DISSENTING OPINION OF JUDGE SCHWEBEL

The contentious jurisdiction of the Court has been limited from the outset of its existence in 1922 to the cases which the parties submit to it, by whatever means. This has been the law of the matter since the Council of the League of Nations struck from the draft of the Court's Statute the provision for general compulsory jurisdiction proposed by the Advisory Committee of Jurists. In the development of that law, the Court has shown great care not to find that it has jurisdiction where jurisdiction is questionable. In its long and complex history of jurisdictional controversy, a history which is unique among courts, the Court has rarely departed from this tradition of judicial caution. Its reasons have been prudential as well as constitutional. Not only is it legally not entitled to assert jurisdiction over States which have not assented to it; doing so, or appearing to do so, in questionable cases may persuade States that a measured submission to the Court's jurisdiction may be interpreted as unmeasured, with the result that they may abstain altogether from adhering to the Court's jurisdiction. The reality of this apprehension has been demonstrated more than once. It may be, as Elihu Lauterpacht maintains in *Aspects of the Administration of International Justice* (1991), that, because of developments in the jurisprudence of the Court, in the practice of the Security Council of the United Nations, and elsewhere, the time is ripe for reconsideration of the traditional position that the jurisdiction of the Court is consensual rather than compulsory. But as yet such a fundamental reconsideration has not taken place.

The jurisdictional problems posed in bilateral disputes are magnified in multilateral disputes. But, in contrast to the rich body of jurisdictional practice in bilateral disputes, the cases in which the Court has addressed situations analogous to that now before the Court are few. Where more than one State is charged with joint (or joint and several) commission of an act wrongful under international law, but only one such State is before the Court, may the Court proceed to exercise jurisdiction over that State even though its determination of the liability of that State may or will entail the effective determination of the liability of another? That is the essence of the problem which the Court must resolve if it is to find that it has jurisdiction in the instant case and that that case is admissible.

In dealing with that problem, private law sources and analogies are of little use. There is no doubt that, in the municipal law of States, a party may maintain suit against a joint tortfeasor or co-contractor or co-trustee

in the absence of other joint tortfeasors, contractors, or trustees. But jurisdiction is not consensual in national law; the situation differs fundamentally from that which governs international jurisdiction, from which it follows that principles and patterns of national practice in this instance have scant application to the issue before the Court.

THE *CORFU CHANNEL* CASE

The problem might have been dealt with by the Court in the *Corfu Channel* case but it was not. The Memorial of the United Kingdom contended "that the Albanian Government ... either caused to be laid, connived at or had knowledge of the laying of mines in certain areas of its territorial waters in the Strait of Corfu", but it named no other alleged joint tortfeasor. In the course of the proceedings, British counsel introduced evidence purporting to show that the mines actually had been laid by ships of the Yugoslav Navy, with the knowledge of the Albanian Government. But the Applicant's submissions made no reference to Yugoslavia and the Court in any event found that the alleged involvement of Yugoslavia was not proved. For its part, Albania, which accepted the Court's jurisdiction by its acceptance of a recommendation of the Security Council for the submission of the dispute to the Court, raised a preliminary objection to the admissibility of the case, but it was not founded on the absence of an alleged joint tortfeasor. Accordingly, the most that may be gleaned from this case is that, where it appears from the facts alleged or shown that there was some unknown joint tortfeasor, the Court will not dismiss the claim against the named tortfeasor *proprio motu*. There would have been no good ground for its so doing, since a holding against Albania could not have entailed the effective liability of an unnamed and unknown joint tortfeasor for the very reason that it was unnamed and unknown.

MONETARY GOLD CASE

The case of *Monetary Gold Removed from Rome in 1943* is the principal precedent, although its singular circumstances — which were linked with the failure of Albania to pay compensation to the United Kingdom as ordered by the Court in the *Corfu Channel* case — ensure that it will not be on all fours with the current or another case. For present purposes, it is important that the Court and counsel for Nauru and Australia are agreed that the *Monetary Gold* case is authority for a proposition of continuing vitality, namely, that where a third State's legal interests would not only be affected by a decision but form the very subject-matter of the decision,

proceedings may not be maintained in the absence of that third State; and that they are further agreed that, unlike the *Monetary Gold* case, in which the question at issue in the Court could not be determined without first passing upon the actions of Albania, a State not party to those proceedings, "the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia . . ." (Judgment, para. 55).

But that is as far as their agreement goes. Australia maintains that, as the Court puts it:

> "in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom *previous* to the determination of Australia's responsibility. It nonetheless asserts that there would be a *simultaneous* determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally precluded by the fundamental reasons underlying the *Monetary Gold* decision." *(Ibid.)*

The Court however concludes, after observing that "the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical", 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, but 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. Accordingly, the Court cannot decline to exercise its jurisdiction." *(Ibid.)*

For my part, I find the Court's reasoning unpersuasive, in the light of the considerations set out below. The essence of my view is that, if a judgment of the Court against a present State will effectively determine the legal obligations of one or more States which are not before the Court, the Court should not proceed to consider rendering judgment against the present State in absence of the others. The fact that the timing of the finding of the responsibility of the absent party precedes such a finding in respect of the present party, or that the finding of the responsibility of the absent party is a logical prerequisite to the finding of the responsibility of the present party, is not significant. What is dispositive is whether the determination of the legal rights of the present party effectively determines the legal rights of the absent party.

Before setting out why, on the facts of the instant case, I am not in agreement with the Court's reasoning or conclusion, I shall discuss the two other cases on which the Court relies.

MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

The Court quotes in support of its construction of the meaning of the *Monetary Gold* case a passage of the Court's Judgment on jurisdiction and admissibility in *Military and Paramilitary Activities in and against Nicaragua:*

> "There is no doubt that in appropriate circumstances the Court will decline, as it did in the case concerning *Monetary Gold Removed from Rome in 1943*, to exercise the jurisdiction conferred upon it 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' ... Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute. As the Court has already indicated ... other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. There is no trace, either in the Statute or in the practice of international tribunals, of an 'indispensable parties' rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings. (Judgment of 26 November 1984, *I.C.J. Reports 1984*, p. 431, para. 88.)" (Judgment, para. 51.)

This 1984 Judgment of the Court in the foregoing as well as some other respects in my view was in error; far from reinforcing the jurisprudence of the *Monetary Gold* case, it obfuscated it. It is necessary to recall what was at issue in 1984 to explain why.

In its Application and argument, Nicaragua's essential claim was that military and paramilitary activities of the United States in and against Nicaragua violated obligations of the United States under conventional and customary international law. Nicaragua brought suit against the United States alone. However, its Application and argument maintained that El Salvador, Honduras and Costa Rica all were vitally involved in the delicts of the United States, because they were lending their territory or armed forces to the indicted activities of the United States. For its part, the United States no less stressed the involvement of El Salvador, Honduras and Costa Rica; indeed, its substantive defence to Nicaragua's charges

was that its activities were conducted in the collective self-defence of those nations which were the object of Nicaraguan subversive intervention which was tantamount to armed attack, through Nicaragua's provision of arms, training, transit, sanctuary, and command-and-control facilities particularly to insurrection in El Salvador. The Court in 1986 held against the United States on the facts and on the law. It essentially concluded, on the facts, that no responsibility could be attributed to the Government of Nicaragua for any flow of arms across its territory to insurgents in El Salvador; on the law, it held that in any event provision of arms to insurgents could not be tantamount to an armed attack.

Now when the Court's Judgment on jurisdiction and admissibility of 1984 is read together with that on the merits of 1986, it appears that the articulate factual holdings of 1986 were the inarticulate factual premises of 1984. That is to say, since the Court was not disposed in 1984 at the stage of jurisdiction and admissibility provisionally to credit the charges of the United States on the facts, it then could arrive at a holding on the law that, if it were subsequently to decide in favour of Nicaragua's submissions on the merits, El Salvador, Honduras and Costa Rica would be protected against any adverse effects of such a judgment by reason of the import of Articles 59, and 62 and 63, of the Statute. By reason of Article 59, the Judgment on the merits would have no binding force except between the United States and Nicaragua and in respect of that particular case. By reason of Articles 62 and 63, should El Salvador, Honduras or Costa Rica consider that their interests might be affected by the decision on the merits, or affected by the construction of a convention to which they were party, they could employ the Court's statutory provisions for intervention in the case.

But, on the factual premises put forth by the United States, it is clear and should have been clear in 1984 that Article 59 could provide no meaningful protection to States such as El Salvador which were the objects of alleged Nicaraguan support of armed insurrection within their borders. Assuming the factual allegations of the United States (and of El Salvador) about the activities of the Nicaraguan Government to have been true, but contemplating nonetheless that the United States could be prohibited from taking measures against Nicaragua to assist El Salvador in its defence against those activities, of what use would it be to El Salvador to rely upon the Court's legal conclusion that the Court's Judgment against the United States was not binding upon it? If the United States were to comply with the Judgment of the Court, it would cease to act in what it and El Salvador maintained was the collective self-defence of El Salvador, with the result that the latter's Government, far from having its interests conserved by the force of Article 59, could fall before the onslaught of the insurrection so significantly supported by Nicaragua.

And what, in truth, did the facts turn out to be? As for Nicaragua's sworn and reiterated denials of any involvement in the material support of insurrection in El Salvador, it subsequently was authoritatively reported that an aircraft flying from Nicaragua packed with missiles was downed in El Salvador, an event which was the subject of consideration in the Security Council; and it later transpired that the Government of the Soviet Union identified, by serial number, the launch tube of a ground-to-air missile which it had supplied in 1986 to the Nicaraguan Government and which had been fired by Salvadoran insurgents in El Salvador. Indeed, in 1991 it was acknowledged by the leadership of Nicaragua that a number of Soviet-supplied missiles had been transferred to Salvadoran guerrillas by elements of the Nicaraguan Army, at least two of which were used to shoot down aircraft of the Salvadoran Government. So much for the utility of Article 59 in safeguarding the position of El Salvador. As for the possibility of its intervening in the proceedings between Nicaragua and the United States, or instituting separate proceedings, that was a route which offered no more comfort to El Salvador and similarly situated States, having regard to the facts that they had made clear that they did not wish to litigate their security before the Court and that the Court earlier in 1984 had itself summarily dismissed El Salvador's request to intervene at the stage of jurisdiction and admissibility in exercise of its statutory "right to intervene in the proceedings" under Article 63, and had done so for reasons which were in conformity neither with the Statute nor with the Rules of Court.

Such precedential status as the Court's holding in the case may be thought to have is further prejudiced by the fact that in 1984 Nicaragua maintained, in respect of the argument of the United States about the effect to be attributed to the absence of El Salvador, Honduras and Costa Rica, that — despite the terms of its Application and argument — it made "no claim of illegal conduct by any State other than the United States" and that it sought "no relief . . . from any other State". These affirmations were belied as well, and within days of the 1986 Judgment on the merits against the United States, when Nicaragua brought intimately related claims in Court against Honduras and Costa Rica, as to which (in apparent contrast to El Salvador) it could make out a title of jurisdiction.

In the light of these considerations, my position on the Court's reliance on the case of *Military and Paramilitary Activities in and against Nicaragua* comes to this. The security interests of the States in whose interest the United States claimed to be acting in collective self-defence were as close if not closer to "the very subject-matter of the case" as were the interests of Albania in the *Monetary Gold* case (see in this regard the analysis of Professor Lori Fisler Damrosch, "Multilateral Disputes", in Damrosch, ed., *The International Court of Justice at a Crossroads*, 1987, pp. 376, 390). In their nature, those vital security interests presumably were more important to them than was Albania's financial interest to it; more to the point,

by determining that the United States was not entitled to act with them in their collective self-defence, the legal as well as the practical interests of those States were no less decisively and centrally determined by the Court's Judgment than would the interests of Albania have been determined by the Court's ruling in respect of it. This conclusion is reinforced by specific prescriptions of the Court's Judgment on the merits, which went so far as to pass upon not only the circumstances in which the absent State of El Salvador might take measures in self-defence but upon the proportionate counter-measures which the three absent States, El Salvador, Honduras and Costa Rica, could be permitted to take. Judgment in the "Nicaragua" case, as in the case now before the Court, was to be "simultaneous" in its effect, but that is not the dispositive distinction. The Court there rather should have given, and in the instant case should give, weight to the intensity and not to the timing or logical derivation of the effects in question. If the legal interests of a third State will not merely be affected but effectively determined by the Court's Judgment, the Court should not proceed to give judgment in the absence of that third State.

Such cases may by their nature be rare and fortunately so, for the principle of permitting third States by their non-appearance to foreclose litigation between two States over which the Court otherwise has jurisdiction is unappealing. The question is one of balancing the propriety of the Court's exercising to the full the jurisdiction which it has been given against the impropriety of determining the legal interests of a third State not party to the proceedings. While it may in practice be unusual for the legal interests of a third State to be subject to such determination, where they are, the balance should swing in its favour, and in favour of the inadmissibility of the action against the present party.

Land, Island and Maritime Frontier Dispute

The final precedent applied by the Court is the Judgment in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*. It dealt with Nicaragua's Application to intervene in the case pursuant to Article 62 of the Court's Statute. Nicaragua sought to intervene in various but not all aspects of a case involving several distinct though in some respects interrelated matters. It not only maintained, pursuant to Article 62, that it had interests of a legal nature that may be affected by the decision in the case; in one respect, Nicaragua argued that its interests were so much part of the subject-matter of the case that the Chamber of the Court could not properly exercise its jurisdiction without its participation. Nicaragua contended that, where the vital issue to be settled concerned the rights of Nicaragua in the Gulf of Fonseca

and the waters outside it, the Court could not, without its consent, give a decision.

The Chamber observed that Nicaragua apparently thus suggested that in such circumstances the failure of a State to intervene, or even refusal of a request for permission to intervene, may deprive the Court of the right with propriety to exercise jurisdiction conferred upon it by special agreement between two other States. In rejecting this argument, the Chamber referred with approval to its holdings respecting the effect of Articles 62 and 59 of the Statute set out in the *Monetary Gold* case and in *Military and Paramilitary Activities in and against Nicaragua.* And it quoted the passage from the *Monetary Gold* case quoted above about Albania's legal interests forming "the very subject-matter of the decision". It continued that, if in the *Frontier Dispute* case the legal interests of Nicaragua did form part of the very subject-matter of the decision, this would doubtless justify an intervention by Nicaragua under Article 62, which lays down a less stringent criterion. The Chamber found that, in respect of the Gulf waters, Nicaragua had shown the existence of an interest of a legal nature which may be affected by the decision. But it held that that interest did not form "the very subject-matter of the decision" as did the interests of Albania in the *Monetary Gold* case. The Chamber explained why in the following terms:

> "while the Chamber is thus satisfied that Nicaragua has a legal interest which may be affected by the decision of the Chamber on the question whether or not the waters of the Gulf of Fonseca are subject to a condominium or a 'community of interests' of the three riparian States, it cannot accept the contention of Nicaragua that the legal interest of Nicaragua 'would form the very subject-matter of the decision', in the sense in which that phrase was used in the case concerning *Monetary Gold Removed from Rome in 1943* to describe the interests of Albania . . . So far as the condominium is concerned, the essential question in issue between the Parties is not the intrinsic validity of the 1917 Judgement of the Central American Court of Justice as between the parties to the proceedings in that Court, but the opposability to Honduras, which was not such a party, either of that Judgement itself or of the régime declared by the Judgement. Honduras, while rejecting the opposability to itself of the 1917 Judgement, does not ask the Chamber to declare it invalid. *If Nicaragua is permitted to intervene, the Judgment to be given by the Chamber will not declare, as between Nicaragua and the other two States, that Nicaragua does or does not possess rights under a condominium in the waters of the Gulf beyond its agreed delimitation with Honduras, but merely that, as between El Salvador and Honduras, the régime of condominium declared by the Central American Court is or is not opposable to Honduras.* It is true that a decision of the Chamber rejecting El Salvador's contentions, and finding that there is no condominium in the waters

> of the Gulf which is opposable to Honduras, would be tantamount to a finding that there is no condominium at all. Similarly, a finding that there is no such 'community of interests' as is claimed by Honduras, between El Salvador and Honduras in their capacity as riparian States of the Gulf, would be tantamount to a finding that there is no such 'community of interests' in the Gulf at all. In either event, such a decision would therefore evidently affect an interest of a legal nature of Nicaragua; but even so that interest would not be the 'very subject-matter of the decision' in the way that the interests of Albania were in the case concerning *Monetary Gold Removed from Rome in 1943*... it follows from this that the question whether the Chamber would have power to take a decision on these questions, without the participation of Nicaragua in the proceedings, does not arise; but that the conditions for an intervention by Nicaragua in this aspect of the case are nevertheless clearly fulfilled." (*I.C.J. Reports 1990*, p. 122, para. 73; emphasis added.)

It appears to follow from the foregoing reasoning that, if, contrary to the Chamber's holding, it had found it necessary to decide whether Nicaragua possessed rights in a condominium, it would have concluded that Nicaragua's interests formed part of the very subject-matter of the decision. So interpreted, the case supports not the position of Nauru — and of the Court — on the question now before the Court but the position of Australia.

The International Responsibility for the Governance of Nauru

It remains to consider whether or not the facts of the situation in the years in which Nauru was a Territory administered under a Mandate of the League of Nations and subsequently was administered as a Trust Territory of the United Nations sustain the conclusion that for the Court to adjudge Australia would entail its effectively adjudging the absent States of the United Kingdom and New Zealand.

On 2 July 1919, an Agreement was concluded between "His Majesty's Government in London, His Majesty's Government of the Commonwealth of Australia, and His Majesty's Government of the Dominion of New Zealand". It recited that a Mandate for the administration of Nauru had been conferred by the Allied and Associated Powers upon "the British Empire", which was to come into operation on the coming into force of the Treaty of Peace with Germany, and that it is "necessary to make provision for the exercise of the said Mandate and for the mining of the phosphate deposits on the said Island". The three Governments accordingly agreed that the administration of Nauru shall be vested in an Administrator and provided:

> "The first Administrator shall be appointed for a term of five years by the Australian Government; and thereafter the Administrator shall be appointed in such manner as the three Governments decide." (Memorial of the Republic of Nauru, Vol. 4, Ann. 26, Art. 1.)

It was provided that the Administrator shall have the power to make ordinances for the peace, order and good government of the Island. The Agreement further specified that title to the phosphates of Nauru shall be vested in a Board of Commissioners (subsequently to be known as the British Phosphate Commissioners, or "BPC"), comprised of three members, one to be appointed by each of the three Governments, who shall hold office during the pleasure of the Government by which he is appointed. The Agreement provided that the phosphate deposits shall be worked and sold under the direction, management and control of the Commissioners. It also specified that:

> "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." (Memorial of the Republic of Nauru, Vol. 4, Ann. 26, Art. 13.)

The Agreement allotted shares of the phosphate production to the three Governments and otherwise provided for its sale.

The 1919 Agreement subsequently was amended to entrench Australia's authority in the administration of Nauru, particularly to ensure that the Administrator would be appointed by Australia and would act in accordance with the instructions of its Government, which in turn remained obligated to consult with the United Kingdom and New Zealand.

The Mandate for Nauru adopted by the Council of the League of Nations on 17 December 1920 recalled that the Treaty of Peace provided that "a Mandate should be conferred upon His Britannic Majesty to administer Nauru . . .". It recorded that "His Britannic Majesty" had agreed to accept a Mandate in respect of Nauru and had "undertaken to exercise it on behalf of the League of Nations . . .". It defined the terms of the Mandate, according the Mandatory "full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory" and requiring it to "promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory . . .".

The Mandate was replaced by the Trusteeship Agreement for the Territory of Nauru approved by the United Nations General Assembly on 1 November 1947. That Agreement was entered into pursuant to the terms of Article 81 of the United Nations Charter, which provides that "the

authority which will exercise the administration of the trust territory" may be "one or more States or the Organization itself".

The Trusteeship Agreement recalled that in pursuance of the Mandate conferred upon His Britannic Majesty, Nauru "has 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" (emphasis added). It recited that:

> "His Majesty desires to place the Territory of Nauru under the Trusteeship System, and the Governments of Australia, New Zealand and the United Kingdom undertake to administer it on the terms set forth in the present Trusteeship Agreement." (United Nations, *Treaty Series*, 1947, Vol. 10, No. 138, p. 4.)

The Agreement designated "The Governments of Australia, New Zealand and the United Kingdom (hereinafter called 'the Administering Authority')" as "*the joint Authority* which will exercise the administration of the Territory" (emphasis added). The Agreement further provided that:

> "The Administering Authority will be responsible for the peace, order, good government and defence of the Territory, and for this 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." (*Ibid.*, p. 6; emphasis added.)

On 26 November 1965, the three Governments agreed to modify their existing Agreements particularly to provide for the establishment of a Nauruan Legislative Council, Executive Council and Nauruan Courts of Justice. These bodies were given certain powers, while others were retained for an Administrator appointed by the Government of Australia, and for the Australian Government.

In 1967, as a result of intensive rounds of negotiation between the representatives of Nauru, on the one hand, and of Australia, New Zealand and the United Kingdom, on the other, agreement was reached on the two cardinal demands of Nauru: its accession to independence, and the acquisition by Nauru of the phosphate enterprise. The resultant agreements were signed by representatives of the three Governments jointly composing the Administering Authority and of Nauru.

On 9 February 1987, the three Governments concluded an Agreement to terminate the 1919 Agreement. That Agreement, which, like so many other documents placed before the Court in this case, expressly describes the three Governments as "the Partner Governments", wound up BPC

and agreed upon a distribution of its assets. In all the years from 1919 to 1968, apart from those of Japanese occupation during the Second World War, the phosphate operations — virtually the whole of organized economic activity on the Island — were run not by Australia but by BPC, which was under the direction of three Commissioners appointed by the three Governments.

In pursuance of the instruments which have been described, it was the Mandatory or Administering Authority, not Australia, which was responsible to, and which was uniformly treated as responsible to, the League and the United Nations. Communications were addressed to and ran between the Mandatory or the Administering Authority, on the one hand, and the League or the United Nations, on the other. The administration in place in Nauru, and the law applied in Nauru, was Australian. But all that Australia — one of the three Governments denominated by the Trusteeship Agreement as "the joint Authority" administering Nauru — did, from 1919 to the independence of Nauru, was done "on behalf of" the Governments of New Zealand and the United Kingdom as well as on its own behalf. Not only Australia, but New Zealand and the United Kingdom as well, were members of the Trusteeship Council under Article 86 of the Charter by virtue of their "administering trust territories"; for a period, New Zealand's only entitlement to remain a member of the Trusteeship Council was by virtue of its administering, as one of the three States constituting the Administering Authority, the Territory of Nauru.

For its part, Nauru steadily maintained not that Australia, but the three Partner Governments, were responsible for rehabilitating worked-out phosphate lands; for example, the record of the negotiating session of 16 May 1967 states that "during the following discussion it emerged that the Nauruans will still maintain their claim on the Partner Governments in respect of rehabilitation of areas mined in the past . . .". At the thirty-fourth session of the Trusteeship Council in June 1967, the representative of Nauru proposed that "the Partner Governments" should accept responsibility for rehabilitating land worked before 1 July 1967, a stand reiterated before the Council on 22 November 1967 when the representative of Nauru maintained that "the three Governments should bear responsibility for the rehabilitation of land mined prior to 1 July 1967". In 1986, Nauru advised the three Governments of its appointment of a Commission to inquire into "the Government or organization who should accept responsibility for rehabilitation . . ." and sought the co-operation of each of those Governments, including provision of records. In 1987, Nauru requested "the three partner Governments of Australia, New Zealand and the United Kingdom" to keep BPC funds intact pending the conclusion of the task of the Commission of Inquiry. After receipt of the report of the Commission of Inquiry, Nauru on 20 December 1988 sent

identic notes to the Governments of Australia, New Zealand and the United Kingdom; that for New Zealand in part reads:

> "The Department of External Affairs wishes to reaffirm the position which has been consistently taken by the Government of Nauru since independence, and which was taken by the elected representatives of the Nauruan people before independence, that *the Administering Authority under the Mandate and Trusteeship over Nauru was and remains responsible for the rehabilitation of the phosphate lands worked out in the period of its administration of Nauru*, prior to 1st July, 1967 when the Nauru Island Phosphate Agreement 1967 entered into force.
>
> Specifically, the Department of External Affairs wishes to reaffirm that *New Zealand, in its capacity as one of the three States involved in and party to the Mandate and Trusteeship Agreements over Nauru*, failed to make proper provision for the long-term needs of the Nauruan people, whose welfare was a sacred trust and overriding responsibility under the relevant Agreements, and that this failure, which was a breach of those Agreements and of general international law, took the form, inter alia, of a failure to make any provision for restoring the worked-out phosphate lands to a reasonable level for habitation by the Nauruan people as a sovereign nation. The Department notes that *at no stage has the Government of Nauru*, or any authorized representative of the Nauruan people, *accepted or agreed that the Nauru Island Phosphate Agreement absolved the Partner Governments or any of them of their responsibility for the rehabilitation of the lands.*
>
> Accordingly, the Department of External Affairs reaffirms that the New Zealand Government was and remains under an obligation to make reparation for this failure, whether in the form of monetary compensation or by making, in co-operation with the Government of Nauru, full provision for the rehabilitation of the relevant lands in a manner to be agreed between the Parties." (Memorial of the Republic of Nauru, Vol. 4, Ann. 80, No. 22; emphasis added.)

Finally, when Nauru brought suit in the Court against Australia, it sent identic notes on 20 May 1989 to New Zealand and the United Kingdom; that for New Zealand in part reads:

> "The Department of External Affairs has the further honour to state that on 19th May, 1989 it lodged an Application with the International Court of Justice in The Hague, in pursuit of its claim for the rehabilitation of the said lands . . .
>
> The Department has the further honour to draw the attention of the High Commission to the fact that the Application named the

> Commonwealth of Australia as sole respondent in respect of the claim. This is without prejudice to the Department's position, as recorded in its Note of 20th December, 1988 that New Zealand, in its capacity as one of the three States involved in and party to the Mandate and Trusteeship over Nauru, was also responsible for the breaches of those Agreements and of general international law referred to in that Note." (Memorial of the Republic of Nauru, Vol. 4, Ann. 80, No. 29.)

In view of the essential fact that, from 1919 until Nauruan independence in 1968, Australia always acted as a member of a joint Administering Authority composed of three States, and always acted on behalf of its fellow members of that joint Administering Authority as well as its own behalf, it follows that its acts engaged or may have engaged not only its responsibility — if responsibility be engaged at all — but those of its "Partner Governments".

Consequently, a judgment by this Court upon the responsibility of Australia would appear to be tantamount to a judgment upon the responsibility of New Zealand and the United Kingdom. Of course the Court's judgment in the current case would in terms be directed only to the parties to it and will have binding force only in respect of that particular case. But let us suppose that Nauru could and would pursue a course of serial litigation like that which Nicaragua pursued first against the United States and, having obtained judgment against it, against Costa Rica and Honduras. Can it be seriously maintained that if, *arguendo*, the Court were to hold on the merits against Australia, the other States with which it jointly composed the Administering Authority would enjoy a consideration whose very subject-matter would not have been passed upon by the Court in the current case?

Nauru maintains that:

> "No legal right or responsibility of either State would be determined by the Court in this case, both by virtue of Article 59 of the Statute and because the focus of the claim is on the acts and omissions of Australia and of Australian officials responsible for the administration of Nauru." (Written Statement of the Republic of Nauru, p. 93, para. 262.)

The answer to that core contention is that the protection afforded the absent States by Article 59 in the quite exceptional situation of this case would be notional rather than real; and that while the focus of the claim is on the acts and omissions of Australia and Australian officials responsible for the administration of Nauru, those acts and omissions were those of Australia acting as one of three States which jointly constituted the Administering Authority, and they were those of Australia acting on behalf of New Zealand and the United Kingdom.

The issue of the weight to be accorded to the situation of absent States may be a finely balanced one. In this case, for the reasons set out, my own view is that the balance inclines towards holding the Application against Australia alone to be inadmissible.

(Signed) Stephen M. SCHWEBEL.