

## SEPARATE OPINION OF JUDGE SHAHABUDDEEN

A major point on which the Court has divided is whether Australia may be sued in the absence of New Zealand and the United Kingdom. I propose to give my reasons for agreeing with the decision of the Court on the point. Before proceeding, there is, however, an introductory matter to which I must refer. It concerns the principle of equality of States before the Court. It arises in the following way.

Nauru is one of the smallest States in the world; Australia is one of the larger. In his opening remarks, the Solicitor-General for the Commonwealth observed:

“There is no need for emotive arguments. It is not a case of David and Goliath, or of a tiny island and a large metropolitan power . . . Before this Court, of course, the equality of the Parties will be preserved. Rich or poor, large or small, the Court will ensure that their legal rights have equal protection.” (CR 91/15, p. 42, Solicitor-General Gavan Griffith, Q.C.)

Counsel for Nauru in his turn referred to the contrasting sizes of the Parties and said:

“Being a small democratic State, Nauru has firm faith in the rule of law in the affairs of nations. It has firm faith in this Court as the dispenser of international justice.” (CR 91/18, p. 31, Professor Mani.)

It seems to me that, whatever the debates relating to its precise content in other respects, the concept of equality of States has always applied as a fundamental principle to the position of States as parties to a case before the Court (*Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, P.C.I.J., Series A/B, No. 65*, p. 66, Judge Anzilotti). In the words of President Basdevant, “Before this Court, there are no great or small States . . .” (*I.C.J. Yearbook 1950-1951*, p. 17). States of all kinds and sizes may bring their cases before the Court on a basis of perfect equality. Big States have a right to value this aspect as much as small. In the *Mavrommatis Concessions* case, Greece sued the United Kingdom before the Permanent Court of International Justice. At one stage in a lively debate, counsel for the United Kingdom found himself remarking that “even the great Powers are entitled to justice at the hands of this Tribunal” (*P.C.I.J., Series C, No. 5-I*, p. 64). So indeed they are; so are all States. The matter has never been in doubt.

To return to the question under examination, as to whether Australia may be sued alone, I consider that an affirmative answer is required for three reasons. First, the obligations of the three Governments under the Trusteeship Agreement were joint and several. Second, assuming that the obligations were joint, this did not by itself prevent Australia from being sued alone. Third, a possible judgment against Australia will not amount to a judicial determination of the responsibility of New Zealand and the United Kingdom. These propositions are developed below. I begin, however, with the initial question, over which the Parties also joined issue, as to whether the objection should be declared to be one which does not possess an exclusively preliminary character. Similar questions arose in relation to other Australian objections, but it is not proposed to deal with those. I would add, by way of general caveat, that any reference in this opinion to the obligation, or liability, or responsibility of Australia should be understood as resting on an assumption made for the purposes of argument. Whether or not Australia had any obligation, or liability, or responsibility is a matter for the merits.

#### PART I. WHETHER THE OBJECTION DOES NOT POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

As is shown by the *Military and Paramilitary Activities in and against Nicaragua* case, where the Court declares that an objection does not possess, in the circumstances of the case, an exclusively preliminary character, the objection is not finally disposed of; the Court, at the merits stage, will return to the point and deal with it (see *I.C.J. Reports 1984*, pp. 425-426, and *I.C.J. Reports 1986*, pp. 29-31). That being so, a question would seem to arise as to how far Article 79, paragraph 7, of the existing Rules of Court is, in its practical operation, different from the earlier provisions of Article 62, paragraph 5, of the Rules of Court 1946 relating to joinder to the merits (see S. Rosenne, *Procedure in the International Court, A Commentary on the 1978 Rules of the International Court of Justice*, 1983, pp. 164-166; and Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, 1986, Vol. IV, p. 617). Because of the textual changes made in the Rules in 1972, the Court no longer says in terms that it is joining a preliminary point to the merits; but, the Court's functions not being activated by the use of formulae, the fact that the Court no longer says so does not by itself affect the substance of what it does.

Nor would it be right to suppose that prior to 1972 the Court considered that it had an unfettered discretion to order a preliminary objection to be joined to the merits. The use of the disjunctive "or" in the first sentence of Article 62, paragraph 5, of the Rules of Court 1946 conveyed no such

notion. Speaking of its power to make such an order, in 1964 the Court expressly stated that it would

“not do so *except for good cause*, seeing that the object of a preliminary objection is to avoid not merely a decision on, but even any discussion of the merits” (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections*, I.C.J. Reports 1964, p. 44; emphasis added).

That view reached back a long way (*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 76*, p. 24, Judges De Visscher and Rostworowski). The actual results may have been debatable in some cases, but I hesitate to imagine that the Court did not recognize that, in principle, wherever reasonably possible a preliminary objection should be determined at the preliminary stage. In the *Barcelona Traction* case, after reviewing the previous jurisprudence on the subject, the Court indicated the circumstances in which it would order a joinder. It said it would do so where

“the objection is so related to the merits, or to questions of fact or law touching the merits, that it cannot be considered separately without going into the merits (which the Court cannot do while proceedings on the merits stand suspended under Article 62), or without prejudging the merits before these have been fully argued” (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections*, I.C.J. Reports 1964, p. 43).

What, however, is scarcely open to dispute is that the new Rules were intended to stress the need to decide a preliminary objection at the preliminary stage wherever reasonably possible, the well-known object being to avoid a repetition of the kind of situation which ultimately arose in the *Barcelona Traction* case and the criticisms attendant thereon (*Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970, p. 3). Fresh urgency has been imparted to the operation of the old criteria, particularly in respect of the Court's earlier thinking that a joinder should not be ordered “except for good cause” (“pour des motifs sérieux”). To the limited extent necessary to enable the Court to determine the objection, the merits may be explored, provided, always, that the issue raised is not so inextricably linked to the merits as to be incapable of determination without determining or prejudging the merits or some part thereof.

These considerations no doubt account for the caution observed by the Court in declaring an objection to be not exclusively preliminary in character. Since the introduction of the new provisions in 1972, the Court has made such a declaration in one case only, namely, the *Military and Paramilitary Activities in and against Nicaragua* case. There, certain objections, although not presented by the respondent as preliminary objections, were

considered in the light of the procedural provisions relating to preliminary objections (*I.C.J. Reports 1984*, p. 425, para. 76). The Court declared one of the objections to be not exclusively preliminary in character (*ibid.*). At the merits stage this objection, which related to jurisdiction, was upheld (*I.C.J. Reports 1986*, p. 38, para. 56). Had it not been for the fact that other grounds of jurisdiction existed, the result would have been a replay of the *Barcelona Traction* situation. Possibly, any criticisms could have been met in the circumstances of the case. In the case at bar, I am not confident that this would be so if the particular objection under consideration were declared to be not exclusively preliminary in character but ultimately came to be upheld at the merits stage. In that event (unlike the position in the *Military and Paramilitary Activities in and against Nicaragua* case), the consequence would be the immediate and total collapse of Nauru's case. Unless it could be convincingly shown that the point could not have been determined at the preliminary stage, it would be difficult to parry criticisms about waste of time, expense and effort, not to mention evasion of the Court's responsibilities.

Nauru's position was that Australia's objection did not have an exclusively preliminary character and could not be determined now, but that, if it had that character, it should be rejected. Australia countered that the objection did have an exclusively preliminary character and should be upheld. By implication, the Court has agreed with Australia's contention that the objection did have an exclusively preliminary character. In my view, the Court was right.

What is Nauru's case? Though variously stated, it comes to this: Nauru is saying that Australia was administering Nauru pursuant to the Trusteeship Agreement; that this Agreement (read with the Charter and in the light of general international law) required Australia to use the governmental powers exercised by it under the Agreement to ensure the rehabilitation of worked-out phosphate lands; but that, in administering the Territory, Australia breached this obligation.

Australia's objection is this: the obligation to ensure rehabilitation (if it existed) was, by virtue of the terms of the Trusteeship Agreement, a joint obligation of Australia, New Zealand and the United Kingdom, with the result that Australia alone could not be sued because

- (i) a party to a joint obligation cannot be sued alone;
- (ii) a judgment against Australia in respect of the joint obligation would amount to an impermissible determination of the responsibility of New Zealand and the United Kingdom (both non-parties) in relation to the same obligation (see Judgment, para. 48).

It will be argued below that the existence of the particular obligation to ensure rehabilitation has at this stage to be assumed. Clearly also no ques-

tion arises at this point as to whether there was in fact a breach of the obligation. The remaining questions are questions of law which can be answered now. They are clearly of a preliminary character.

With respect to the question whether the particular obligation under the Trusteeship Agreement was joint, it seems to me that it is open to the Court to take the position, as I think it in effect has, that whatever the precise juridical basis of the obligations of the three Governments under the Trusteeship Agreement, Nauru is not precluded from suing Australia alone. On this approach, the Court is not called upon to say, and has not said, whether or not the particular obligation was joint, as asserted by Australia (see Judgment, para. 48).

However, if the Court were called upon to determine whether the obligation was joint, this determination could be made by considering the terms of the Trusteeship Agreement and those terms alone. Previous or subsequent facts could not make the obligation joint if it was not joint under the Trusteeship Agreement. Correspondingly, if the obligation was joint under the Trusteeship Agreement, previous or subsequent facts could not make it other than joint.

I do not intend to suggest that none of the facts may be considered. The facts are useful, but their utility lies in the assistance they provide in understanding how the Trusteeship Agreement came to be constructed in the way it was and how it worked in practice. In this respect, an abundance of facts has been presented by both sides, and I shall be referring to some of these. But the facts do not themselves constitute the foundation of the particular issues of law now calling for decision. The situation is materially different from one in which the question whether a case against a State is maintainable in the absence of other States may conceivably depend directly on facts which could only be explored and ascertained at the merits (cf. arguments in *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, Memorial of Nicaragua, p. 141, Section "C"; CR 84/19, p. 47, Mr. J. N. Moore; and L. F. Damrosch, "Multilateral Disputes", in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 1987, pp. 391-393).

I must now explain why I consider that it has to be assumed at this stage that Australia had an obligation to ensure rehabilitation under the Trusteeship Agreement, as alleged by Nauru. The reason is that the question whether the obligation existed is part of the merits and, these being preliminary proceedings, the elements of the merits have to be assumed (see *Nottebohm, I.C.J. Reports 1955*, p. 34, Judge Read, dissenting); they cannot be determined now.

In some national systems, a wide range of points of law relating to the merits may be set down for argument in advance of the normal hearing on the merits, provided that all the relevant material is before the Court. The governing criterion is that the point (which might for convenience be

called a preliminary objection on the merits) must be one which, if decided in one way, will be decisive of the litigation or at any rate of some substantial issue in the action<sup>1</sup>. The object is, of course, to save time, effort and cost. There have been arguments (though not in this case) as to whether preliminary objections on the merits may competently be made before this Court<sup>2</sup>. However, while reserving my opinion on that point, I would note that the Court's jurisprudence (including paragraphs 36, 38, 56 and 68 of today's Judgment) has proceeded on the basis of a long-standing distinction between preliminary objections and the merits, even though one may argue as to whether the distinction, itself rather general and never easy to draw, was accurately applied in particular cases.

What are the merits? Broadly speaking

"the merits of a dispute consist of the issues of fact and law which give rise to a cause of action, and which an applicant State must establish in order to be entitled to the relief claimed" (*Anglo-Iranian Oil Co., Preliminary Objection, I.C.J. Reports 1952*, p. 148, Judge Read, dissenting).

To establish its case on the merits, Nauru must prove, *inter alia*, first, that Australia had an obligation under the Trusteeship Agreement to ensure rehabilitation and, second, that Australia was in breach of that obligation. An argument that Australia did not have that substantive obligation would accordingly concern the merits and lack a preliminary character. It would touch the substance, as amounting to an assertion that there was no obligation under international law which Australia could have breached in relation to Nauru (see the general reasoning in *Electricity Company of Sofia and Bulgaria, P.C.I.J., Series A/B, No. 77*, pp. 82-83; *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, pp. 44-46, and Judge Morelli, dissenting, at pp. 110-112; *ibid.*, *Second Phase, I.C.J. Reports 1970*, pp. 226 ff., Judge Morelli, concurring; and *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 19, para. 7). An argument of that kind would go not to the

<sup>1</sup> See, as to English law, *The Supreme Court Practice*, 1979, Vol. 1, London, 1978, pp. 282-284, Order 18/11/1-4. And see *Northern Cameroons, I.C.J. Reports 1963*, separate opinion of Judge Fitzmaurice, pp. 106-107; *Nuclear Tests (Australia v. France), Interim Protection, I.C.J. Reports 1973*, dissenting opinion of Judge Gros, p. 121; and *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, separate opinion of Judge Gros, p. 292.

<sup>2</sup> See, generally, and compare Judge Morelli, in *Rivista di diritto internazionale*, Vol. 47, 1964, p. 3; Vol. 54, 1971, p. 5; Vol. 58, 1975, pp. 5 and 747; Giuseppe Sperduti, *ibid.*, Vol. 53, 1970, p. 461; Vol. 57, 1974, p. 649; Vol. 58, 1975, p. 657; Roberto Ago, *Comunicazioni e studi*, Vol. 14, 1975, p. 1, at p. 11, footnote 22; Ugo Villani, *Italian Yearbook of International Law*, 1975, Vol. 1, p. 206, at p. 207; and S. Rosenne, *op. cit.*, p. 160, as to Article 79 of the new Rules "implying a re-definition of the qualification *preliminary*".

question whether Australia could be sued alone, but to the question whether Australia could be adjudged liable, even if it could be sued alone.

Consequently, the question whether Australia had the obligation to ensure rehabilitation cannot be determined in this phase of the proceedings; it can only be determined at the merits stage. The existence of the obligation has simply to be assumed at this point. This being so, the only issues now open are the issues of law referred to above, that is to say, whether the obligation (if it existed) was joint, and, if it was, whether the propositions at (i) and (ii) above are well founded. These issues can be determined now and cannot justifiably be reserved for the merits. Nothing relating to the establishment at the merits stage of the existence of the alleged obligation to ensure rehabilitation can provide a reason for not dealing with those issues now.

In my opinion, the Court acted correctly in refraining from declaring that the objection as to the absence from the proceedings of New Zealand and the United Kingdom does not possess an exclusively preliminary character. So I pass to the objection itself, beginning with a background reference to Australia's position under the Trusteeship Agreement.

## PART II. AUSTRALIA'S POSITION UNDER THE TRUSTEESHIP AGREEMENT

An appreciation of Australia's position under the Trusteeship Agreement should take account of two factors, first, the evolution of Australia's international personality during the Mandate period, and, second, the legal character of a trusteeship agreement.

The first factor relates to the external aspects of the constitutional evolution of the relations between component units of the British Empire (see, generally, Sir Ivor Jennings, *Constitutional Laws of the Commonwealth*, Vol. 1, *The Monarchies*, 1957, pp. 18 ff.). It is probable that the underlying doctrine of the unity of the British Crown, which was then current, explains the fact that, although Nauru was in practice administered by Australia under the 1920 Mandate, the latter was conferred simply on "His Britannic Majesty". Traces of the doctrine are perhaps discernible even in the case of the Mandate for New Guinea, in which the Mandatory was described as "His Britannic Majesty for and on behalf of the Government of the Commonwealth of Australia (hereinafter called the Mandatory)" (Art. 1 of the Mandate, 17 December 1920, Procès-Verbal of the Eleventh Session of the Council of the League of Nations, held at Geneva, p. 102; see also the second and third preambular paragraphs, and A. C. Castles, "International Law and Australia's Overseas Territories", in *International Law in Australia*, ed. D. P. O'Connell, 1965, pp. 294-295).

By contrast, Article 2 of the 1947 Trusteeship Agreement for Nauru

made a separate reference to each of the three Governments when speaking of the "Governments of Australia, New Zealand and the United Kingdom" as having been "designated as the joint Authority which will exercise the administration of the Territory". Further, as will be shown below, by the Agreement itself Australia was given the leading role. The material before the Court makes it clear that during the Mandate period Australia had been moving in the direction of securing a progressively greater degree of practical control over the administration of Nauru, an aspiration which had been earlier manifested in the expression of a desire by Australia to annex the Island before the granting of the Mandate. Correspondingly, by 1947, what Chief Justice Sir Garfield Barwick elegantly called the "imperceptible and, in relative terms, the uneventful nature of the progress of Australia from a number of separate dependent colonies to a single independent and internationally significant nation" had run its full course<sup>1</sup>.

With respect to the second factor, trusteeship agreements exhibit peculiarities which have left the precise legal character of such agreements open to some degree of speculation, as is evidenced by an interesting literature on the subject. Professor Clive Parry's conclusion is this:

"As actually achieved in the form of treaties between the United Nations and the several administering authorities, the trusteeship agreements are legal acts distinct from the Charter. They possess, however, a dispositive (or conveyancing) as well as a contractual character. In their 'dispositive' aspect they are not independent of the Charter. Together with the relevant provisions of the Charter they constitute a quasi-statutory basis for the trusteeship system as in fact applied to specific territories. They have, as has the régime which they inaugurate and govern, an objective character. This is perhaps their most important aspect." (Clive Parry, "The Legal Nature of the Trusteeship Agreements", *British Year Book of International Law*, Vol. 27, 1950, p. 164, at p. 185.)

These remarks may be borne in mind, in conjunction with the evolution of Australia's international personality, in considering Article 4 of the Trusteeship Agreement relating to Nauru, which provided as follows:

"The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this

<sup>1</sup> See generally, D. P. O'Connell, "The Evolution of Australia's International Personality", in *International Law in Australia*, ed. D. P. O'Connell, 1965, Chap. 1, and the foreword by Sir Garfield Barwick; D. P. O'Connell and James Crawford, "The Evolution of Australia's International Personality", in *International Law in Australia*, 2nd ed. by K. W. Ryan, 1984, p. 21; and W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia*, 5th ed., p. 56.



purpose, in pursuance of an Agreement made by the Governments of Australia, New Zealand and the United Kingdom, the Government of Australia will, on behalf of the Administering Authority and except and until otherwise agreed by the Governments of Australia, New Zealand and the United Kingdom, continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory."

As a result of the dual contractual and "quasi-statutory" character of a trusteeship agreement, and whatever might have been the earlier implications of the first factor mentioned above, it is possible to read this provision, which came into force in 1947, as providing (with the approval of the General Assembly), first, for full powers of administration to be vested in the three Governments as constituting the Administering Authority, and, second, for these powers to be delegated by them to Australia. This interpretation is supported by other elements of the Trusteeship Agreement. It is difficult, therefore, to resist Australia's argument that, however extensive was its administrative authority over Nauru, that authority fell to be regarded in law as having been exercised by it on behalf of all three Governments.

But, although form is not unimportant, international law places emphasis on substance rather than on form (*Mavrommatis Palestine Concessions*, P.C.I.J., Series A, No. 2, p. 34; *Interhandel*, I.C.J. Reports 1959, p. 60, Judge Spender; *Barcelona Traction, Light and Power Company Limited*, Preliminary Objections, I.C.J. Reports 1964, pp. 62-63, Judge Koo; and, *ibid.*, Second Phase, I.C.J. Reports 1970, p. 127, Judge Tanaka). Some notice may, therefore, be taken of the extent and exclusiveness of the powers enjoyed by Australia, and, in particular, of certain differences between its position and that of New Zealand and the United Kingdom which could have a bearing on some of the issues to be examined.

The provisions of the Trusteeship Agreement do not readily yield up the reality of the actual power structure which they laid down. The first part of Article 4 of the Agreement had the effect of vesting plenary powers of government in the three Governments as constituting the Administering Authority; but the second part of the provision made it clear that, for all practical purposes, those powers could be exercised only by Australia, which was given the right to "continue to exercise full powers of legislation, administration and jurisdiction in and over the Territory". The authority so conferred on Australia could be revoked by subsequent agreement by the three Governments, but, clearly, there could be no such revocation without the consent of Australia. In fact, there was no revocation: the Agreement made by the three Governments in 1965, while providing for a measure of subordinate governmental authority to be exercised by the Nauruans, had the effect of further diminishing the role of New Zealand and the United Kingdom in relation to that of Australia. Thus, Australia had exclusive authority to administer Nauru for all practi-

cal purposes, as well as the even more significant power to prevent any diminution or withdrawal of that authority. Australia's controlling position continued unimpaired right up to independence.

The implications for an appreciation of the real power structure established by the Trusteeship Agreement are important. Take Article 5, paragraph 1, of the Trusteeship Agreement. This recorded an undertaking by the "Administering Authority" that

"It will co-operate with the Trusteeship Council in the discharge of all the Council's functions under Articles 87 and 88 of the Charter."

Or, consider Article 5, paragraph 2 (*b*), of the Trusteeship Agreement, under which the "Administering Authority" undertook to

"Promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants."

It is not clear to me that the Administering Authority could do any of these things without an appropriate exercise by Australia of its "full powers of legislation, administration and jurisdiction in and over the Territory". However, the Trusteeship Agreement did not reserve to the Administering Authority any competence to direct or control the way in which Australia chose to exercise its "full powers", and the evidence does not suggest that Australia acknowledged that the Administering Authority had any such competence as of right. In so far as the Administering Authority had any functions under the Trusteeship Agreement that could be discharged without an exercise by Australia of its "full powers of legislation, administration and jurisdiction in and over the Territory" (which seems doubtful), such functions had nothing to do with the substance of the claims presented by Nauru. And this is apart from the consideration that, in the first place, the Administering Authority could not act without the concurrence of Australia. The Parties to the case were agreed that the Administering Authority was not a separate subject of international law or a legal entity distinct from its three member Governments. These could act only by agreement, and there could be no agreement if Australia objected.

Australia submitted that it acted with the concurrence of New Zealand and the United Kingdom in appointing Administrators of the Trust Territory (Preliminary Objections of the Government of Australia, Vol. I, paras. 36, 45, 334 ff., and 341). However, none of the pertinent documents suggests that New Zealand and the United Kingdom had any legal basis on which to demand to be consulted as of right, let alone demand that their concurrence be obtained. New Zealand and the United Kingdom participated in the negotiations and ensuing agreement for the transfer of the phosphate undertaking to Nauruan control; but the real basis on which they were acting there was the commercial one which they occupied as part-owners of the undertaking and future purchasers of Nauruan phosphates. In so far as the negotiations embraced the subject of rehabili-

tation, this did not show that New Zealand and the United Kingdom had any control of the actual administration of the Trust Territory: under the Trusteeship Agreement their responsibility for non-rehabilitation could exist without such control. The law is familiar with situations in which a party may become contractually liable for the acts of another though having no power of direction or control over them. Possibly, the concurrence of New Zealand and the United Kingdom was legally required in respect of a proposal, such as that relating to resettlement, which premised a modification of the fundamental basis of the original arrangements, or that relating to independence, which premised the termination of the Trusteeship Agreement itself; but I am unable to see that there was any such requirement, as a matter of law, where the normal administration of the Territory was concerned.

The first preamble of the Trusteeship Agreement recalled that, under the Mandate, the Territory of Nauru had "been administered . . . by the Government of Australia on the joint behalf of the Governments of Australia, New Zealand, and the United Kingdom of Great Britain and Northern Ireland". Thus, the Trusteeship Agreement itself recognized that the administration of the Island had in practice been in the hands of Australia during the Mandate. This, of course, continued under the Trusteeship (see para. 43 of the Judgment). The position was, I think, correctly summed up by counsel for Nauru as follows:

"Nauru was administered as an integral portion of Australian territory. Its administration bore no relation to the territory of any other State. As far as can be discovered, no governmental official of either New Zealand or the United Kingdom lived on Nauru during the period from 1920 to early 1968, or performed governmental acts there. Throughout the whole of that period, the government officials on Nauru, the Administrator and the persons responsible to him, were Australian public servants, answerable to other Australian public servants in Canberra, and in no sense subject to the direction or control of any other Government. Article 22 of the Covenant referred to administration 'under the laws of the Mandatory': in fact, those laws were Australian. No British or New Zealand law was ever applied to Nauru." (CR 91/20, pp. 75-76, Professor Crawford.)

The international agreements which applied to Nauru were a selection of international agreements to which Australia was a party (*ibid.*, p. 78). Although independence had been agreed to by all three Governments, the Nauru Independence Act 1967 was an Australian enactment; no counter-part legislation was enacted by New Zealand or the United Kingdom. Until independence the flag — the only one — which flew in Nauru was the Australian flag.

I am not persuaded by Australia's argument that its governmental

authority was excluded from the phosphate industry by reason of Article 13 of the Nauru Island Agreement 1919, reading:

“There shall be no interference by any of the three Governments with the direction, management, or control of the business of working, shipping, or selling the phosphates, and each of the three Governments binds itself not to do or to permit any act or thing contrary to or inconsistent with the terms and purposes of this Agreement.”

Referring to this provision, in the case of *Tito v. Waddell*, Megarry, V-C., observed — correctly, if I may say so — that:

“This article established the independence of the British Phosphate Commissioners as against any one or two of the three governments, though not, of course, against all three acting in concert.” ([1977] 3 All ER 129, at p. 166.)

Article 13 of the Nauru Island Agreement could not apply to Australia as Administrator for the reason that, in administering Nauru under authority delegated by all three Governments, its acts would in substance have been the acts of all three Governments “acting in concert”, and not the acts of Australia alone.

It is not possible to conceive of the major industry of a Territory (irrespective of ownership) being entirely beyond the competence of the legislative, executive and judicial powers of the Territory, in whomsoever these are vested. Consequently, to hold that the governmental powers of the Australian-appointed Administrator did not extend to the phosphate industry and that this was exclusively within the competence of the three Governments acting through the British Phosphate Commissioners (BPC) is effectively to hold that governmental powers concerning all matters relating to the industry were exercisable by the three Governments acting through BPC. This in turn amounts to saying that there were two governments in Nauru, namely, an economic government administered by the three Governments acting through BPC with exclusive responsibility for the Territory’s main industry, and another government administered by Australia with responsibility for residual matters. I cannot read the Trusteeship Agreement as meaning that the régime which it introduced in Nauru in 1947 consisted of two such governments. It is, I think, unquestionable that all governmental power must derive from the Trusteeship Agreement (see, as to a mandate, *International Status of South West Africa, I.C.J. Reports 1950*, p. 133). BPC (whose undertaking could equally have been carried on by an ordinary commercial company as, indeed, had been earlier the case) did not profess to be exercising governmental powers under the Trusteeship Agreement: it simply had no standing under that Agreement. On the other hand, as the legislative and other evidence shows, Australia did not consider that its Administrator was wholly without competence over the industry. The Trusteeship Agree-

ment was concluded on the basis that all governmental functions in Nauru, though formally vested in all three Governments, would be exercised by Australia alone. It is untenable to suppose that the "full powers of legislation, administration and jurisdiction in and over the Territory", which were conferred on Australia by the Trusteeship Agreement, were not "full" enough to extend to the overwhelming bulk of the Territory's economy.

Part of the problem concerns the correct appreciation of Nauru's case. There could be an impression that Nauru's claims directly concern Australia's part in the commercial operations of the phosphate industry. That impression would not be accurate. No doubt, Nauru's case has many branches; but the essence of the case — whether it is well founded or not being a matter for the merits — is that Australia, while having under the Trusteeship Agreement "full powers of legislation, administration and jurisdiction in and over the Territory", failed to exercise these comprehensive governmental powers so as to regulate the phosphate industry in such a way as to secure the interests of the people of Nauru (CR 91/20, p. 83, and CR 91/22, p. 45, Professor Crawford). In particular, says Nauru, there was failure to institute the necessary regulatory measures to ensure the rehabilitation of worked-out areas, not in the case of mining in any country, but in the case of large-scale open-cast mining in the minuscule area of this particular Trust Territory. The consequence, according to Nauru, was that the Territory became, or was in danger of becoming, incapable of serving as the national home of the people of Nauru, contrary to the fundamental objectives of the Trusteeship Agreement and of the Charter of the United Nations. In this respect, the question, as I understand it, is not simply whether rehabilitation was required by such environmental norms as were applicable at the time; the question is whether rehabilitation was required by an implied obligation of Australia under the Trusteeship Agreement not to allow the destruction of the small national homeland of the Nauruan people, or any substantial part of it, through an unregulated industrial process which went so far as to result at one stage in the making and consideration of serious proposals for resettlement of the Nauruan people altogether outside of Nauru. That, I think, is Nauru's case.

There is no basis for suggesting that New Zealand and the United Kingdom had any capacity, as of right, to require Australia to use the governmental powers, which it alone could exercise, for the purpose of legally ensuring rehabilitation. No doubt, having accepted that Australia was acting on their behalf, with the possibility that they could in consequence be liable for its acts, New Zealand and the United Kingdom had an interest in seeing that Australia discharged the responsibilities of the Administering Authority in a satisfactory way. But "the existence of an 'interest' does not

of itself entail that this interest is specifically juridical in character" (*South West Africa, Second Phase, I.C.J. Reports 1966*, p. 34, para. 50). An interest is not always a right (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, pp. 36, 38, and Judge Morelli at pp. 235-237): in this case, given the terms of Article 4 of the Trusteeship Agreement, New Zealand and the United Kingdom had no capacity as of right to control the course of Australia's conduct of the administration of the Island. Presumably, they had some influence; but, as Jenks remarked, even where influence is considerable, "influence is less than power" (C. W. Jenks, *The World Beyond the Charter*, 1969, p. 99).

Judge Hudson once warned that "[a] juristic conception must not be stretched to the breaking-point" (*Lighthouses in Crete and Samos, P.C.I.J., Series A/B, No. 71*, p. 127). In the circumstances of that case, he had occasion to add that "a ghost of a hollow sovereignty cannot be permitted to obscure the realities of [the] situation" in Crete. No questions of sovereignty arise here; nevertheless, those remarks may be borne in mind in considering the realities of the situation in Nauru. In law, Australia was acting on behalf of all three Governments; and Australia is right in saying that this circumstance was consistently reflected in the positions taken by the United Nations and by Nauru. But it would be erroneous to suppose that New Zealand and the United Kingdom were also administering Nauru in the sense of having any real say in its administration; they had none.

### PART III. THE OBLIGATIONS OF THE THREE GOVERNMENTS WERE JOINT AND SEVERAL, WITH THE CONSEQUENCE THAT AUSTRALIA COULD BE SUED ALONE

I come now to the question whether the obligations of the three Governments were joint, as contended by Australia, or whether they were joint and several, as contended by Nauru.

I understood counsel for Australia to be accepting that the international case-law does not support the Australian view that the obligations of the three Governments were joint, even if he considered that neither does it support the Nauruan view that the obligations were joint and several (CR 91/21, pp. 63-64, Professor Pellet, stating that "le match est nul").

As regards the work produced by the International Law Commission, which was laid by either side before the Court, the statement of counsel for Australia was this:

"the International Law Commission has never expressly adopted a position on the problem under consideration, displaying great reticence as regards the very idea of joint and several liability" (*ibid.*, p. 65).

But reticence is not resistance. The Parties disputed the precise meaning of paragraph 2 of the commentary on Article 27 of the Commission's Draft Articles on State Responsibility of 1978. That paragraph states in relevant part:

"A similar conclusion is called for in cases of parallel attribution of a single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then two or more States will concurrently have committed separate, although identical, internationally wrongful acts. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other." (*Yearbook of the International Law Commission*, 1978, Vol. II, Part Two, p. 99.)

It is not necessary to enter into the general aspects of the difficult question carefully examined by the Commission as to when a State is to be regarded as participating in the internationally wrongful act of another State. It suffices to note that the Commission considered that, where States act through a common organ, each State is separately answerable for the wrongful act of the common organ. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded technically as a common organ.

Judicial pronouncements are scarce. However, speaking with reference to the possibility that a non-party State had contributed to the injury in the *Corfu Channel* case, Judge Azevedo did have occasion to say:

"The victim retains the right to submit a claim against one only of the responsible parties, *in solidum*, in accordance with the choice which is always left to the discretion of the victim, in the purely economic field; whereas a criminal judge cannot, in principle, pronounce an accomplice or a principal guilty without at the same time establishing the guilt of the main author or the actual perpetrator of the offence." (*I.C.J. Reports 1949*, p. 92.)<sup>1</sup>

On the facts, the *Corfu Channel* case allows for a number of distinctions.

<sup>1</sup> As to the last point, however, compare, in English law, *Archbold, Pleading, Evidence and Practice in Criminal Cases*, 40th ed., p. 1898, para. 4136; *Halsbury's Laws of England*, 4th ed., Vol. 11 (1), pp. 49-50, para. 50; and *R v. Howe* [1987] 1 All ER 771 HL.

However, it is to be observed that Judge Azevedo's basic view of the general law was that the right to sue "one only of the responsible parties, *in solidum*" was available to the injured party "in accordance with the choice which is *always* left to the discretion of the victim, in the purely economic field . . ." (emphasis added). This approach would seem to be consistent with the view that Nauru does have the right to sue Australia alone.

If domestic analogies are to be considered, the most likely area lies within the broad principles of the law of trust in English law and of cognate institutions in other systems. A United Nations Trusteeship must not, of course, be confused with a trust as understood in any specific system of municipal law; but, used with discretion, the principles relating to the latter are not unhelpful in elucidating the nature of the former. As Judge McNair said, in relation to Mandates, it "is primarily from the principles of the trust that help can be obtained on the side of private law" (*International Status of South West Africa, I.C.J. Reports 1950*, p. 151; and see, *ibid.*, pp. 148, 149, 152, and the *Namibia* case, *I.C.J. Reports 1971*, p. 16, at p. 214, Judge de Castro). Now, the applicable rule in the English law of trusts has been stated thus:

"Where several trustees are implicated in a breach of trust, there is no primary liability for it between them, but they are all jointly and severally liable to a person who is entitled to sue in respect of it." (*Halsbury's Laws of England*, 4th ed., Vol. 48, p. 522, para. 939; see also, *ibid.*, p. 539, para. 971, and *ibid.*, Vol. 35, para. 68.)

This being so, I do not find it surprising that, in regard to Nauru, the view has been expressed "that the three countries are jointly and severally responsible under international law for the administration of the territory" (A. C. Castles, "International Law and Australia's Overseas Territories", in *International Law in Australia*, ed. D. P. O'Connell, 1965, p. 332). I think this view is to be preferred to the view that the responsibility was exclusively joint.

This conclusion, that the obligation to ensure rehabilitation (if it existed) was joint and several, disposes of Australia's contention that proceedings will not lie against one only of the three Governments. It should also dispose of Australia's contention that any judgment against Australia will amount to a judgment against New Zealand and the United Kingdom. But Australia does not think so; it considers that, even if the obligation was joint and several, a judgment against it would still imply a determination of the responsibility of New Zealand and the United Kingdom. The issue concerning the implications of a possible judgment against Australia for New Zealand and the United Kingdom is not being examined here; it will be examined in Part V. However, to anticipate the conclusion reached there, even if the obligation was joint, a judgment



against Australia will not amount to a determination of the responsibility of New Zealand and the United Kingdom. This conclusion, if correct, would apply *a fortiori* if the obligation was joint and several.

PART IV. EVEN IF THE OBLIGATIONS OF THE THREE GOVERNMENTS WERE JOINT, THIS BY ITSELF DID NOT PREVENT AUSTRALIA FROM BEING SUED ALONE

Assuming that I am wrong in the foregoing, the result would be no different, in my opinion, even if the obligations of the three Governments under the Trusteeship Agreement were joint. It is possible, as I think is recognized in paragraphs 48 and 49 of the Judgment of the Court, to see Australia's argument as raising two questions: first, whether the fact that an obligation is joint by itself means that a suit will not lie against one co-obligor alone; and, second, whether a judgment against one co-obligor will constitute a determination of the responsibility of the other co-obligors and a resulting breach of the consensual basis of the Court's jurisdiction. The second question is examined in Part V; the first is considered below.

On the question being considered, I agree with Australia that "there are in reality two separate and distinct issues", namely, "whether Australia alone can be sued, and, if so, whether it can be sued for the whole damage" (Preliminary Objections of the Government of Australia, Vol. I, p. 131, para. 320). However, in my view, if the answer to the first issue is that Australia alone can be sued, the second issue, concerning the extent of the damage for which it may be sued, is a matter for the merits. The two issues being admittedly "separate and distinct", once it is accepted that Australia alone may be sued, I do not see how the question of the exact extent of the damage for which it is responsible can be made to take the form of a plea in bar of a suit otherwise properly brought against it. I believe this approach accords with the position taken by the Court in paragraph 48 of the Judgment. Accordingly, I shall be focusing on the first of these two issues, that is to say, whether Australia alone may be sued in respect of a joint obligation.

While refraining from citing and discussing particular texts, I cannot say that I have the impression that the valuable work of the International Law Commission, which was placed before the Court by the Parties, was directed to the question of pure principle as to whether a party to an act done at one level or another of association with another party may be sued alone. In so far as the work of the Commission deals with acts of that kind, it appears to be directed to the question whether, in a suit brought against any one such party, the claim may be for the entirety of the resulting

damage or only for such part as is proportionate to the extent of that party's own participation in the causative act, done in the exercise of its separate sovereign power. If a joint obligation is conceived of as an obligation which in law is capable of existing only in relation to all the co-obligors as a group, without any one of them being individually subject to it, this would be a ground for saying that proceedings will not lie against any one of them separately. On this aspect, Australia's pleadings are open to different interpretations (CR 91/20, p. 63, Professor Crawford, and Preliminary Objections of the Government of Australia, Vol. I, p. 3, para. 2, penultimate sentence, and p. 131, para. 321). However, I do not think that Australia is contending that, standing by itself, it was not subject to the obligations of the Trusteeship Agreement; if it were, it would, for reasons given under Part I above, be raising an issue of the merits, since it would in effect be saying that the obligation at international law, which Nauru alleges that it breached, simply did not exist. The general tendency of doctrinal writings, as I appreciate them, does not take the matter any further.

While properly acknowledging the need for caution in transposing legal concepts from domestic societies to the international community, both Parties presented municipal law materials and sought some support from them for their respective contentions. I am not acquainted with non-Anglo-Saxon legal systems but, subject to the same need for circumspection — a need that I emphasize — I will consider briefly the position in English law, as I understand it.

In the case of a joint tort, in English law the plaintiff can always sue any or all of the tortfeasors, because, as it was said over two hundred years ago, "a tort is in its nature the separate act of each individual" (*Egger v. Viscount Chelmsford* [1964] 3 All ER 412 CA; and *Clerk and Lindsell on Torts*, 16th ed., p. 179, para. 2.53). This rule applies also to torts committed by partners (*Halsbury's Laws of England*, 4th ed., Vol. 35, para. 67). The real problem was different; it was this, that "recovery of judgment against one of a number of joint tortfeasors operated as a bar to any further action against the others, even though the judgment remained unsatisfied" (*Clerk and Lindsell on Torts*, 16th ed., p. 180, para. 2.54). This bar was removed by Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (replaced by the Civil Liability (Contribution) Act 1978), under which judgment against one joint tortfeasor is no bar to action against others, subject to considerations of aggregation and costs. Clearly, however, even before the 1935 enactment, there was nothing in principle to prevent the plaintiff from suing one only of a number of joint tortfeasors.

In the case of joint contractors the procedural position in 1967 was stated thus:

"A defendant has a *prima facie* right to have his co-contractor

joined as defendant and in the absence of special circumstances showing that [an] order [staying the proceedings until joinder was effected] should not be made, it is the practice to make it; . . . But if it is shown that there is any good reason to the contrary, e.g., that the new party is out of the jurisdiction (*Wilson v. Balcarres, etc., Co.* [1893] 1 QB 422), or that every effort has been made to serve him without success, then the action may be allowed to proceed without joinder (*Robinson v. Geisel* [1894] 2 QB 685, CA)." (*The Supreme Court Practice* 1967, Vol. 1, p. 154, Order 15/4/10; and see *Chitty on Contracts*, 26th ed., Vol. 1, pp. 807-808, para. 1303, and G. H. Treitel, *The Law of Contract*, 6th ed., p. 444.)

The related common law rule was that "an action against a joint contractor served to bar any other proceedings against another joint contractor" (*Chitty on Contracts*, 26th ed., Vol. 1, p. 807, para. 1303). This rule was later abolished by Section 3 of the Civil Liability (Contribution) Act 1978, under which a plaintiff may sue one of several joint contractors without prejudice to his right to sue others later (*ibid.*, p. 809, para. 1306, and *The Supreme Court Practice*, 1991, Vol. 1, London, 1990, p. 185, Order 15/4/10).

Nauru argues persuasively that

"the Court is not competent in the present proceedings to interpret any provisions in the Optional Clause declarations of the United Kingdom and New Zealand that they might seek to rely on if they were parties to proceedings commenced by Nauru" (CR 91/20, p. 90, Professor Crawford);

and certainly the position under the two declarations is not equally clear. But, if the Court may not make any interpretation of its own, it may nevertheless notice that it is Australia, the proponent of the preliminary objection, which is itself affirming that the Court would not have jurisdiction under those declarations against New Zealand and the United Kingdom if Nauru were to sue them (CR 91/17, pp. 20, 21, 26, 46, 48, Professor Pellet; and Preliminary Objections of the Government of Australia, Vol. I, p. 138, para. 346). In my view, the possibility, insisted on by Australia itself, that there would be no jurisdiction in respect of New Zealand and the United Kingdom constitutes a reasonable approximation to the exception in English law (even as it stood before 1978) which permitted of an action being brought against one of a number of joint contractors if, for reasons of jurisdiction or service, it was not practicable to join the others. That possibility also serves to attract attention to the Court's statement in 1984 to the effect that, in the absence of any system of compulsory intervention, and barring the operation of the *Monetary Gold* principle (an aspect dealt with in the following Part), "it must be open to the Court, and indeed its duty, to give the fullest decision it may in the circumstances of

each case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984*, p. 25, para. 40).

One of the books cited by Australia, and relied on by it, in its survey of domestic legal systems, was Glanville Williams, *Joint Obligations*, London, 1949 (Preliminary Objections of the Government of Australia, Vol. I, p. 128, para. 309). The particular reference was to page 35, paragraph 2. Two pages earlier, speaking of joint promises, that learned author expressed the view that "Bowen L.J. stated the rule clearly" when he said:

"There is in the cases of joint contract and joint debt as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors *or he may sue one*, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors . . . it is for the same cause of action — there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country." (Glanville Williams, *op. cit.*, pp. 33-34, citing *Re Hodgson, Beckett v. Ramsdale*, (1885) 31 Ch. D. 177, at p. 188, CA; emphasis added.)

Subject to the right to plead in abatement, Glanville Williams did not appear to think that the fact that a contractual obligation is joint operates in principle to preclude the plaintiff from suing one only of the joint contractors.

It does not appear to me that recourse to municipal law, in so far as I have been able to explore it, yields any satisfactory analogies supportive of the suggested existence of any rule of international law precluding the present action on the ground that the obligation was joint. On balance, the general trend of the references given by the Parties to non-Anglo-Saxon legal systems is not, I believe, at variance with this conclusion (see, also, the authorities cited in the Memorial of the United States of America of 2 December 1958 in *I.C.J. Pleadings, Aerial Incident of 27 July 1955*, pp. 229 ff.).

As has often been remarked, to overestimate the relevance of private law analogies is to overlook significant differences between the legal framework of national societies and that of the international community, as well as differences between the jurisdictional basis and powers of the Court and those of national courts; "lock, stock and barrel" borrowings would of course be wrong (*International Status of South West Africa, I.C.J. Reports 1950*, p. 148, Judge McNair). On the other hand, nothing in

those differences requires mechanical disregard of the situation at municipal law; to speak of a joint obligation is necessarily to speak of a municipal law concept. The compulsory or involuntary character of municipal jurisdiction, with its facilities for enforcing contribution among co-obligors, does not, I think, wholly account for the fact that, at municipal law, a suit may be competently brought against one co-obligor in respect of a joint obligation. If for any reason it is impossible to enforce or obtain contribution among the co-obligors, this does not absolve an available co-obligor from liability to the obligee. The obligee is not entitled to collect the full amount repetitively from each of the co-obligors; but he is entitled to collect the full amount by suing any or all of them. Possibly, at international law, there could be a question as to whether a suit against one co-obligor may be for the full amount; but I am unable to see how this could affect his liability in principle to separate suit.

Further, any question whether there is a right of contribution would constitute a separate dispute between co-obligors to be separately resolved by any appropriate means of peaceful settlement. As indicated above, international judicial settlement differs from municipal judicial settlement in important ways; though it is in a real sense the ultimate method of peaceful settlement of international disputes, it does not enjoy the jurisdictional primacy enjoyed by municipal judicial settlement among other settlement mechanisms. The fact that recourse to the Court may not be open to a party seeking contribution is not decisive (cf. *J. H. Rayner Ltd. v. Department of Trade* [1990] 2 AC 418 HL, at p. 480, letter F). The claim to contribution may be pursued in other ways. This perspective is not, I believe, very different in principle from that adopted by counsel for Australia when he argued, as I understood him, to the effect that a decision of the Court upholding Australia's preliminary objection as to the absence of New Zealand and the United Kingdom would result in Nauru not obtaining any legal ruling on the merits, but would not deprive Nauru of the opportunity of pursuing its claim in other ways (CR 91/21, p. 68). In international law a right may well exist even in the absence of any juridical method of enforcing it (Eugène Borel, "Les voies de recours contre les sentences arbitrales", *Recueil des cours de l'Académie de droit international de La Haye*, Vol. 52 (1935-II), pp. 39-40). Thus, whether there is a right to contribution does not necessarily depend on whether there exists a juridical method of enforcing contribution.

In considering whether the legal rule contended for by Australia exists, I would remind myself of the following statement by Charles De Visscher:

"The temptation to formalism, and the proneness to generalization by abstract concepts and to premature systematization, represent one of the most serious dangers to which international-law doctrine is still exposed. It escapes only by constant return to respect for facts and by exact observation of the concrete and very special conditions which in the international domain contribute to forming the legal rule and govern its applications. Of course the legal rule never embraces social reality in all its fullness and complexity. Attempting to do so, law would risk compromising its proper ends as well as overshooting its possibilities. If abstraction carried to an extreme degenerates into unreality, individualization pushed to excess leads to the destruction of the rule. International justice especially must maintain a proper relationship between social data and the rules designed to govern them." (Charles De Visscher, *Theory and Reality in Public International Law*, trans. P. E. Corbett, 1968, p. 143.)

Possibly, these words could offer comfort to both of the competing points of view on the question whether there is a legal rule precluding an action against one only of a number of joint actors. The implications of holding that there is such a rule can only be grasped and evaluated by reference to concrete cases exemplifying its operation.

In this case, Australia (which is before the Court) accepts that it "exercised actual administration of the territory of Nauru" (Preliminary Objections of the Government of Australia, Vol. I, p. 136, para. 339); its argument is that it was doing so on behalf of itself, New Zealand and the United Kingdom as together constituting the Administering Authority. I do not understand it to be saying that in law there is no conceivable basis on which it could be individually subject to the obligations of the Trusteeship Agreement; it contends that the issue whether it was in breach of those obligations can only be determined in a suit brought against itself, New Zealand and the United Kingdom. So the substance of the matter is this: it is not a question of Nauru proposing a technical device for attaching responsibility to Australia for something which Australia did not itself do or for breach of an obligation which Australia could not conceivably have in law, but rather a question of Australia proposing a formula precluding the Court from adjudicating on the issue whether Australia's own acts were in breach of its trusteeship obligations, on the ground that these obligations were jointly shared by Australia with two other States on whose behalf Australia was acting but which are not parties to the proceedings.

It seems to me that to hold, in such circumstances, that there exists a rule of law, as asserted by Australia, which has the effect of barring these proceedings in the absence of New Zealand and the United Kingdom on the ground that the obligation was joint is to import a level of formalism and abstraction that is incompatible with the "proper relationship between

social data and the rules designed to govern them" — a relationship which Judge De Visscher tells us it is the duty of international justice especially to maintain.

PART V. A JUDGMENT AGAINST AUSTRALIA WILL NOT AMOUNT TO A  
JUDICIAL DETERMINATION OF THE RESPONSIBILITY OF  
NEW ZEALAND AND THE UNITED KINGDOM

I come finally to Australia's argument that a judgment against it will amount to a determination of the responsibility of New Zealand and the United Kingdom, and that, consequently, Nauru's action is really against all three Governments, two of which, however, are absent and have not accepted the jurisdiction of the Court in the case.

Australia emphasized that the argument was not that New Zealand and the United Kingdom were "indispensable parties". In litigation before the Court there are, indeed, two elements which advise caution in adopting an "indispensable parties" rule. These elements, which are interrelated, are, first, that the jurisdiction of the Court is consensual, and, second, that the Court has no power to order joinder of third parties. There are circumstances in which it may be incompetent or improper for the Court to hear a case in the absence of a third party: the case of the *Monetary Gold Removed from Rome in 1943* shows that (*I.C.J. Reports 1954*, p. 32). But, as was indicated by that case and emphasized in later cases expounding it, the Court would only decline to exercise its jurisdiction where the legal interests of a State not party to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision" (*ibid.*). That this was the position in that case is shown by the following part of the Judgment:

"The first Submission in the Application centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions — questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy — only two States, Italy and Albania, are directly interested." (*Ibid.*)

Thus, in that case the Court was being asked to determine whether Albania, a non-party, had by its actions engaged international responsibility to Italy, the Applicant, and, if so, whether, in consequence, certain monetary gold belonging to Albania should be treated as due to Italy by way of compensation. Without determining these issues as between Italy and Albania, the Court could not pass on to determine the issues presented in the Application as between the parties thereto: Italy's claims against the parties to the case depended on the outcome of a claim which it was asserting against Albania in its Application against those parties. It was not a case in which the decision which the Court was asked to pronounce as between the parties before it might be based on a course of reasoning which could be extended to a non-party; the decision would constitute a direct determination of the responsibility of the non-party, with concrete and juridically dispositive effects for its admitted ownership of the gold. A court (including this Court) may in some circumstances give judgment against a party *in absentia*; but no court, not even a municipal court exercising jurisdiction on a non-consensual basis, can give judgment against someone who was not in some sense a party to the proceedings, or to the relevant phase thereof leading to the particular judgment, with a corresponding entitlement to be heard. To do so would be to offend against a cardinal principle of judicial organization which forbids a court from adjudicating in violation of the *audi alteram partem* rule. That precept of judicial behaviour, which is of general application to all courts, would clearly have been affronted if the Court had adjudicated on Albania's responsibility. Additionally, the requirement for consent to jurisdiction, which is specific to this particular Court, would also have been negated.

It follows that the test to be applied in deciding whether the Court may not properly act is not simply whether it would have been more convenient to decide an issue with the presence before the Court of all the States that might be affected by the decision, but whether the absence of such a State is, in the particular circumstances, such as to make it impossible for the Court judicially to determine the issues presented before it even when account is taken of the protective provisions of Article 59 of the Statute.

The passage quoted above from the *Monetary Gold* case was cited by counsel for Nicaragua in the *Military and Paramilitary Activities* case (CR 84/14, p. 26, Mr. Reichler). It was cited in opposition to an argument by counsel for the United States to the effect that not only would the responsibilities of certain non-party States be necessarily determined by any decision against the United States, but that the decision would have practical effects on those States. The effects would be practical, it was argued, in the sense that, if the Court, as it was requested by Nicaragua, were to enjoin the United States from co-operating militarily with those States, the consequence would be to prevent them from obtaining any law-



ful military assistance from the United States and in turn to impair their legal right of self-defence (CR 84/19, pp. 42 ff., Mr. J. N. Moore; see also CR 84/10, pp. 76-77, Mr. McGovern, and Counter-Memorial submitted by the United States of America, Part IV, Chap. I). The argument did not find favour with the Court (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, pp. 184-186, 429-431). And yet, the argument would seem to have been stronger than Australia's contention in this case: unlike the position taken by the United States, Australia has not been able to argue that a decision against it would have the practical effect of depriving New Zealand and the United Kingdom of the ability to make use of any right which they may possess under international law. It is useful to note that the question, as the Court understood it, was not whether Nicaragua had a claim against any other State in an absolute sense (as Nauru might conceivably have against New Zealand and the United Kingdom), but whether such a claim was presented in the particular proceedings before the Court. In this respect, the Court recalled that Nicaragua

"emphasizes that *in the present proceedings* Nicaragua asserts claims against the United States only, and not against any absent State, so that the Court is not required to exercise jurisdiction over any such State" (*I.C.J. Reports 1984*, p. 430, para. 86; emphasis added).

Was the conclusion reached in the *Monetary Gold* case overthrown by the position taken by the Court on Italy's application to intervene in the case of the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*? Refusing the application, the Court said:

"The future judgment will not merely be limited in its effects by Article 59 of the Statute: it will be expressed, upon its face, to be without prejudice to the rights and titles of third States." (*I.C.J. Reports 1984*, pp. 26-27, para. 43.)

Although, strictly speaking, the second part of the statement seemed unnecessary, the substance of the statement was in keeping with the previously settled jurisprudence of the Court. However, at the merits stage the Court said:

"The present decision must, as then foreshadowed [in 1984], be limited in geographical scope so as to leave the claims of Italy unaffected, that is to say that the decision of the Court must be confined to the area in which, as the Court has been informed by Italy, that State has no claims to continental shelf rights." (*I.C.J. Reports 1985*, p. 26, para. 21.)

Arguably, the position so taken by the Court went beyond, and was not really foreshadowed by, the position previously taken by it in 1984, for

now the Court was not merely saying that its decision would not in law affect Italy's interests, but was in fact refraining from adjudicating as between the parties before it with respect to any areas in relation to which Italy might have a claim. It seems to me that a point of some difficulty was raised by the argument that, if Italy's claims had been sufficiently extensive, this, on the view which the Court eventually took, could well have prevented the Court from giving any judgment at all as between the parties before it (*I.C.J. Reports 1985*, p. 28, para. 23). Possibly, the cited dictum of the Court in its 1985 decision is to be explained by certain "special features" to which it referred (*ibid.*). Alternatively, it is to be explained by the particular terms of the Special Agreement, under which the Court was expected to decide

"in absolute terms, in the sense of permitting the delimitation of the areas of shelf which 'appertain' to the Parties, as distinct from the areas to which one of the Parties has shown a better title than the other, but which might nevertheless prove to 'appertain' to a third State if the Court had jurisdiction to enquire into the entitlement of that third State, . . ." (*ibid.*, p. 25, para. 21).

In effect, the Special Agreement itself required the Court to refrain from adjudicating over areas which were subject to Italy's claims and which might therefore not "appertain" in "absolute terms" to the parties to the case. In my opinion, the case did not modify the general principle laid down in the *Monetary Gold* case.

That principle was applied in the case concerning the *Land, Island and Maritime Frontier Dispute* (*I.C.J. Reports 1990*, p. 92). For present purposes, the reasoning of the Chamber, particularly on questions of opposability, is to be found in the passage from its decision set out in the dissenting opinion of Judge Schwebel in the present case. The decision was closely canvassed by both sides. On a consideration of the views expressed, it seems to me that something could be said for the proposition that, *ex hypothesi*, a condominium of the three States (the case advanced by El Salvador), or a "community of interests" among them (the case advanced by Honduras), could not take effect in law as between two of them only. To determine that the rights of two States are governed by a condominium or by a "community of interests" of three is arguably to determine, on a basis of necessary interdependence, that the rights of the third State are also thereby governed. It is not easy to see how a declaration upholding the existence of either of the two suggested régimes could apply as between two of the three States save on the basis that it had the same legal effect in relation to the third State. By contrast, in the present case, any judgment against Australia can have full effect as between the two litigating States without needing to produce any legal effects in relation to the two absent States. The reasoning of the Chamber, in holding that it was not precluded from hearing the case before it in the absence of Nicaragua as a party, applies *a fortiori* to justify the hearing of the present case in the absence of New Zealand and the United

Kingdom. I have difficulty in seeing how it may be possible to reconcile the decision in that case with a different conclusion in this.

Australia accepts that, unlike the position in the *Monetary Gold* case, it is not necessary for the Court in this case to make a determination of responsibility against New Zealand and the United Kingdom as a prerequisite to making a determination of responsibility against Australia. However, Australia takes the view that any determination against it would necessarily imply simultaneous determinations against New Zealand and the United Kingdom, and it considers that this would be equally barred by the *ratio decidendi* of the *Monetary Gold* case in so far as this rests on the incompetence of the Court to determine the responsibility of any State without its consent. I agree that if the Court is in fact making a determination of the responsibility of a non-party, the particular stage in the decision-making process at which it is doing so cannot make the decision less objectionable. But this would be so only if what was involved was a judicial determination purporting to produce legal effects for the absent party, as was visualized in the *Monetary Gold* case, and not merely an implication in the sense of an extended consequence of the reasoning of the Court. It seems to me that an approach based on simultaneity of determinations is likely to involve an implication of that kind, and not an adjudication. The Court's jurisprudence shows that such implications are not a bar to the exercise of jurisdiction.

As I read the *Monetary Gold* case, the test is not merely one of sameness of subject-matter, but also one of whether, in relation to the same subject-matter, the Court is making a judicial determination of the responsibility of a non-party State. Leaving aside the question of sameness of subject-matter, would a decision in this case constitute a judicial determination of the responsibility of New Zealand and the United Kingdom? Or, if it would not technically constitute such a determination, would it be tantamount to such a determination in the very real sense in which the Court was asked to determine the responsibility of Albania?

In considering whether a possible judgment against Australia would amount to a determination of the responsibility of New Zealand and the United Kingdom, it is relevant, and, indeed, necessary, to consider the legal elements on which such a judgment might be based. The suit before the Court is constituted as between Nauru and Australia. Nauru is asking the Court to say that Australia is in breach of a certain obligation which Australia allegedly had to Nauru under international law. The obligation, assuming that it existed, was also the obligation of New Zealand and the United Kingdom. But Nauru does not need to rely on this fact, and the Court, while it may notice the fact, does not need to found its decision on it. That others had the same obligation does not lessen the fact that Aus-

tralia had the obligation. It is only with Australia's obligation that the Court is concerned. In contrast with the situation in the *Monetary Gold* case, the decision of the Court as between Nauru and Australia will not be based on the obligation of New Zealand and the United Kingdom. Also, even if the obligation was joint, the decision of the Court need not be founded on that fact: in that connection, as has been noticed in Part I, in today's Judgment the Court has not found it necessary to say whether or not the obligation was joint (see paragraph 48 of the Judgment). If it was joint, this would not mean that it was any the less the obligation of Australia. All the Court is concerned with in these proceedings is whether the obligation, if it existed, was Australia's obligation.

Therefore, there need be nothing in the legal elements of a possible judgment in favour of Nauru which would require the judgment to be construed as *per se* constituting or amounting to a judicial determination of the responsibility of New Zealand and the United Kingdom. On the basis of argument that the obligation was intrinsically and inseverably joint, it might be contended that the conclusion reached in the judgment could in logic be extended to New Zealand and the United Kingdom; but this would be a matter of extending the reasoning of the Court to a case to which its judgment *per se* does not apply and on a ground not relied on by the judgment itself. So far as the judgment is concerned, by itself it will not affect the rights of New Zealand or the United Kingdom in the sense in which a judgment deploys its effects, as would have been the case with Albania. New Zealand and the United Kingdom will not be deprived of any rights in the subject-matter of the case, or at all. Certainly, no property or property rights belonging to them will be transferred or otherwise affected as a result of such a decision. It is difficult to see what protection will be needed beyond that provided by Article 59 of the Statute of the Court.

In any proceedings by Nauru against them, New Zealand and the United Kingdom will be free to deny liability on any ground, whether or not it is a ground pleaded by Australia in these proceedings; in this respect, differences have been noticed in Part II above between the position of Australia, on the one hand, and that of New Zealand and the United Kingdom, on the other, under the Trusteeship Agreement, and it cannot be assumed *a priori* that these differences could not be reflected in the defence to any such proceedings. However strong may be the tendency of the Court to follow a possible decision given in this case in favour of Nauru in any proceedings brought by Nauru against New Zealand and the United Kingdom, that tendency still falls short of being a judicial determination made in this case of the responsibility of those two States in the sense in which the Court was asked to make a determination of the responsibility of Albania in the *Monetary Gold* case. A decision in this case, if, as I think, it does not *per se* constitute a judicial determination of the responsibility of New Zealand and the United Kingdom, can at best

have only precedential value in any proceedings concerning their responsibility; and that value, however high one may be disposed to rate it, is only influential, not controlling. The possibility of a court deciding differently on the same issues in differently constituted proceedings is not a phenomenon less known to the law than the general propensity of courts to be guided by their rulings in similar cases. To use the propensity to be guided by previous rulings to exclude the possibility of deciding differently in a later case would be even less right in international litigation than it would be in municipal.

It has been correctly pointed out that "[a]s interstate relationships become more complex, it is increasingly unlikely that any particular dispute will be strictly bilateral in character" (L. F. Damrosch, "Multilateral Disputes", in L. F. Damrosch (ed.), *The International Court of Justice at a Crossroads*, 1987, p. 376). Counsel writing for Nicaragua in the *Military and Paramilitary Activities* case had earlier spelt out the implications of that consideration in the following way:

"The rule established in *Monetary Gold* is soundly grounded in the realities of contemporary international relations. Legal disputes between States are rarely purely bilateral. As in the case of delimitation of the continental shelf, the resolution of such disputes will often directly affect the legal interests of other States. If the Court could not adjudicate without the presence of all such States, even where the parties before it had consented fully to its jurisdiction, the result would be a severe and unwarranted constriction of the Court's ability to carry out its functions." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility*, Memorial of Nicaragua, para. 248.)

I agree with Australia that the

"fact that international disputes may be increasingly multilateral in nature is no reason to ignore the fundamental international law principles of sovereignty of States and the requirement of consent to adjudication" (Preliminary Objections of the Government of Australia, Vol. I, p. 144, para. 363).

But I do not think that these principles are in danger of being violated in this case. That the wider implications of a dispute do not necessarily prevent adjudication in litigation between some only of the interested parties would seem to have been implicitly anticipated by the Permanent Court of International Justice as early as 1932 (*Free Zones of Upper Savoy and the District of Gex*, P.C.I.J., Series A/B, No. 46, p. 136). As observed above, this

Court has recognized that, unless barred by the *Monetary Gold* principle, it should seek "to give the fullest decision it may in the circumstances of each case" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, I.C.J. Reports 1984, p. 25, para. 40*).

The jurisprudence of the Court is under constant review; no case, however venerable, is exempt from scrutiny and re-evaluation. However, it would not appear that there has been any movement away from the stand taken by the Court when it stated in 1984 that the "circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), I.C.J. Reports 1984, p. 431, para. 88; emphasis added*). It may be that that limit has been set at a point which enables the Court to adjudicate in situations in which a municipal court would refrain from adjudicating unless there was joinder; but, if so, there are good reasons for the difference. The danger to the authority of the Court presented by any tendency to act on the basis of a low jurisdictional threshold is not something to be lightly dismissed; but I do not feel oppressed by any apprehension in the circumstances of this case if, as I consider, it can be treated as being within the limits permitted by the *Monetary Gold* case and as therefore not involving the exercise of jurisdiction against non-parties.

The decision in the *Monetary Gold* case turned in part on the fact that the rule enunciated in Article 59 of the Statute "rests on the assumption that the Court is at least able to render a binding decision" (*I.C.J. Reports 1954, p. 33*). For the reasons already given, in that case the Court could not give a decision on the seminal issue concerning Albania's international responsibility that would be "binding upon any State, either the third State, or any of the parties before it" (*ibid.*). A decision in this case would of course not be binding on New Zealand and the United Kingdom; but I am unable to see why it would not be binding on Australia. Australia is before the Court; even if the alleged responsibility was joint, this does not by itself mean that Australia could not ultimately share in the responsibility (if any) on any basis whatsoever. It is for the Court to determine whether there is any basis on which Australia shares the responsibility. If the Court determines that there is a basis, it is difficult to see why its decision would not be binding on Australia.

I should also say something about Australia's contention that the absence of New Zealand and the United Kingdom from the proceedings deprives the Court of "critical factual information" (Preliminary Objections of the Government of Australia, Vol. I, p. 140, para. 354). Australia's reliance on the *Status of Eastern Carelia* case (*P.C.I.J., Series B, No. 5, p. 27*) overlooks the fact that the absence of an interested State does not necessarily operate to deprive the Court of evidence if the evidence is otherwise available (*Western Sahara, I.C.J. Reports 1975, pp. 28-29*). The

latter was also an advisory opinion case, but this does not affect the general proposition. A person who can give relevant evidence may be a necessary witness, not a necessary party<sup>1</sup>. In systems which provide for it, joinder is not justified for the sole purpose of securing or facilitating the production of evidence: evidence must be produced in the normal ways. A contention similar to Australia's was advanced in the *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility* case, but without success (*I.C.J. Reports 1984*, p. 430, para. 86; United States Counter-Memorial, para. 443; and Mr. J. N. Moore, CR 84/19, at pp. 42, 47, 48, 51). In any event, the arguments do not persuade me that Australia, having in fact been in charge of the administration of Nauru at all material times, is not, or cannot be, in possession of all the relevant evidence.

#### CONCLUSION

Australia's arguments are worthy of consideration, and there could be more than one view of their value. For the reasons given, I have not, however, been able to feel persuaded. In my opinion, the obligations of the three Governments under the Trusteeship Agreement were joint and several, and Australia could accordingly be sued alone. In the alternative, if the obligations were joint, this circumstance still did not prevent Nauru from suing Australia alone. Nor do I think that a possible judgment against Australia will amount to a determination of the responsibilities of New Zealand and the United Kingdom. Whether Australia in fact had an international obligation to ensure the rehabilitation of worked-out phosphate lands, whether, if so, it was in breach of that obligation, and what, if so, is the extent of responsibility which it thereby engaged, are different questions.

(Signed) Mohamed SHAHABUDEEN.

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<sup>1</sup> *Amon v. Raphael Tuck & Sons, Ltd.* [1956] 1 All ER 273, at pp. 286-287.