SEPARATE OPINION OF JUDGE SHAHABUDDEEN

The case touches on important principles of contemporary international law — principles which have changed the shape of the international community, altered the composition of its leading institutions, affected their orientation, and influenced their outlook. But, the mandate of the Court being limited by the consensual nature of its jurisdiction, its decision has turned on the preliminary question how far it may adjudicate where the outcome would have consequences for the legal position of a third party. In support of the Judgment, I would add the following observations.

I. The Principle that the Court Cannot Exercise Jurisdiction over a State without Its Consent

Reflecting a view generally held in municipal law, Article 59 of the Statute of the Court provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". But it does not follow that the Court is free to determine a dispute between parties in entire disregard of the implications of the decision for the legal position of a non-party. Under one form or another of an "indispensable parties" rule, the problem involved is solved in domestic legal systems through an appropriate exercise of the power of joinder. The Court lacks that power; and the right of intervention, or to institute separate legal proceedings where possible, is not always a sufficient safeguard. Hence, when situations arise in which the requested judgment would in fact, even though not in law, amount to a determination of the rights and obligations of a non-party, the Court is being asked to exercise jurisdiction over a State without its consent. *Monetary Gold Removed from Rome in 1943* says it cannot do that.

That precedent has given rise to questions[1]. In a fundamental sense the questions stem from the fact that, as was remarked by Judge Jessup, "Law is constantly balancing conflicting interests" (*Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J.*

[1] Some were considered in D. H. N. Johnson, "The Case of the Monetary Gold Removed from Rome in 1943", *International and Comparative Law Quarterly*, 1955, Vol. 4, p. 93. The Court had that article before it in 1984. See Memorial of Nicaragua, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility*, dated 30 June 1984, para. 257.

Reports 1970, p. 206, para. 81, separate opinion). The interests which are in conflict here, and which need to be balanced against each other if collision is to be avoided, are those of Portugal in having its case determined by the Court notwithstanding possible effects of the decision on Indonesia, and those of Indonesia in not having its rights and obligations determined by the Court without its consent. Problems of this kind are apt to arise from the fact that, in the increasingly complex character of international relations, legal disputes between States are rarely purely bilateral. The argument follows that, as it was put to the Court in another case, 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"[1].

It is difficult to think of any point at which a balance may be struck between these competing considerations without the Court having sometimes to assume jurisdiction notwithstanding that the interests of a non-party State would to some extent be affected, as has happened in some cases. A fair interpretation is that what the Court has been doing was to identify some limit beyond which the degree to which the non-party State would be affected would exceed what is judicially tolerable. That limit is reached where, to follow the language of the Court, the legal interests of the non-party would not merely be affected by the judgment, but would constitute its very subject-matter.

Possibly another formulation might have been invented; but the test adopted is not in substance new to legal thought. The juridical problem to be solved has recognizable parallels in other areas of the law: it concerns the extent to which a given course of action could be regarded as lying within a permissible field although it produces effects within a forbidden one. No doubt with the constitutional jurisprudence of some countries in mind, in the case of the *Application of the Convention of 1902 Governing the Guardianship of Infants* Judge Sir Percy Spender remarked that a "law may produce an effect in relation to a subject-matter without being a law on that subject matter" (*I.C.J. Reports 1958*, p. 118). That approach could be redirected to the problem before the Court: would the requested judgment produce an effect in relation to the legal interests of Indonesia without being a judgment on those interests?

Obviously, there could be argument concerning marginal situations; but there is a dividing line, and it is often practicable to say that a given situation falls on one side or the other of it. *Monetary Gold* represents

[1] Memorial of Nicaragua, cited in the preceding note, para. 248.

that line. Whatever the academic criticisms, the essential principle of the case has not been challenged. The case may be distinguished, but the cases distinguishing it have also affirmed it. Nor would it be correct to say, without important qualification, that since 1954 the principle of the case has in no sense been applied; it is possible to attribute the shape of the judgments given in some of the cases to the need to take account of it[1]. Certainly, where a case cannot be distinguished, the principle applies. In this case, the effort of Portugal was to distinguish and not to attack *Monetary Gold*; its counsel rejected what he understood to be an Australian attempt to "imply that Portugal is questioning the soundness of the *Monetary Gold* case" (CR 95/6, p. 11, Professor Dupuy). It is not necessary to examine all the cases, real or hypothetical, which may be thought supportive of an attempt to distinguish *Monetary Gold*. The case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* has been considered in the Judgment. I shall limit myself to one other case.

Corfu Channel, Merits, comes closest to the view that the Court is not necessarily prevented from acting by the circumstance that the lawfulness of the conduct of a third State may seem to be involved. In that case, the argument of Albania, as correctly recalled in Judge Weeramantry's dissenting opinion to the present Judgment, should have been enough to alert the Court to the question whether it could properly find against Albania if it could not do so without making a determination as to Yugoslavia's international responsibility in its absence[2]. However, it does not appear to me that the evidence was examined with a view to making a finding of international responsibility against Yugoslavia in respect of its alleged conduct; it was examined as a method of proof, or disproof, of the British allegation that the mines had been laid with the connivance of Albania. Assuming that the minelaying operation had been carried out by two Yugoslav warships, the United Kingdom argued that this

> "would imply collusion between the Albanian and the Yugoslav Governments, consisting either of a request by the Albanian Gov-

[1] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 20, para. 35; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 61-62, para. 75, and p. 94, para. 133, subpara. C (3), last sentence; *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application for Permission to Intervene, Judgment, I.C.J. Reports 1984*, pp. 25-27, paras. 40-43; and *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, pp. 25-28, paras. 21-23.

[2] See also, *I.C.J. Pleadings, Corfu Channel*, Vol. IV, pp. 609-610, duplique de M. Joe Nordmann, conseil du Gouvernement albanais.

> ernment to the Yugoslav Government for assistance, or of acquiescence by the Albanian authorities in the laying of the mines" (*I.C.J. Reports 1949*, p. 16; and *I.C.J. Pleadings, Corfu Channel*, Vol. IV, p. 495, Sir Frank Soskice).

By its suggested request or acquiescence, Albania would make Yugoslavia's acts its own; it would be by making Yugoslavia's acts its own that it would engage international responsibility. In effect, proof of the mines having been laid by Yugoslavia would be part of the factual material evidencing the commission of acts by Albania which independently engaged its international responsibility. A determination by the Court that Yugoslavia engaged international responsibility by reason of its alleged conduct in laying the mines would not have to be made for the purpose of making a finding of international responsibility against Albania. The Court did not have before it the type of issue later raised in *Monetary Gold*, in which a determination that the absent State had engaged international responsibility would have had to be made as a precondition to its admitted ownership of the gold being legally set aside by the Court and passed on by it to others. *Corfu Channel* is not at variance with *Monetary Gold*; nor does it show that the latter is inapplicable to the circumstances of the instant case.

In 1984 the Court observed 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), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 431, para. 88). True, too, outside of the prohibited area, "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, Judgment, I.C.J. Reports 1984*, p. 25, para. 40). But these remarks also recognized that the principle of the case remains intact, being directly founded on the consensual nature of the Court's contentious jurisdiction. Would it apply to prevent the Court from adjudicating on the merits of Portugal's case?

II. Whether the Requested Judgment Would Require the Court to Determine Indonesia's Legal Interests

The premise of Portugal's claim is that, whatever may be the basis, it possesses the exclusive power to enter into treaties on behalf of East Timor in respect of the resources of its continental shelf; Australia contends that it is Indonesia which possesses the power. The premise of Portugal's claim is thus in dispute.

The Court must first resolve this dispute relating to Portugal's premise, by determining that the treaty-making power belonged to Portugal and therefore of necessity that it did not belong to Indonesia, before it could go on to determine whether Australia engaged international responsibility by negotiating and concluding the 1989 Treaty with Indonesia and by commencing to implement it. In effect, a prerequisite to a decision against Australia is a determination that Indonesia did not possess the treaty-making power. In the ordinary way, the Court could not make that determination without considering whether the circumstances of Indonesia's entry into and continuing presence in East Timor disqualified it from acquiring the power under general international law. That would involve the determination of a question of Indonesia's responsibility in the absence of its consent. The Court cannot do that.

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That would seem to end the case, but for an argument by Portugal that the resolutions of the General Assembly and the Security Council conclusively established its status as the administering Authority; that that status carried with it the exclusive power to enter into treaties on behalf of East Timor in respect of the resources of its continental shelf; that the resolutions should in these respects be treated by the Court as *données*; and that in consequence a decision by the Court on Indonesia's legal interests would not be required.

However, this way of putting the matter does not efface the fact that what Portugal is asking the Court to accept as *données* is not the mere text of the resolutions, but the text of the resolutions as interpreted by Portugal. The various resolutions would constitute the basis of the Court's decision; they would not remove the need for a decision to be taken by the Court as to what they meant. As the Parties accept, the Court has power to interpret the resolutions.

Portugal's interpretation of the resolutions is closely contested by Australia. The issue so raised by Australia is not frivolous; the Court would have to decide it. The Court has done so. On the conclusion which it has reached, the resolutions do not suffice to settle the question whether the treaty-making power lay with Portugal, as Portugal claims, or with Indonesia, as Australia claims. Other matters would have to be investigated before that question could be answered. Such other matters would include the question whether, by reason of its alleged conduct, Indonesia engaged international responsibility which disqualified it from acquiring that power under general international law. Portugal accepts that the Court cannot act if the international responsibility of Indonesia would have to be passed upon.

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However, even if Portugal's interpretation of the resolutions is correct, the result need not be affected. The prerequisite of which the Court must ultimately be satisfied is that, whatever may be the basis, the treaty-making power lay with Portugal and not with Indonesia. If the Court were to accept Portugal's interpretation of the resolutions as correct, what it would be deciding, without hearing Indonesia on a substantial question of interpretation, is that it was Portugal and not Indonesia which possessed the treaty-making power; acceptance of Portugal's interpretation as correct would merely shorten the proof of Portugal's claim to the power. Indonesia's legal interests would nonetheless be determined in its absence. In effect, the question is not merely whether Portugal's interpretation is correct, but whether, in reaching the conclusion that it is correct, the Court would be passing on Indonesia's legal interests.

There is a further point. As the Court would be barred by the *Monetary Gold* principle from acting *even if* Portugal's interpretation of the resolutions were correct, it is possible to dispose of Portugal's Application without the necessity for the Court to determine whether or not the resolutions do indeed bear the interpretation proposed by it; the Court could arrive at its judgment assuming, but without deciding, that Portugal's interpretation is correct.

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The matter may also be considered from the point of view of the effects of the requested judgment on the rights of Indonesia under the 1989 Treaty and on the validity of the Treaty itself.

First, as to Indonesia's rights under the Treaty. Submission 5 *(b)* of the requested judgment would require Australia to abstain from implementing the Treaty; Indonesia would thus lose the benefit of implementation of the Treaty by Australia. That is not a matter of theoretical interest; Indonesia would be deprived of concrete benefits to which it is entitled under the Treaty, including possible financial benefits, in much the same way as the judgment requested in *Monetary Gold* would have deprived Albania of its right to the property involved in that case. Article 59 of the Statute of the Court would not protect Indonesia against these effects.

In *El Salvador* v. *Nicaragua*, El Salvador asked that "the Government of Nicaragua be enjoined to abstain from fulfilling the . . . Bryan-Chamorro Treaty . . ."[1]. The Central American Court of Justice replied:

> "The Court is without competence to declare the Bryan-Chamorro Treaty to be null and void, as in effect, the high party complainant requests it to do when it prays that the Government of Nicaragua be

[1] *American Journal of International Law*, 1917, Vol. 11, p. 683.

> enjoined 'to abstain from fulfilling the said Bryan-Chamorro Treaty'. On this point the Court refrains from pronouncing decision, because, as it has already declared, its jurisdictional power extends only to establishing the legal relations among the high parties litigant and to issuing orders affecting them, and them exclusively, as sovereign entities subject to its judicial power. To declare absolutely the nullity of the Bryan-Chamorro Treaty, or to grant the lesser prayer for the injunction of *abstention*, would be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court."[1]

Although El Salvador had not asked for an order declaring the Bryan-Chamorro Treaty to be invalid[2], in the view of the Central American Court of Justice its prayer for an order enjoining Nicaragua "to abstain from fulfilling" the Treaty was "in effect" a request that the Court should "declare the . . . Treaty to be null and void", which of course it could not do in the absence of the other party to the Treaty. Thus, to grant "the lesser prayer for the injunction of *abstention*" would have the same effect as a declaration of invalidity; they would both "be equivalent to adjudging and deciding respecting the rights of the other party signatory to the treaty, without having heard that other party and without its having submitted to the jurisdiction of the Court". The injunction was refused.

Second, as to the validity of the 1989 Treaty. There are situations in which the Court may determine that an international obligation has been breached by the act of negotiating and concluding an inconsistent treaty, without the decision being considered as passing on the validity of the treaty[3]. But a situation of that kind is distinguishable from one in which the essential ground of the alleged breach and of any relief sought necessarily implies that a State which is a party to a bilateral treaty with the respondent but not a party to the case lacked the capacity in international law to enter into the treaty. Where this would be the true ground of decision, as it would be here, it is difficult to avoid the conclusion that the validity of the treaty was being passed upon in the absence of the State concerned. Further, as pointed out above, an order enjoining Australia from implementing the Treaty would itself presuppose a finding of invalidity.

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[1] *American Journal of International Law*, 1917, Vol. 11, p. 729.

[2] Cf. the third prayer of Costa Rica in *Costa Rica* v. *Nicaragua* (*American Journal of International Law*, 1917, Vol. 11, p. 202), where the Central American Court of Justice was asked to "declare and adjudge said treaty to be null and void and without effect". The prayer was refused.

[3] See the Vienna Convention on the Law of Treaties 1969, Art. 30, para. 5, and the decisions of the Central American Court of Justice in *Costa Rica* v. *Nicaragua* (*American Journal of International Law*, 1917, Vol. 11, p. 181), and *El Salvador* v. *Nicaragua* (*ibid.*, p. 674); and consider Judge Schücking's understanding of the judgment in *Oscar Chinn* (*P.C.I.J., Series A/B, No. 63*, p. 148, third paragraph).

In *El Salvador* v. *Nicaragua*, the Central American Court of Justice made it clear, and rightly so, that it would not decline to act on "the trivial argument that a third nation . . . possesses interests connected with the matters or questions in controversy"[1]. But the Court obviously did not consider that the argument was "trivial" in so far as the requested judgment would require it to determine the rights of a non-party State, inclusive of the question of the validity of a treaty entered into between that State and the respondent. It was on the clear basis that it could not and would not determine these matters, either directly or indirectly, that it found it possible to declare that the respondent "*is under the obligation* — availing itself of all possible means provided by international law — to re-establish and maintain the legal status that existed prior to the" treaty[2]. In effect, the Court was able to assume competence to act in relation to some of the reliefs claimed by El Salvador, but not in relation to all. Here, by contrast, none of the reliefs requested by Portugal could be granted without passing on the legal interests of an absent State.

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In an interesting and careful argument, counsel for Portugal submitted that

> "other courts . . . have ruled on the violation of obligations derived from a treaty, in cases where there was a conflict of obligations, without ruling on the resolution of the conflict, despite the absence of the other party to the treaty from which the other incompatible obligation derived" (CR 95/13, p. 55, Professor Galvão Teles).

Counsel cited *Soering* v. *United Kingdom* (*EHRR*, Vol. 11, p. 439), *The Netherlands* v. *Short* (*ILM*, 1990, Vol. 29-II, pp. 1375 *et seq.*) and *Ng* v. *Canada* (CC PR/C/49/D.469/1991), adding that the judicial function of the adjudicating bodies in those cases obliged them "to *answer the question that was put to them*. They were not, for example, required to decide on the rights of the United States, which was a party to the treaty and absent from the proceedings." As this argument of counsel seems to recognize, the dividing line is set by asking whether the requested judgment would be deciding not merely the rights of the parties, but those of the absent State as well. In my opinion, the judgment requested in this case would decide the rights of an absent State. Institutional and structural differences apart, this is a point on which the three cited cases are distinguishable.

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[1] *American Journal of International Law*, 1917, Vol. 11, p. 699.
[2] *Ibid.*, p. 730, fifth paragraph of the *dispositif*.

It was also argued for Portugal that, by virtue of Article 59 of the Statute of the Court, a judgment of the Court in favour of it would be binding only as between itself and Australia; Indonesia, as a non-party to the case, would not be bound. But the problem involved is more fundamental than that to which that provision is directed. The provision applies to a judgment duly given as between the litigating parties; until such a judgment has been given, the provision does not begin to speak (see, on this point, *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 33, first paragraph). For the reasons set out above, the judgment requested by Portugal would not be a judgment duly given even as between the litigating Parties. The fact that, by virtue of Article 59 of the Statute, Indonesia would not be bound is not a reason why the Court should attempt to do what it cannot legally do: the provision does not operate as a standing reservation in law subject to which the Court is at liberty to pronounce on the legal interests of a State in the absence of its consent.

III. Portugal's First Submission

A word may be said on the question whether the grounds on which the Judgment rests prevented the Court from granting the first of Portugal's five submissions, in which the Court was asked

> "[t]o adjudge and declare that, first, the rights of the people of East Timor to self-determination, to territorial integrity and unity and to permanent sovereignty over its wealth and natural resources and, secondly, the duties, powers and rights of Portugal as the administering Power of the Territory of East Timor are opposable to Australia, which is under an obligation not to disregard them, but to respect them".

There is no need to dwell on the distinction between arguments and *conclusions*[1]. Portugal recognizes the distinction; it does not suggest that the Court can grant its first submission considered as an argument intended to support the requested judgment but not in itself constituting part of the decision. It is necessary then to see what is the sense in which Portugal's first submission could be regarded as part of the requested decision.

Portugal's first submission can only be considered as part of the requested decision if, as the wording of the submission itself implies, a judicial declaration that the claimed rights are opposable to Australia is required to ensure that Australia recognizes that it "is under an obligation not to disregard them, but to respect them". The implication is that

[1] See the discussion of the cases in Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, Vol. 2, pp. 578 ff.

Australia has been disregarding them, and not respecting them. But, if it is asked why it should be thought that Australia has been disregarding them and not respecting them, the answer can only be that Australia has negotiated and concluded the 1989 Treaty with Indonesia and has commenced to implement it.

Thus, the fundamental issue raised by Portugal's first submission is the same as the question whether the treaty-making power is held in law by Portugal or by Indonesia. As the Court cannot determine that question in the absence of Indonesia, it cannot competently grant the submission. A submission, however worded, can only be granted if the granting of it is necessary for the resolution of the dispute between the parties to the case. If the Court cannot determine the dispute, it cannot grant any of the submissions sought.

IV. Conclusion

International law places the emphasis on substance rather than on form. When the matter is thus regarded, it is apparent that Portugal's Application would require the Court, in the absence of Indonesia, to determine Indonesia's legal interests, inclusive of its claim to the treaty-making power in respect of East Timor and a question of its international responsibility, as a prerequisite to a determination of Portugal's claim that Australia engaged international responsibility to Portugal by negotiating and concluding the 1989 Treaty with Indonesia and by commencing to implement it. I agree that the Court cannot act.

(Signed) Mohamed Shahabuddeen.