DISSENTING OPINION OF JUDGE AGO

[Translation]

1. I deeply regret being unable to associate myself with the Judges who have voted in favour of the present Judgment. I regret it all the more since I am certainly no less sensitive than my colleagues to the frustration felt by the Nauruans when they gaze upon the present state of their small island's territory. I also hope with all my heart that it will be possible for this people once again to find in its country of origin conditions of life favourable to its development.

But these perfectly justified emotional reactions should not blind us to the fact that the questions we have to consider in this preliminary phase are very specific questions of law and that it is by reference to the law, and only to the law, that they have to be answered.

2. My reason for taking the position I have indicated and for writing this opinion is that I am compelled to take note of an insurmountable contradiction between two facts. There is, on the one hand, the fact that the Government of Nauru has brought proceedings, against Australia alone, for the purpose of enforcing its claims with respect to the "rehabilitation" of its territory. But it is, on the other hand, equally unquestionable that first the League of Nations and then the United Nations entrusted the task of administering Nauru jointly to three distinct sovereign entities, namely the United Kingdom, Australia and New Zealand. This authority was conferred on a basis of complete legal equality between the three Powers. To be sure, the participation of one of them, Australia, in the discharge of the tasks involved in administering the territory under the joint Trusteeship of three States might, in point of fact, be more substantial than that of the two others. But this could in no way affect the fundamental situation of equality of rights and obligations between the three partners, a situation which, in addition, was particularly guaranteed as regards the mining of phosphate deposits.

3. It is by reason of the contradiction referred to above that, in considering all the preliminary objections raised by Australia in the present case, I have felt unable to avoid ascribing decisive importance to one, namely the objection based on the fact that two of the three Powers to which Trusteeship over Nauru had been jointly assigned were not parties to the proceedings. I wish to make it perfectly clear that I am referring to that objection alone, since, in the case of all the others, I fully concur with the majority of the Court in considering that they should be rejected.

4. I do not know for what reasons the newly independent State of Nauru elected to sue Australia alone. The Judgment to which the present

opinion is appended correctly points out, in paragraph 33, that on the very day of the proclamation of the Republic, the Head Chief and future President of Nauru, Mr. DeRoburt, told the press that:

> "We hold it against Britain, Australia and New Zealand to recognize that it is their responsibility to rehabilitate one third of the island."

In the same context it should also be noted that in 1968 this same Mr. DeRoburt had taken the initiative of proposing a meeting between the representatives of the three Governments that formerly had together made up the Administering Authority of the trust territory and representatives of the Nauruan Government

> "to work out how best [an] airstrip could be constructed *as a rehabilitation project* and to determine the degree of financial and technical assistance the partner Governments would be able to offer" (Memorial of Nauru, Vol. 4, Ann. 76; emphasis added).

5. There was therefore every reason to think that, if an application was to be submitted to the Court, it would be directed against the three States jointly. In my opinion the prerequisites for this were duly fulfilled. New Zealand and the United Kingdom had, like Australia, accepted the compulsory jurisdiction of the Court. The terms of New Zealand's acceptance were, in essence, the same as those of Australia's. As for the United Kingdom, its declaration did, it is true, diverge in certain respects from those of the two other States. But, had New Zealand as well as Australia been parties to the proceedings, it could fairly safely have been assumed that the United Kingdom would not have left its two former partners in the administration of Nauru and the exploitation of its mineral resources on their own. It is therefore most likely that it would not, by itself, have raised insurmountable obstacles. Particularly since the clause excluding from the acceptance of the compulsory jurisdiction of the International Court of Justice disputes with States Members of the Commonwealth — a clause originally inserted in the declaration in anticipation of the establishment of a special court for the Commonwealth — could easily have been regarded as obsolete, since that expectation has never been fulfilled. Furthermore, although Nauru had been admitted to the Commonwealth, the conditions of its admission did not make it a full member.

6. Nauru would therefore, at least, have had every reason to seek to bring an action before the Court against the three States affected by the claim it intended to put forward.

But, whatever may have been the reasons that led it to proceed otherwise, the fact remains that it did so. Its Government elected to bring pro-

ceedings against Australia alone in respect of the obligation it claims to exist to "rehabilitate" the part of its territory worked out, prior to its independence, by the three States that had made up the "Administering Authority". Having taken this course, the Nauruan Government must face the consequences of that choice. It has thus placed the Court before a difficulty that is, in my opinion, insurmountable, namely that of determining the possible obligations of Australia in the area in question without at the same time *ipso facto* determining those of the other two States that are not parties to the proceedings. For otherwise the Court would manifestly overstep the limits of its jurisdiction.

The Judgment to which this opinion is appended expressly admits that:

> "In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned . . ." (Para. 55.)

I welcome this admission. But surely, having made it, one cannot consider its consequences avoided by the mere assertion that

> "no *finding in respect of that legal situation* will be needed as a basis for the Court's decision on Nauru's claims against Australia" (*ibid.*; emphasis added).

In fact, it is precisely by ruling on these claims against Australia alone that the Court will, *inevitably*, affect the legal situation of the two other States, namely, their rights and their obligations. If, when dealing with the merits of the case, the Court were to recognize that responsibility and accordingly seek to determine the share of the responsibility falling upon Australia, it would thereby indirectly establish that the remainder of the responsibility would fall upon the two other States. Even if the Court were to decide — on what would, incidentally, be an extremely questionable basis — that Australia was to shoulder in full the responsibility in question, that decision would, equally inevitably and just as unacceptably, affect not only the "interests" but also the legal situation of two States that are not parties to the proceedings. In either case, the exercise by the Court of its jurisdiction would be deprived of its indispensable consensual basis.

These are the reasons that have led me to conclude that the preliminary objection raised in this respect by Australia was well founded and should have been upheld by the Court.

(Signed) Roberto AGO.