COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE CERTAINES TERRES À PHOSPHATES À NAURU

(NAURU c. AUSTRALIE)

VOLUME III

Contre-mémoire de l'Australie ; procédure orale ; réponses aux questions ; correspondance ; document

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

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L'affaire de *Certaines terres à phosphates à Nauru (Nauru c. Australie)*, inscrite au rôle général de la Cour sous le numéro 80 le 19 mai 1989, a fait l'objet d'un arrêt rendu le 26 juin 1992 (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 240). Elle en a été rayée par ordonnance de la Cour du 13 septembre 1993, à la suite du désistement par accord des Parties (*Certaines terres à phosphates à Nauru (Nauru c. Australie), C.I.J. Recueil 1993*, p. 322).

Les pièces de procédure relatives à cette affaire sont publiées dans l'ordre suivant :

Volume I. Requête introductive d'instance de Nauru ; mémoire de Nauru.
Volume II. Exceptions préliminaires de l'Australie ; exposé écrit de Nauru sur les exceptions préliminaires.
Volume III. Contre-mémoire de l'Australie ; procédure orale sur les exceptions préliminaires ; réponses écrites aux questions ; choix de correspondance ; document présenté à la Cour.

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S'agissant des renvois du Greffe, les chiffres romains gras indiquent le volume de la présente édition ; s'ils sont immédiatement suivis par une référence de page, cette référence renvoie à la nouvelle pagination du volume concerné. En revanche, les numéros de page qui sont précédés de l'indication d'une pièce de procédure visent la pagination originale de ladite pièce et renvoient donc à la pagination entre crochets de la pièce mentionnée.

En ce qui concerne les exposés oraux, la pagination originale est précédée du numéro d'ordre des comptes rendus distribués sous forme multicopiée provisoire sous la cote CR 91/-- et, pour les renvois, c'est aussi à la pagination correspondante placée entre crochets sur le bord intérieur des pages qu'il faudra se reporter.

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La Haye, 2004.

The case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, entered on the Court's General List on 19 May 1989 under Number 80, was the subject of a Judgment delivered on 26 June 1992 (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240). The case was removed from the List by an Order of 13 September 1993, following discontinuance by agreement of the Parties (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), I.C.J. Reports 1993*, p. 322).

The pleadings in the case are being published in the following order :

Volume I. Application instituting proceedings of Nauru; Memorial of Nauru.
Volume II. Preliminary objections of Australia; written statement of Nauru on the preliminary objections.
Volume III. Counter-Memorial of Australia; oral arguments on the preliminary objections; written replies to questions; selection of correspondence; document submitted to the Court.

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Regarding the reproduction of case files, the Court has decided that henceforth, irrespective of the stage at which a case has terminated, publication should be confined to the written proceedings and oral arguments in the case, together with those documents, annexes and correspondence considered essential to illustrate its decision. The Court has also specifically requested that, whenever technically feasible, the volumes should consist of facsimile versions of the documents submitted to it, in the form in which they were produced by the parties.

Accordingly, certain documents reproduced in the present volume have been photographed from their original presentation.

For ease of use, in addition to the normal continuous pagination, wherever necessary this volume also contains, between square brackets on the inner margin of the pages, the original pagination of the pleadings reproduced and occasionally, within parentheses, the pagination of the original document.

In references by the Registry, bold Roman numerals are used to refer to Volumes of this edition; if they are immediately followed by a page reference, this relates to the new pagination of the Volume in question. On the other hand, the page numbers which are preceded by a reference to one of the pleadings relate to the original pagination of that pleading and accordingly refer to the bracketed pagination of the document in question.

In the case of the oral arguments, the original pagination is preceded by the number of the verbatim records as issued in a provisional duplicated form and carrying the reference CR 91/-- and it is also to the corresponding pagination between square brackets on the inner margin of the pages that one should refer for all cross-references.

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The Hague, 2004.

RÉPONSES ÉCRITES AUX QUESTIONS POSÉES PAR LES MEMBRES DE LA COUR

WRITTEN REPLIES TO QUESTIONS PUT BY MEMBERS OF THE COURT

REPLY BY AUSTRALIA TO A QUESTION PUT BY A MEMBER OF THE COURT

The second question addressed to Australia by Judge Shahabuddeen on 19 November 1991 referred to a statement made by Professor Jiménez de Aréchaga on Monday, 11 November and asked:

> "What was the legal basis of the responsibility for meeting the cost of rehabilitation, which Australia said it did not decline, but on the contrary had met in the manner described?"

Australia has *never* assumed a *legal* responsibility for meeting the cost of rehabilitation. It did, however, acknowledge that the Nauruans genuinely believed that the Partner Governments had a moral or political responsibility, and it is this responsibility which they have in fact met.

The moral or political character of this responsibility appears from the circumstances of Australia's acknowledgment of it. There is nothing unusual in Governments accepting responsibilities which are not legal.

In his speech, Professor Jiménez de Aréchaga referred to a statement by the Chairman of the Working Group set up by the Partner Governments and Nauruan representatives in 1966 to examine the Davey Committee Report. That statement concerned Australia's responsibility for meeting the cost of rehabilitation.

The Head Chief had immediately preceding this statement

> "commented on the Nauruan view of the responsibility of the Partner Governments to restore the mined lands. [The] Head Chief said — What the Nauruan people were seeking is Government acceptance of their responsibility but how the Governments finance this responsibility is up to them. However in the eyes of the Nauruan people this responsibility is not discharged if the Nauruan people receive less from the phosphate in order to enable the Governments to meet their share of the costs of rehabilitation." (Australia's Preliminary Objections, Vol. II, Ann. 7, p. 34, para. 14.)

The Chairman's response was as follows:

> "*The Chairman* emphasised that the Government was not saying that it did not take any responsibility for meeting the cost of rehabilitation, but it would do this by ensuring that the payments to the Nauruans would be sufficiently generous to enable all expenditure necessary for the long-term welfare of the Nauruans, including rehabilitation if they decide upon it, to be met." (*Ibid.*, p. 34, para. 15.)

To this the Head Chief replied:

> "that the Nauruan people, having decided upon rehabilitation, considered it a matter of principle that the Governments should accept responsibility for rehabilitation of the areas already mined. He said that as there was not an acknowledgment of this responsibility he could not see that any advantage would be served by the Working Party discussing the Technical Committee's Report." (*Ibid.*, p. 35, para. 16.)

The record leads to the following conclusions. First, that it was the Nauruans, not the Partner Governments, who first raised this matter of responsibility;

secondly, that Nauru saw this responsibility as the responsibility of all the Partner Governments, not just Australia; and finally, and most importantly, it was not said that this was a legal responsibility. Rather the responsibility of which Nauru spoke was a moral, political or even an economic one. In any event, that is clearly how it was treated by the Partner Governments. The Head Chief spoke of what seemed fair "in the eyes of the Nauruan people" and the Chairman, of payments "sufficiently generous for their long-term welfare, including rehabilitation if they decide upon it". There is absolutely no sense in which the Nauruans were asserting any kind of legal responsibility. You will find no reference whatsoever to the Trusteeship Agreement.

Further, this understanding is completely consistent with the statement made by the Special Representative of the Administering Authority in the Trusteeship Council in November 1967. In terms similar to those of the Chairman of the Working Group, the Representative also acknowledged that the Partner Governments had a responsibility to see that the financial arrangements for Nauru were sufficient to enable the Nauruans to provide for their future. He added that he considered the arrangements which had in fact been made were "just" and "as far as one could judge" that they would be "ample" (Australia's Preliminary Objections, Vol. II, Ann. 28, para. 402).

What is more, even in these present proceedings, Nauru has thought to invoke moral considerations to lend support to its claim. Thus, it asserts that on its view it would be "neither fair nor equitable for Australia now to abdicate its responsibility to rehabilitate the phosphate lands" (CR 91/18, p. 28).

And, as Australia has already noted in its written and oral proceedings, although Nauruan representatives asserted this responsibility before independence, they did not assert that the failure to meet it would amount to breach of the Trusteeship Agreement as such.

The acceptance by the Partner Governments of some general responsibility of this nature was perfectly natural. It is true that, under the Trusteeship Agreement, the Partner Governments as the Administering Authority undertook to meet certain broad obligations. It was, however, for them to decide in their discretion how these obligations might best be fulfilled. That is, the Partner Governments could choose how to meet their legal obligations and were not required to adopt any specific course, providing they ultimately satisfied their obligations under the Trusteeship Agreement. These obligations were, after all, obligations of result.

Furthermore, in exercising their administering authority, the Partner Governments necessarily brought with them their own understanding of an appropriate moral, social, political and economic order. They, therefore, brought with them an acceptance of a host of broad moral, political and economic responsibilities. The discharge of these responsibilities was clearly not a matter of law, although in keeping with the basic objectives of the Trusteeship system as laid down in Article 76 of the United Nations Charter.

REPLY BY NAURU TO QUESTIONS PUT BY A MEMBER OF THE COURT

1. During oral hearings held on 19 November 1991, Judge Schwebel asked the following questions for the Republic of Nauru to answer:

> "What is the position of Nauru as to why it did not at the same time bring suit against New Zealand? What is the position of Nauru as to why it did not at the same time bring suit against the United Kingdom?"

2. The reason why the Republic of Nauru decided to institute the current proceedings against Australia alone has been explained at some length in Nauru's Application that instituted these proceedings on 19 May 1989 (see particularly paragraphs 5 to 12 and 15 to 17); the Nauru Memorial (Parts III, IV and V); the Nauru Written Statement (Part I and Part IV, Chapter 5); and the oral presentation of Professor James Crawford, counsel for Nauru, on 19 November 1991 (CR 91/20, pp. 59-96).

3. Nauru holds all the three former Partner Governments, namely Australia, New Zealand and the United Kingdom, individually responsible for breach of obligations under the United Nations Trusteeship System and the principles of general international law, and in particular for breach of obligations in respect of rehabilitation of phosphate lands mined out before 1 July 1967. However, in Nauru's view, it was Australia which played *the* dominant role in the administration of the Territory of Nauru ever since the grant of the Mandate on 17 December 1920 until 31 January 1968. The Australian dominance over and control of the Territory was underscored, *inter alia*, by the following principal facts on record:

(a) Since the Mandate of 17 December 1920, through the United Nations Trusteeship until 31 January 1968, Australia always had, and exercised, the full power of administration over Nauru. The Australian flag, to the exclusion of the Union Jack and the New Zealand flag, flew over the Territory throughout this period.

(b) The Administrator of Nauru always remained Australian civil servant appointed by the Australian Government. At least since 1923, the Administrator reported directly and exclusively to the Australian Government through the Australian Government Department responsible for Australian Territories.

(c) By virtue of Article 22, paragraph 8, of the Covenant of the League of Nations, Australia administered Nauru "as an integral portion of Australian territory". In terms of its internal constitutional framework, until the Nauru Act 1965 (Cth), Australia treated Nauru as a Crown colony asserting its right to govern the Territory under prerogative powers. With the enactment of that Act by Australia, Nauru ceased to be a Crown colony, but it remained an Australian territory under sole Australian authority.

(d) Australia had, and exercised, the exclusive legislative authority to enact laws for Nauru, ever since it took over the administration of the Territory. By this power to enact laws, Australia established and operated, for the entire duration of its administration, a system of Government monopoly over the phosphate industry. By a legislative feat, the Australian administration even achieved "expropriation" of phosphate rights of the Nauruan landowners.

By a similar exercise of the legislative authority it also repealed the extant German laws regulating the conduct of mining, which had required a degree of rehabilitation of mined lands and the payment of compensation to the landowner. No attempt was made by Australia to replace them with any equivalent safeguards (see generally, Nauru Memorial, Vol. 1, paras. 512-551 at pp. 188-189; *ibid.*, Part I, paras. 22-27 at pp. 10-11; paras. 54-58 at pp. 22-23; paras. 63-68 at pp. 26-28; paras. 80-100 at pp. 33-38; see also Nauru Written Statement, paras. 10 and 11 at pp. 7-8).

(e) The Nauru Act 1965 which established a Legislative Council on Nauru and the Nauru Independence Act 1967 were exclusively Australian legislation.

(f) The defence of Nauru was a matter exclusively of Australian concern.

(g) The international agreements which were applied to Nauru were a selection of international agreements to which Australia was a party.

(h) Every Annual Report to the League of Nations, and later to the United Nations General Assembly was presented by Australia, and orally dealt with in the Permanent Mandates Commission of the League of Nations and the Trusteeship Council of the United Nations by the Australian delegation.

(i) In 1950s and 1960s it was Australia which was instrumental in reporting on the feasibility of Nauruan rehabilitation through an Australian Government agency, namely the Commonwealth Scientific and Industrial Research Organisation, and then through the Davey Committee.

(j) Australia called for increasing tonnages of phosphate for the benefit of its own agriculture.

(k) New Zealand and the United Kingdom, the other former Partner Governments, recognized that the actual responsibility for administration of the Territory was vested in Australia (see e.g. the statement by Mr. Shaw of the United Kingdom, United Nations Trusteeship Council, *Official Records*, 13th Special Session, 1323rd meeting, p. 4, para. 30).

4. In the light of the legal considerations set forth in the written statement of the Republic of Nauru and during the oral hearings, Nauru is entitled to proceed against any one of the three States responsible for their acts and omissions during the currency of the Trusteeship in Nauru.

5. In these circumstances, the Republic of Nauru took the policy decision to proceed against Australia alone. By this decision, it has not in any way waived its rights under international law to alternative remedies, including its independent right to proceed against New Zealand and the United Kingdom, as has been clarified by the diplomatic notes despatched by Nauru Government on 20 May 1989 to both New Zealand and the United Kingdom (see Annex 80, Numbers 29 and 30, Nauru Memorial, Vol. 4, pp. 568-571). The present non-exercise of its rights to alternative remedies, in Nauru's view, has no bearing on the separate responsibility of Australia in the current proceedings, or on the receivability of Nauru's claims in these proceedings, or on questions of judicial propriety, or on the merits of Nauru's claims against Australia. There exists no rule of international law requiring a State to bring simultaneous proceedings against all States which might possibly be held concurrently liable in respect of particular damage. This is true *a fortiori* where the proceedings are brought against the principal wrongdoer as they have been in the present case.