, 444, 445.

¹⁶⁰ 'Cablegram to Canberra' (9 December 1975) in *Timor Papers*, above n 136, 611, 612.

¹⁶¹ 'Cablegram to Canberra' (10 December 1975) in *Timor Papers*, above n 136, 621, 622.

¹⁶² 'Department of Defence Paper' (4 February 1976) in *Timor Papers*, above n 136, 691, 696.

¹⁶³ *Ibid.*

¹⁶⁴ On 20 January 1978 the Australian Minister for Foreign Affairs, Andrew Peacock, announced Australia's decision to recognise Indonesia's *de facto* control of East Timor, *Australia Foreign Affairs Record* (January 1978) 46–7, cited in Timothy McCormack, 'Use of Force' in Harry Reicher (ed), *Australian International Law: Cases and Materials* (1995) 1035:

East Timor. This de jure recognition was continued by the Hawke Government, which came to power in 1983. According to Jill Jolliffe, from at least August 1975, 'Australian foreign policy towards East Timor was based on full knowledge of events in the territory.'¹⁶⁶ The *Timor Papers* reinforce this view, confirming that Australia was at all relevant times fully apprised of the Indonesian position. In the words of Robert Furlonger (former Ambassador to Jakarta) in 1974, 'we [were], in effect, being consulted' by Indonesia.¹⁶⁷

It is alleged, therefore, that in condoning the Indonesian position with respect to East Timor, Australia was complicit in the denial of a people's right to self-determination. In discussing the likely reaction of the Australian public to the recognition of Indonesia's forcible acquisition of East Timor, Cooper said '[i]f the Government now decides to recognise what it has previously condemned the question many people will ask is not whether we can live with it but whether we can live with ourselves.'¹⁶⁸ The moral culpability of successive Australian governments is unquestionable. Still to be determined — by the international community or, in the future, by the now independent East Timor — is Australia's *legal* responsibility.

A caveat must be placed on the preceding discussion of Australia's policy towards the future of Portuguese Timor. This paper does not set out to engage in a comprehensive analysis of the formation and implementation of Australian

Since November 1975 the Indonesian government has continued to extend its administrative control over the territory of East Timor. This control is effective and covers all major administrative centres of the territory. Accordingly, the government has decided that although it remains critical of the means by which integration was brought about it would be unrealistic to continue to refuse to recognise de facto East Timor as part of Indonesia.

165 On 14 February 1979 the Fraser Government accorded de jure recognition of Indonesian sovereignty over East Timor: Chinkin above n 137, 277. See also the statement made by the Australian Minister for Foreign Affairs, Andrew Peacock, on 15 December 1978 to the effect that 'Australia would give de jure recognition of the Indonesian takeover of East Timor early in 1979 on a date to be fixed, when talks on delineating the sea bed boundary between East Timor and Australia began': Peter Goldie, 'Family Reunion Moves "Not Linked": East Timor Takeover to be Recognised', *Canberra Times* (Canberra, Australia), 16 December 1978, 1. On 22 August 1985 the Hawke Government announced its intention to continue de jure recognition of Indonesian sovereignty over East Timor: 'East Timor: Recognition of Indonesian Control' (1985) 56 *Australian Foreign Affairs Record* 750–1. It should be noted that not long after according de jure recognition of Indonesia's integration of East Timor in 1979, Australia began negotiating a treaty for the joint exploration and extraction of sea bed resources (mainly gas) in the Timor Gap: *Treaty between Australia and Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, opened for signature 11 December 1989, Australia–Indonesia, 29 ILM 469 (entered into force 9 February 1991) ('*Timor Gap Treaty*'). For a discussion of both the *Timor Gap Treaty* and the ICJ proceedings brought against Australia by Portugal, see Jean-Pierre Le Fonteyne, 'The Portuguese Timor Gap Litigation before the International Court of Justice: A Brief Appraisal of Australia's Position' (1991) 45 *Australian Journal of International Affairs* 170.

166 Jolliffe, above n 114, 233.

167 'Letter from Furlonger to Feakes' (3 July 1974) in *Timor Papers*, above n 136, 62, 63.

168 'Cablegram to Canberra, Jakarta, Washington and New York from Cooper' in *Timor Papers*, above n 136, 834, 836.

foreign policy regarding Timor. The interplay of international diplomacy, national interest and political motivations in relation to East Timor weaves a complex web of issues. However, certain conclusions can be drawn. The policy preference of successive Australian governments for the integration of Portuguese Timor is clear. Whitlam's concern that there be 'obedience to self-determination' was recognised within the Department of Foreign Affairs as irreconcilable with the primary goal of integration, given the strong pro-independence stance of the East Timorese. Australia clearly communicated on numerous occasions its support for the incorporation of Portuguese Timor into Indonesia, and Indonesia believed it had Australia's tacit support for the achievement of this common goal.¹⁶⁹ The absolute constant in Australia's policy stance on Portuguese Timor was this: it attached overriding importance to relations with Indonesia and considered the wishes of the Timorese to be of secondary importance.

In assessing the extent to which Australia is legally responsible for the devastating consequences of the Indonesian invasion, it must be determined whether the denial of the East Timorese people's right to self-determination is a serious breach of an international obligation under art 41, and further, whether Australia's actions constitute assistance to Indonesia's commission of an internationally wrongful act under the Draft Articles.

B *The Denial of the Right to Self-Determination as a Serious Breach of an International Obligation*

In the Former Draft Articles, art 19 included the denial of the right of peoples to self-determination as one of the four examples of international crime.¹⁷⁰ The *1976 ILC Report* stated that the ILC was 'unanimous in selecting ... what today is an indisputable example of an international crime'.¹⁷¹ In surveying state practice in relation to the crimes listed in art 19(3) of the Former Draft Articles,¹⁷² Antonio Cassese concurs with the ILC that there is sufficient evidence supporting the categorisation of the denial of the right of self-determination 'accruing to peoples subjected to colonial domination, racist

¹⁶⁹ From at least October 1975, Australia received highly sensitive information from Indonesia detailing 'Indonesian plans for military involvement in Portuguese Timor': 'Submission to Willesee' (27 October 1975) in *Timor Papers*, above n 136, 516, 516.

¹⁷⁰ Former Draft Article 19(3)(b), provided an international crime may result from 'a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination'. In the 1976 Commentary to the Draft Articles, the ILC made clear that force need not necessarily be military force, but rather could be understood to mean 'against the will of the subject population, even if that will is not manifested, or has not yet been manifested, by armed opposition': *1976 ILC Report*, above n 44, [69].

¹⁷¹ *1976 ILC Report*, above n 44, [69].

¹⁷² Cassese, above n 45, 201. See also Gerry Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 *Stanford Journal of International Law* 255.

regimes or foreign occupation¹⁷³ as an international crime. The removal of art 19 from the Draft Articles makes the international crime–delict distinction less relevant. However, it does serve to highlight the fact that the right of peoples to self-determination is one of the few international obligations that are owed to the international community as a whole. A gross or systematic failure by a state to fulfil the obligation to accord the right to self-determination will undoubtedly constitute a serious breach for the purposes of art 41.

Indeed, at customary international law the *erga omnes* character of the right to self-determination in the context of decolonisation appears beyond dispute. In 1991 Portugal instituted proceedings against Australia, alleging that in concluding the *Timor Gap Treaty* with Indonesia, Australia violated the East Timorese people's right to self-determination. The ICJ stated that while it could not make a determination due to the absence of Indonesia — an essential party to the dispute — it was an 'irreproachable' fact that the right of peoples to self-determination 'has an *erga omnes* character ... [and] is one of the essential principles of contemporary international law.'¹⁷⁴

Whether self-determination beyond the context of peoples subject to colonial domination has attained the status of a peremptory norm remains unresolved. Self-determination is undeniably a principle of customary international law,¹⁷⁵ and there is extensive judicial support for the proposition that it also *jus cogens*.¹⁷⁶ The status of self-determination outside the colonial context is,

¹⁷³ Cassese, above n 45, 202.

¹⁷⁴ *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90, [29]. Portugal submitted in its memorial that self-determination was a right assertable *erga omnes*. This assertion was not contested by Australia and was applied by the Court in its judgment. The written pleadings are available at <<http://www.icj-cij.org/icjwww/icas/ipa/ipaframe.htm>> at 18 May 2001 (copies on file with author). For a discussion of the case, see Le Fonteyne, above n 165; Gerry Simpson, 'Judging the East Timor Dispute: Self-Determination at the International Court of Justice' (1994) 17 *Hastings International and Comparative Law Review* 323.

¹⁷⁵ State practice affirming the right as a principle of customary international law may be found in: the impact and widespread application of Resolution 1514, above n 126; additional General Assembly Resolutions, especially GA Res 2625, 25 UN GAOR, UN Doc A/8028 (1970); GA Res 1541, 15 UN GAOR, UN Doc A/4684 (1960); ratification of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, 6 ILM 368 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force 3 January 1976). See also Deborah Cass, 'Rethinking Self-Determination: A Critical Analysis of Current International Theories' (1992) 18 *Syracuse Journal of International Law and Commerce* 21, 27; Shearer, above n 81, 112.

¹⁷⁶ *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (Advisory Opinion)* [1975] ICJ Rep 16; *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12; *Frontier Dispute (Burkina Faso v Republic of Mali) (Merits)* [1986] ICJ Rep 554; *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90. For a discussion of the East Timorese people's right to self-determination as a norm of *jus cogens*, see Lauri Hannikainen, 'The Case of East Timor from the Perspective of Jus Cogens' in Catholic Institute for International Relations and International Platform of Jurists for East Timor, *International Law and the Question of East Timor* (1995) 103.

however, uncertain. Thus, in assessing the applicability of the regime of state responsibility for the commission of a serious breach of an international obligation to the East Timor situation, it is of vital importance to determine the rights of the East Timorese at international law.

Prior to the autonomy referendum in August 1999, there was the question of how to categorise the rights of the East Timorese. Many considered East Timor to be an example of incomplete decolonisation and thus susceptible to the exercise of the right of self-determination by its people. However, Indonesia maintained the East Timorese people *had* exercised this right in the Regional Popular Assembly held in 1976 favouring integration. The validity of this ballot has always been questioned at international law, despite forming the basis for *de facto* recognition by several States.¹⁷⁷ Regardless, the recent ballot, in exercise of a right to self-determination, leaves no doubt that the East Timorese never ceased to be subject to colonial domination. The colonial domination by the Portuguese was simply replaced by the Indonesian Government's forcible occupation of East Timor — an occupation prohibited at international law and a ground for invoking state responsibility under the Draft Articles.

A further question to be addressed is: was the denial of the East Timorese people's right to self-determination a 'serious breach', such that it raises the level of responsibility into the category of conduct contemplated by new art 41? It is clear that the Indonesian invasion of East Timor was forcible, both in military terms and in the sense that it was against the will of the subject population.¹⁷⁸ In addition, the series of General Assembly and Security Council resolutions demanding the withdrawal of Indonesian troops and respect for the East Timorese people's right to self-determination, make evident the extent of the international community's condemnation.¹⁷⁹ These factors alone suggest that the breach committed by Indonesia was grave enough to qualify as a serious breach of an international obligation.

C *Assessing Australia's Responsibility under the Draft Articles*

As discussed above, art 16 of the Draft Articles provides that aid or assistance provided by one state to another, rendered for the commission of an internationally wrongful act, invokes that state's international responsibility. The

¹⁷⁷ Most notable among these states is Australia: see above n 164 and accompanying text. It is not alleged here that Australia was subject to a duty of non-recognition in relation to East Timor. For a discussion of this doctrine, see generally John Trone, 'The Stimson Doctrine of Non-Recognition of Territorial Conquest' (1996) 19 *University of Queensland Law Journal* 160–4; Chinkin, above n 137, 279–82.

¹⁷⁸ See generally Kohen and Taylor, above n 123, 15; Averbury, above n 120, 217–18.

¹⁷⁹ See generally, above nn 124–5 and accompanying text.

question then becomes, did Australia assist in the commission or furtherance of Indonesia's internationally wrongful act?¹⁸⁰

The denial of a people's right to self-determination is not a 'once-off' act. Rather, colonial or foreign domination operates over a period of time. In the case of East Timor, foreign domination lasted for 25 years. Thus Australia's involvement can be considered in two contexts: firstly, the assistance in the initiation of the breach through the provision of political assistance; and secondly, the furtherance of the breach, particularly through the conclusion of the *Timor Gap Treaty*. There should be no substantive difference in the levels of responsibility entertained by either instance of involvement as both constitute complicity, as defined by the ILC. For the purposes of this paper, only Australia's responsibility for assistance in the initial invasion of East Timor by Indonesia will be assessed.¹⁸¹

In the year leading up to the Indonesian invasion of East Timor, Indonesia sought the support of Australia for any future actions in East Timor. Australian representatives, from ambassadors to Prime Ministers, were compliant with Indonesian demands that the question of East Timor be left to Indonesia to resolve. Prime Minister Whitlam accorded a higher importance to Australia's relationship with Jakarta than to the rights of the East Timorese, and personally indicated to senior Indonesian military officers and politicians that Australia would be willing to support the integration of East Timor into Indonesia. This was not a situation of incitement or coercion to commit an act, nor was it an instance of 'co-perpetration'. Therefore Australia cannot be said to have direct

¹⁸⁰ It is worth noting in this respect the dissenting opinion of Weeramantry J in *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90. Weeramantry J rejected Australia's argument that it had not breached any international obligations as there were neither express directions of the UN, nor prohibitions under general international law in relation to East Timor. Weeramantry J held instead that when an obligation is owed *erga omnes*, the test of performance of that international obligation is not only compliance with particular prohibitions it may contain, but also with its 'underlying norms and principles': *East Timor (Portugal v Australia) (Merits)* [1995] ICJ Rep 90, 102, 139. For a discussion of the implications of Weeramantry J's opinion, see Ragazzi, above n 64, 138–9.

¹⁸¹ It is also possible to argue that Australia was complicit in the furtherance of Indonesia's internationally wrongful act in negotiating and concluding the *Timor Gap Treaty*. In 1979 the Australian Government recognised Indonesian sovereignty in East Timor at law. This effectively paved the way for the negotiation and conclusion of the *Timor Gap Treaty*, as outlined previously: see further Simpson, 'The Diffusion of Sovereignty', above n 172; Le Fonteyne, above n 165. In the *1999 ILC Report*, above n 9, [253], the commentary to art 27 of the Former Draft Articles makes clear that 'aid or assistance' may include the conclusion of a treaty enabling the commission of the internationally wrongful act — here the continued denial of the right of the East Timorese to self-determination, including control over natural resources. The conclusion of the treaty effectively assisted Indonesia in continuing its 'foreign domination' of East Timor and represented to the international community Australia's recognition of the legality of the Indonesian invasion. In order to prove that Australia is responsible for assisting Indonesia in this way, it must be shown that Australia intended its assistance to facilitate Indonesia's internationally wrongful act. Once again, the problems associated with proving an intention to facilitate a wrongful act arise, with the predominant concern being the multiplicity of intentions to which Australia could point in concluding the treaty with Indonesia.

responsibility. However, the facts clearly reveal that Australia provided diplomatic support and political assistance to the integrationist elements within the Indonesian Government and military. Therefore the question of the subjective intention of Australian officials in supporting Indonesia is crucial.

As previously discussed, according to the ILC's commentary the strictest requirement of art 16 is that it must be proved that the assistance rendered was intended to facilitate the commission of the internationally wrongful act. What represents the intention of Australia in this case? Is it the collective will of the government as elected by the population, or is it that of several key governmental representatives? By applying the notion of control advanced in either *Nicaragua*¹⁸² or *Prosecutor v Tadic*,¹⁸³ it could be argued that the actions of any agent of a state may provide grounds for state responsibility,¹⁸⁴ especially

¹⁸² In *Nicaragua* the ICJ was concerned with the notion of control in the context of attribution of the actions of rebels to the United States. The ICJ required a high degree of control for a foreign state to be held responsible for violations of international law committed by rebels, and that two elements must be proved in this regard. Firstly, that the foreign state be in *effective control* of the de facto organs. Secondly, that the control be exercised *with respect to the specific operation* in the course of which the breaches may have been committed: [1986] ICJ Rep 14, [114]–[116].

¹⁸³ In *Prosecutor v Tadic* the Appeals Chamber of the ICTY held that as international humanitarian law does not contain unique criteria for the establishment of control over individuals considered to be de facto state organs, it was justified in looking beyond international humanitarian law for legal principles concerning 'control': 'This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials': Case No 94-IT-1-T (15 July 1999), 38 ILM 1518, [98]. The ICTY concluded that the standard of control required in *Nicaragua* was too high. Accordingly, 'the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions': at [145].

¹⁸⁴ It is not submitted that these two cases concern the same issues, as one is concerned with individual criminal responsibility and the other with state responsibility. The ICTY made clear in *Prosecutor v Tadic* at [104] that:

What is at issue is not the distinction between the two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a de facto organ of a State. Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as de facto State officials, thereby rendering the conflict international and thus setting the necessary precondition for the 'grave breaches' regime to apply[.]

where those actions are implicitly accepted by the government of the day.¹⁸⁵ This raises a further question — must intent be proved expressly or by implication? While the totality of the evidence does point to an intention to acquiesce, at bare minimum, in Indonesia's actions in East Timor, it may nonetheless be insufficient to meet the stringent evidentiary requirements of art 16.

A further but less significant factor in assessing Australia's complicity, is the requirement that 'the aid or assistance must have the effect of making it *materially* easier'¹⁸⁶ for the recipient state to commit the internationally wrongful act. To what extent did Australia's political assistance facilitate the international crime perpetrated by Indonesia in East Timor? The view that Australia's political stance provided encouragement to advocates of the Indonesian integration of East Timor has already been noted. The material impact of Australia's acquiescence in Portuguese Timor becoming 'Indonesian Timor' should not be underestimated. Australia, one of Indonesia's nearest neighbours and a Western democracy that claims to be committed to human rights, pledged, prior to the event, that it would not interfere in an invasion of East Timor. To regard these actions as immaterial in their effect on Indonesia is to deny both political and historical reality. The material effect of the 'assisting' state's actions appears not to be a particularly onerous requirement of the assistance provision. The more difficult hurdle is undoubtedly that of intention.

VII A CASE OF ASSISTED AGGRESSION? THE UNITED STATES MILITARY SUPPORT FOR THE INDONESIAN INVASION OF EAST TIMOR

A *United States Military Support to the Suharto Regime*¹⁸⁷

Like Australia, the United States has a long history of association with Indonesia.¹⁸⁸ From the time of Suharto's emergence as President after the military coup in 1965, the United States sought close economic ties with Indonesia, predominantly to ensure that there was a non-communist ally in the region.¹⁸⁹ Cold War tensions, and the later fall of Saigon, elevated the strategic

¹⁸⁵ Given that the statements and actions considered here all flow from government officials, the ICJ's discussion of declarations made by US authorities, which raise a contention of collective defence in relation to activities in Nicaragua, is instructive. The Court held that 'such declarations may involve legal effects' and that they may be seen as 'evidence that [such] facts are attributable to the States the authorities of which are authors of these declarations': *Nicaragua* [1986] ICJ Rep 14, [71]. For an extensive discussion of the 'Act of State' requirement under international law, see Hugh Thirlway, 'The Law and Practice of the International Court of Justice 1960–1989: Part 7' (1995) 66 *British Yearbook of International Law* 3, 38–96.

¹⁸⁶ *1978 ILC Report*, above n 95, 104.

¹⁸⁷ Much of the evidence relied on in the following section draws heavily from Dunn, *Timor*, above n 104, as it provides the most extensive account of United States–Indonesian relations at the time. Dunn draws support from many government documents and exchanges.

¹⁸⁸ See generally Dunn, *Timor*, above n 104.

¹⁸⁹ *Ibid.*

importance of Indonesia to the West, especially to the United States. Indonesia was a major oil producer, and its island territory commanded the strategically important deepwater Ombai–Wetar Straits between the Indian Ocean and the West Pacific Ocean used for the passage of American nuclear submarine fleets.¹⁹⁰ In fact, the level of military assistance provided by the United States to the Indonesian armed forces was such that by 1975 it is estimated that 90 per cent of the military equipment used by the Indonesian army was supplied by the United States.¹⁹¹ According to James Dunn, ‘in the mid-1970s the Suharto government’s plan to refurbish its armed forces depended heavily upon American technology, indulgence and political support.’¹⁹² As Dunn makes clear, the relationship granted Washington powerful leverage over events in Indonesia:

In the event of a conflict involving the major communist states the integrity of Indonesia’s vulnerable archipelago might well depend upon American military support. Moreover, since the mid-1960’s ... the Indonesian armed forces have become increasingly dependent upon United States military assistance ... No treaty arrangements existed. But then they hardly needed to be negotiated, because Indonesia’s essential strategic importance to the West assured its natural protection.¹⁹³

On the diplomatic front, the American position closely resembled that of Australia. By mid-1975 ‘the Americans had resolved to distance themselves from developments in Timor, while indicating to the Indonesians their willingness to accept integration.’¹⁹⁴ Indeed, American officials persuaded the Indonesians to delay the planned invasion of Dili for approximately a week, in order to ensure the return of President Ford and Secretary of State Kissinger

¹⁹⁰ The deep sea channel lies off the coast of East Timor between Dili and Atauro, and joins the Indian and Pacific Oceans: Jolliffe, above n 114, 295. John Taylor notes that the maintenance of ‘good will’ with Indonesia was essential if ‘the United States was to maintain its capability to move undetected between the Indian and Pacific Oceans’: John Taylor *Indonesia’s Forgotten War: The Hidden History of East Timor* (1991) 74.

¹⁹¹ Carmel Budiardjo and Liem Soei Liong, *The War Against East Timor* (1984) 9.

¹⁹² Dunn, *Timor*, above n 104, 346.

¹⁹³ *Ibid* 345–6.

¹⁹⁴ *Ibid* 347. See also the report of the Australian Ambassador to Indonesia, Richard Woolcott, to Alan Renouf, former Head of the Australian Department of Foreign Affairs, on 17 August 1975, reproduced in Dunn, above n 104, 347; ‘Cablegram to Canberra’ (17 August 1975) in *Timor Papers*, above n 136, 313, 314:

The United States might have some influence on Indonesia at present as Indonesia really wants and needs United States assistance in its military re-equipment programme. But Ambassador Newsom told me last night that he is under instructions from Kissinger personally not to involve himself in discussions on Timor with the Indonesians on the grounds that the United States is involved in enough problems of greater importance overseas at present. The State Department has, we understand, instructed the Embassy to cut down the reporting on East Timor[.]

from Indonesia to the United States.¹⁹⁵ American officials knew their military arms would be used in the attack,¹⁹⁶ and wanted to maintain a facade of distance from the armed invasion of East Timor. A cablegram from Woolcott to Canberra records a conversation with US Ambassador Newsom, in which Newsom apparently commented that ‘if Indonesia were to intervene the United States would hope they would do so “effectively, quickly and not use our equipment.”’¹⁹⁷

The extensive use of United States military equipment by Indonesia in East Timor has been seen as essential to the success of the operation.¹⁹⁸ Dunn notes that Hercules aircraft were used to carry troops into East Timor, ‘many of whom carried recently acquired American small arms’.¹⁹⁹ According to evidence given by Noam Chomsky to the UN General Assembly, the United States continued to supply Indonesia with arms immediately after the invasion of East Timor.²⁰⁰ In 1976, the year following the Indonesian invasion of East Timor, the United States doubled its military aid to Indonesia (US\$20 million in grant aid and US\$23 million in credits) and maintained its level of economic aid at US\$80 million.²⁰¹ The United States continued to fill orders for arms, thereby facilitating the activities of Indonesia in East Timor.²⁰²

The provision of extensive military assistance to Indonesia by the United States accords well with the general foreign policy stance taken by the Ford

¹⁹⁵ President Ford and Secretary of State Kissinger had been in Jakarta for discussions with President Suharto following arms negotiations between Indonesia and the United States in October and November: Jolliffe, above n 114, 230; Dunn, *Timor*, above n 104, 348. While in Indonesia, Kissinger told the media that ‘the United States understands Indonesia’s position on the question of East Timor’: Noam Chomsky, *Statement Delivered to the Fourth Committee of the United Nations General Assembly* (November 1978) in Tørben Retbøll (ed), above n 158, 2. Taylor notes that the US State Department dubbed the visit of Kissinger and Ford to Indonesia ‘the big wink’: Taylor, above n 190, 64.

¹⁹⁶ Dunn, *Timor*, above n 104, 348.

¹⁹⁷ ‘Cablegram to Canberra’ (17 August 1975) in *Timor Papers*, above n 136, 313, 314.

¹⁹⁸ Ibid 349. On 10 December 1975 the United States State Department stated ‘[t]here is no doubt United States Military Assistance Program equipment was used, and we could be in for part of the blame if the operation is not a quick success’: Dale van Atta and Brian Toohey, ‘The Timor Papers: Part 2’, *National Times*, 30 May – 12 June 1982.

¹⁹⁹ Ibid.

²⁰⁰ Chomsky, *Statement*, above n 195, 9–10. See also the report on hearings before the United States House of Representatives International Relations Committee in which a government spokesperson stated that the policy of ceasing the supply of arms to Indonesia had never been implemented in 1975–6: Sub-Committee on International Organizations, *United States Policy on Human Rights and Military Assistance: Overview on Indonesia* (1978) cited in Taylor, above n 190, 182.

²⁰¹ Ross Waby, ‘Aid to Indonesia Doubled as United States Shrugs off Timor’, *The Australian* (Sydney, Australia), 22 January 1976, 4; Taylor, above n 190, 169.

²⁰² A United States State Department official is quoted as stating, ‘[i]n terms of bilateral aid relations between the United States and Indonesia, we are more or less condoning the incursion into East Timor ... We regard Indonesia as a friendly, non-aligned nation — a nation we do a lot of business with’: Waby, above n 201, 4.

administration in relation to the question of East Timor.²⁰³ Not unlike the Australian position, the United States adopted a stance that would place the least possible strain on Washington–Jakarta relations, despite the unrivalled economic and military power it possessed over the Suharto Government.²⁰⁴ The grounds upon which allegations of assisting in the commission of an internationally wrongful act may be levelled at the United States in relation to East Timor are, however, different from those levelled at Australia. The supply of arms, combined with the knowledge of their use in an act of aggression, may constitute assistance under the Draft Articles. Initially, however, the nature of aggression as an international crime must be assessed, as well as determining whether the Indonesian invasion of East Timor constituted such an act.

B *Aggression as a Serious Breach of an International Obligation*

Former art 19(3) of the Draft Articles expressly mentioned a serious breach of the prohibition on aggression as constituting an international crime.²⁰⁵ Similar to the position with self-determination, it is likely that aggression falls within the category of international obligations contemplated by new art 41 — as its breach risks ‘substantial harm to the fundamental interests’ of the international community.

While the maintenance of international peace and security is of vital importance to the international community, the definition of aggression has remained subject to debate since the inception of the UN in 1945. Article 2(4) of the *UN Charter* establishes a general prohibition against the use of force by states.²⁰⁶ In this regard, the word aggression is not used in the text of the *UN Charter*.

²⁰³ Dunn notes that the position advocated by Kissinger was supportive of Indonesia on the question of East Timor, partly due to the regional instability caused by the fall of Saigon: Dunn, *Timor*, above n 104, 348.

²⁰⁴ Daniel Moynihan, former United States representative to the UN, *A Dangerous Place* (1979) 247, recounts in relation to East Timor:

The United States wished things to turn out as they did, and worked to bring this about. The Department of State desired that the United Nations prove utterly ineffective in whatever measures it undertook. The task was given to me and I carried it forward with no inconsiderable success.

See also Timo Kivimäki, ‘National Diplomacy for Human Rights: A Study of US Exercise of Power in Indonesia, 1974–1979’ (1994) 16 *Human Rights Quarterly* 415, 419, citing the Committee on Foreign Affairs, United States House of Representatives, *Human Rights in Asia: Non-Communist Countries* (February 1980): ‘[f]or the United States, the fate of the Timorese was peripheral ... because Indonesian policies in Timor were commonly seen as directly beneficial to United States strategic interests’.

²⁰⁵ Former Draft Articles, above n 3, art 19(3)(a) provided that an international crime may result from ‘a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression’.

²⁰⁶ *UN Charter* art 2(4) provides: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’

In 1950 the General Assembly charged the ILC with the task of assessing the possibility and desirability of providing a definition of aggression.²⁰⁷ The ILC held that as it was not possible to exhaustively enumerate aggressive acts, it declined to prepare a conclusive definition of aggression.²⁰⁸ Instead the ILC continued to consider the matter in the context of the Draft Code of Crimes against the Peace and Security of Mankind ('Draft Code of Crimes').²⁰⁹ Articles 15 and 16 of the Draft Code of Crimes consider the act of aggression and the threat of aggression respectively.²¹⁰ It should be noted that the Draft Code of Crimes applies not to state responsibility, but rather to *individual* criminal responsibility. Consequently, the most instructive international instrument defining aggression, as it relates to actions which may invoke the responsibility of the aggressor state at international law, is the General Assembly Resolution 3314.²¹¹

Article 1 of Resolution 3314 provides that '[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State', and thereby it largely replicates art 2(4) of the *UN Charter*. The Resolution also states that 'a war of aggression is a crime against international peace' and that 'aggression gives rise to international responsibility'.²¹² Resolution 3314 would appear to be more restrictive than art 2(4) of the *UN Charter* as it does not extend to threats of aggression. Further, the resolution excludes economic and other non-forceful forms of aggression.²¹³ However, it should be noted that the *1976 ILC Report* expressly referred to Resolution 3314 with regard to the notion of aggression contained in former art 19(3):

Some members of the Commission, however, thought that the notion of 'aggression' could have a broader meaning than that given it by the said definition and could, for example, include "economic" aggression as well as aggression involving the use of armed force.²¹⁴

Thus while no comprehensive and satisfactory definition of aggression has ever been provided, the working definition anticipated by the *1976 ILC Report* is

²⁰⁷ GA Res 378V, 5 UN GAOR, UN Doc A/Res/378V (1950).

²⁰⁸ See Shearer, above n 81, 487.

²⁰⁹ ILC, 'Report of the International Law Commission to the General Assembly' [1951] *Yearbook of the International Law Commission* 123, 131–5. The ILC's Draft Code of Crimes can be found in ILC, *Report of the International Law Commission on the Work of its 48th Session*, UN Doc A/51/10, ch II [46]–[48] (1996) ('Draft Code of Crimes'). Note the fact that in the *Rome Statute*, above n 2, aggression was left to be defined at a later date.

²¹⁰ For a discussion of these provisions and their implications at international law, see Timothy McCormack and Gerry Simpson, 'The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions' (1994) 5 *Criminal Law Forum* 1, 24–9.

²¹¹ Resolution 3314, above n 101. The resolution was adopted by consensus.

²¹² *Ibid* art 5(2).

²¹³ Harris, above n 19, 948.

²¹⁴ *1976 ILC Report*, above n 44, [68].

broader than both the one elaborated in Resolution 3314 and that contained in art 2(4) of the *UN Charter*. Given the uncertain content of the prohibition on aggression, its status at international law is difficult to ascertain. At a minimum, however, the formulation of aggression contained in art 2(4) of the *UN Charter* — and the interpretation of this in Resolution 3314 — is undoubtedly a peremptory norm and its status as an obligation owed *erga omnes* appears undisputed.²¹⁵

Was the Indonesian invasion of East Timor an act of aggression? Applying the narrower definition contained in Resolution 3314, we are confined to acts of aggression through the use of military force. Indonesia's use of armed force against the sovereignty, territorial integrity and political independence of East Timor is unquestionable. It is less clear, however, whether East Timor in 1975 constituted a 'state' as required by Resolution 3314. If the discussion concerning the right to self-determination above is applied here, then it brings East Timor closer to possessing the characteristics of a state. While the Indonesian invasion was condemned by both the Security Council and the General Assembly,²¹⁶ the resolutions never called the invasion an act of aggression. Does this preclude a finding that the invasion was nevertheless an act of aggression? As referred to earlier, Daniel Moynihan, former United States ambassador to the United Nations, alluded to the fact that overly derisive language in the Resolutions may have resulted in certain Western powers — particularly the United States — exercising their veto in order to keep Indonesia on side.²¹⁷ Thus it would be unwise to overemphasise the wording of the Security Council resolution in this instance. Without clearer guidance as to the interpretation of Resolution 3314, it is difficult to accurately assess whether Indonesia's invasion was an act of aggression, but the degree of force used and the resultant casualties all point to a *prima facie* serious breach of the prohibition against aggression.²¹⁸

C *Assessing United States' Responsibility under the Draft Articles*

If the international responsibility of Indonesia is engaged for its act of aggression against the territory of East Timor, it is necessary to consider the extent to which the United States was complicit in the commission of this internationally wrongful act. The legal requirements of assistance under new art 16 have already been discussed. In essence, for the United States to be held responsible for assisting Indonesia, two things must be proved. Firstly, it must be shown that United States' actions made it materially easier for Indonesia to

²¹⁵ Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', above n 73. Acts of aggression violate the main preoccupation of the international community — the maintenance of international peace and security: *UN Charter* art 1(1).

²¹⁶ See generally above nn 124–5 and accompanying text. See also Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', above n 73.

²¹⁷ See generally above n 204 and accompanying text.

²¹⁸ Clark argues that despite the 'numerous ambiguities and circularities' of the General Assembly's definition of aggression, 'the core of the definition clearly applies to Indonesia's actions': above n 118, 33.

commit an act of aggression against East Timor; and secondly, that in supplying military and political support to this end the United States intended to facilitate such an act.

The extent to which the United States' Military Assistance Program facilitated the use of force against East Timor is clear: the provision of United States military aid made it feasible for Indonesia to invade. Various accounts of the United States–Indonesia relationship refer to the fact that Indonesia could not have successfully invaded East Timor without American support. As the *1976 ILC Report* makes clear, the provision of transport, military personnel or weaponry in order to commit an act of aggression will constitute material assistance under art 16.²¹⁹

The question of intention is far more difficult to resolve. As in the case of Australia, we are faced with ambassadorial and high-ranking politicians' statements, presidential actions and congressional compliance, which all point to knowledge of the manner in which American arms would be used and were used. However, does this *prove* an intention on the part of the United States to facilitate the aggressive use of force against East Timor? The issues arising in relation to the Australian example emerge again here — to what extent are statements of officials indicative of an actual intention, and must intention be expressly proved with no recourse to implication from circumstantial evidence? If intention must be expressly proved, and if official statements and actions are an insufficient basis for proving intention, then it is unlikely that the United States could be held responsible for assisting in the commission of an internationally wrongful act. Obviously, the resolution of these issues is crucial if the ILC wishes the provisions in the Draft Articles on assistance to be functional.

VIII CONCLUSION

The Draft Articles have the potential to institute a new level of accountability for state actions through the provisions on assisting an internationally wrongful act. As the case studies on the role of Australia and the United States in East Timor have demonstrated, the Draft Articles allow for the consideration of actions by assisting states. It is apparent that both states were involved in the fate of East Timor,²²⁰ and many would agree that some measure of atonement is required. However, the framing of the Draft Articles in the area of complicity is less than perfect in fulfilling this aim of according reparation to injured states. The major stumbling block to obtaining reparation from states assisting the commission of an internationally wrongful act is the requirement of proving intention on the part of the assisting state. The standard of proof required to

²¹⁹ *1976 ILC Report*, above n 44, [30], discussing the identical art 27 of the Former Draft Articles.

²²⁰ Chomsky maintains that the primary difference between the United States' and Australia's reactions to the East Timor crisis is that 'United States complicity by means of military and other support is far greater': Chomsky, *Statement*, above n 195, 7.

demonstrate an intention to facilitate the commission of an internationally wrongful act appears to render the assistance provisions of the state responsibility regime analogous to obligations imposing criminal liability. Given the ILC's insistence that the State responsibility regime is not about criminal liability, and that penal sanctions are not imposed as a consequence of a finding of breach, the standard of proof would seem to be set at an unjustifiably high level.

Necessarily, where cases of assistance are alleged, much important information will be hidden away from public and international scrutiny, deemed to be state secrets or too politically sensitive for public release. It took 25 years for the release of the Australian Government's papers on East Timor and at least five more years will pass before cabinet deliberations are made public. The problems of proving outright the intention of a state are thus compounded. Brownlie identifies these problems to be a consequence of the individuality of issues in disputes between states:

Legal issues, particularly in disputes between states, have an individuality which resists a facile application of general rules. Much depends on the assignment of the burden of proof, the operation of principles of the law of evidence, the existence of acquiescence and estoppels, the nature of the *compromis* and the precise nature of the relevant substantive rules or treaty provisions.²²¹

In the international arena, disputes are rarely fought by the immediate parties to the conflict alone. The international flow of armaments and its economic value to many states provide just one example of why the international community cannot let the blame for internationally wrongful acts rest solely on the shoulders of the apparent parties to the conflict. However, drawing the line between a disinterested observer and an implicated party when apportioning responsibility is not easy. The Draft Articles fail to strike the right balance between preventing culpable states from escaping accountability for the commission of internationally wrongful acts, and allowing blameless states to be free from baseless accusations of involvement in such acts. The Draft Articles on assisting in the commission of internationally wrongful acts are aptly described as being 'torn between the traditional bilateralist position and new considerations of community interest and public order.'²²² The involvement of Australia and the United States in the invasion of East Timor highlights both the inadequacies and strengths of the Draft Articles, but suggests that caution remains the victor in the quest for justice.

In the case of East Timor, the preservation of a friendly bilateral relationship with Indonesia was accorded the greatest priority both by Australia and the United States. While the world community strives towards greater accountability for wrongs committed in the international arena, human rights remain dispensable in the pursuit of national interests. The actions of both Australia and

²²¹ Brownlie, above n 10, 47.

²²² 1999 ILC Report, above n 9, [261].

the United States, and countless other countries in different times and places, remain at odds with this general trend of international law. However, in applying the legal framework provided by the Draft Articles, it is unlikely that either country will ever be made to account formally for its role in the suffering of the East Timorese. The provisions on assistance in the commission of internationally wrongful acts concern the indirect responsibility of states, yet the ineffectiveness of the provisions intended to protect fundamental international legal principles 'contributes to the weakening of these principles and undermines the efficacy of the rule of law in international affairs.'²²³

²²³ Simpson, 'Judging the East Timor Dispute', above n 172, 346.