

DISSENTING OPINION
OF PRESIDENT SIR ROBERT JENNINGS

I very much regret that I am unable to agree with the decision of the Court rejecting Australia's preliminary objection based on the circumstance that New Zealand and the United Kingdom are not also parties to the proceedings (see (1) (g) of para. 72 of the Judgment). My difficulties with this part of the Judgment may be stated very briefly.

This preliminary objection raises an important issue concerning the consensual basis of the Court's jurisdiction where the legal interests of third States are involved in a case. Articles 62 and 63 of the Court's Statute, which allow for intervention, show that the parties to a case may have their claims adjudicated by the Court, even when the legal interests of third States may be affected by the Court's decision. There is, however, a limit to the exercise of jurisdiction in a case affecting the legal interests of a third State, and that limit is where, according to the well-known formula of the case of the *Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, the third State's "legal interests would not only be affected by a decision, but would form the very subject-matter of the decision" (*I.C.J. Reports 1954*, p. 32).

That the legal interests of New Zealand and the United Kingdom will form the very subject-matter of any decision in Nauru's case against Australia is surely manifest. The Mandate for Nauru was in 1920 conferred upon "His Britannic Majesty"; the Trusteeship Agreement of 1947 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";

New Zealand and the United Kingdom were two of the three members of the British Phosphate Commissioners; and they were both joint parties to the Canberra Agreement of 1967. This is to mention only the salient instances of the inextricable involvement of the legal interests of those two States in this matter.

Moreover, one must contemplate the situation that must arise if, on the merits, there should be any question of assessing the reparation that might be due from Australia (see para. 48 of the Judgment). If the obligations from which the liability arises are held to be solidary (joint and several) so that Australia is liable for the whole, or whether, alternatively, Australia is held liable only for some proportion of the whole sum, it is clear in either

case that the Court will unavoidably and simultaneously be making a decision in respect of the legal interests of those two other States.

For these reasons it seems to me that the Australian preliminary objection in this matter is well founded, and that the Court is without jurisdiction in this case.

(Signed) R. Y. JENNINGS.
