

## SEPARATE OPINION OF JUDGE RANJEVA

[Translation]

While the Court is to be applauded for recalling that the right of peoples to self-determination is one of the essential principles of customary international law, possessing the characteristic of an absolute right *erga omnes* and for upholding the Australian objection to the effect that Portugal's Application would necessitate a ruling on the rights and obligations of Indonesia, it is nevertheless regrettable that this case should not have led the Court to analyse the extent and limitations of the jurisprudence in *Monetary Gold Removed from Rome in 1943*. It would have been appropriate to highlight the true overall economy of the 1954 Judgment, to ensure that no doubt remained regarding questions of jurisdiction at a time when recourse to the jurisdiction of the Court is receiving growing support from the international community. The virtue of this approach would have been all the more instructive in that it could usefully have been supplemented by meticulous analysis of that State's request on the basis of a consideration of its subject-matter. Such an improvement would not have affected the operative part of the Judgment delivered by the Court in this case.

I. ANALYSIS OF THE CASE LAW IN *MONETARY GOLD*

The consensual nature of international jurisdiction prohibits the Court from adjudicating on the legal interests of a State which has not clearly expressed its consent to jurisdiction. Such was the basic principle evoked by the Judgment of 1954. In the present case, was it necessary for the Court to adjudicate, as a prerequisite, by applying the jurisprudence of *Monetary Gold*, on the lawfulness of Indonesia's presence in the Territory of East Timor? This is the crux of the matter. The Judgment responds positively to this question by means of *petitio principii*, whereas it would perhaps have been preferable to ponder how far the analysis of the structure of the Court's reasoning, both in 1954 and in 1992, in the case concerning *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, justified a conclusion as to whether or not it was valid to transpose the jurisprudence of *Monetary Gold*.

The conclusive passage in the 1954 Judgment deserves to be recalled:

“In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implica-

tion, as authorizing proceedings to be continued in the absence of Albania.” (*I.C.J. Reports 1954*, p. 32.)

This conclusion is explained by the logical sequence of propositions which form the structure of the Court’s reasoning. The sequence of this reasoning is as follows: the reply to the question of the possible responsibility of Albania vis-à-vis Italy, the determining proposition, subsequently conditioned the possibility of the reply to the question of the definitive attribution of the Albanian gold, the substance of the dispute. In other words, the determining proposition turned upon a question of subjective personal rights governing mutual relations between two legal entities, whereas the principal question turned upon a true objective point of law: the attribution of the gold. This being so, it was impossible for a court of a consensual nature to adjudicate upon a question of subjective rights without the consent of all the parties concerned: the relevant decision, by a constitutive act or by a declarative act, would have determined the substance of the rights and obligations governing the relations between the parties.

On reading the conclusive paragraph of the Judgment of 1992 in the case concerning *Certain Phosphate Lands in Nauru*, one may wonder whether one is not faced with a departure from previous doctrine:

“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.” (*I.C.J. Reports 1992*, pp. 261-262.)

The problem of the 1992 Judgment turns upon a preliminary objection relating to the *jus standi ut singuli* of Australia as Respondent in a dispute about responsibility, in other words in the context of subjective rights. Notwithstanding the mandate or trusteeship agreements, which determined the legal situation of the relations between the three mandatory or trust powers, the Court did not find it necessary, as a prerequisite, to rule on the legal problems relating to relations between the United Kingdom, Australia and New Zealand.

To analyse these propositions, the elements pertinent to an understanding of the decision by which the Court accepts the exercise of its jurisdiction must be called to mind. To begin with, the very subject-matter of the Judgment concerns Australia’s obligation to reply before the Court to the allegations that it has violated its obligations as mandatory then trust Power; in other words, one is faced with a question affecting the basis of the procedural right, but which does not call into question the material content of a subjective right concerning the legal relations between the three parties. Secondly, as regards the actual subject-matter

of the procedural rights, the act of seising the Court has the effect of imposing a general, impersonal system, in other words, a system of objective law, upon the various players involved, be they the parties themselves or the Court; in other words, the legal ties resulting from the seisin of the Court are not contractual or subjective in nature, since the modifications proposed by the parties to a case originate in Article 101 of the Rules.

It is therefore the objective nature of the legal relations which exist between those involved in the proceedings, relations stemming from the act of seisin, which explains, in the preliminary phase, the fact that the Court did not deem it necessary to transpose the jurisprudence of *Monetary Gold*, inasmuch as that jurisprudence required that a dispute implicating a State absent from the proceedings should first be settled.

In the present case, the structure of the Portuguese Application presupposes that the givens of the dispute, which have given rise to an agreement of principle by the two Parties in contention, concern a question of an objective right *erga omnes*, namely, East Timor's acknowledged status as a non-self-governing territory and the right of the people of Timor to self-determination. Hence, in logical terms, one is faced with a hypothesis which is the inverse of that envisaged in *Monetary Gold*. This observation causes one to wonder whether it was adequate purely and simply to refer to the principle set out in that Judgment.

In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, moreover, did the Court not recall the intrinsic limits on the scope of the jurisprudence in *Monetary Gold* in the following terms?

“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.)

A prior decision, in the meaning in which it is understood in the Judgment delivered in the *Monetary Gold* case would be essential, it seems to me, when the object of that prior decision is subjective rights, in other words, rights relating to the legal situation of a State which has not consented to the jurisdiction or which does not appear before the Court. Can the same principle be transposed in cases where the prior decision concerns a question of objective rights opposable *erga omnes*? This question can no longer be avoided since the *jus cogens* falls within the province of positive law. The difficulty resides in the fact that, by nature, the rules of objective law transcend the order of conventional rules and that disputes involving objective law call into question the legal interests of third States. Is the purpose of the rule of *Monetary Gold* to limit the domain of the Court's jurisdiction *ratione juris* solely to disputes involving objec-

tive rights? To refer without any explanation to the jurisprudence in *Monetary Gold* leaves too many questions open for it to satisfy the requirements of the good administration of justice, one of whose components is the foreseeability of legal decisions; this observation is all the more valid since the same results could have been obtained and reinforced on the basis of an actual analysis of Portugal's Application.

## II. SUBJECT-MATTER OF PORTUGAL'S APPLICATION

In my view, a scrupulous examination of the subject-matter of Portugal's Application did not oblige the Court, as a prerequisite, to adjudicate on the lawfulness of the entry into and continued presence of Indonesia in the Territory of East Timor; such an approach would also have led to the conclusion that the Court could not exercise the jurisdiction which it possesses by virtue of the acceptance by Portugal and Australia of the jurisdiction of the Court under Article 36, paragraph 2, of the Statute.

Portugal is simultaneously pursuing three objectives: first, the preservation of the right of the people of East Timor to self-determination; second, the "nullification" of the obligations stipulated by Australia and Indonesia in the 1989 Treaty and, at the same time, depriving Indonesia of the benefit of the legal effects of the principle *pacta sunt servanda*. One is therefore faced with an Application concerning a dispute relating to questions of objective rights and subjective rights. An examination of the relations between the propositions concerning each type of right shows that the questions of objective rights are the justification for matters of subjective rights being taken into account, which must be regarded as the Applicant's principal and final conclusion. Moreover, this cause and effect relationship between the submissions of the Application calls to mind the distinction between submissions and false submissions, as highlighted by the Court in the *Minquiers and Ecrehos* case (*Judgment, I.C.J. Reports 1953*, p. 52).

In the present dispute, by partly but principally requiring the "nullification" of the treaty obligations entered into by Australia vis-à-vis Indonesia and thus depriving Indonesia of the benefit of the effects of the principle *pacta sunt servanda*, a decision of the Court would have adjudicated directly upon Indonesia's rights. Such a solution cannot be accepted in international law without there being any need, as a prerequisite, for a decision relating to the lawfulness of the entry into and continued presence of Indonesia in the Territory of East Timor.

Where the questions of objective rights are concerned, the Court observes that there is no longer any reason to adjudicate on that part of Portugal's submission which calls for the right of the people of East Timor to self-determination to be declared opposable to Australia. The Judgment takes note of the fact that the dispute in the relations between the two Parties on this point has been resolved during the proceedings; but in so doing, has the Court not deprived itself of the opportunity to

indicate in detail the fate it intended to reserve to its jurisdiction, since a dispute arose turning upon an objective right?

On examination, the agreement of principle reached between Portugal and Australia concerning the right of the people of Timor shows the acceptance, by them, of a norm of international law, the expression of *convictio juris*, whose legal consequences must be deduced, both as regards the Applicant and the Respondent. In ruling that the case should be dismissed, the Judgment has refrained from adjudicating upon a dispute between the Parties which is still pending — the legal consequences of the agreement of principle concerning the right of the people of East Timor to self-determination; the Judgment should have done this by showing the need for a prior decision in order to adjudicate upon this question of objective law, which it does not do.

But could the Court, in the context of the interpretation it has given of the jurisprudence of *Monetary Gold*, go beyond a simple acknowledgment, in legal terms, of a situation of fact, from which it does not draw the legal consequences?

In my view, the difficulties the Court had to confront resulted from the fact that it was difficult to establish the *summa divisio* between the parties and the third party in an international act: Australia is the centre of gravity of the whole case. But is it realistic to consider that State as an absolute third party, falling within the residual category exterior to the circle of the Parties: Portugal vis-à-vis the 1989 Treaty and Indonesia vis-à-vis the Judgment? This approach, bearing the hallmark of realism, reveals the limitations of an (abstract and) theoretical view of the principle of the relative effect of the conventions and of *res judicata*.

Realism in such a tricky case should have led the Court to offer the Parties involved an appropriate legal framework for holding in check the undesirable effects of a legal act or a situation. In acting thus, the Court would not be concerned with choosing between the practical measures which the interested States or the competent organs of the United Nations can take in order to solve the more general problem of East Timor. In adjudicating on the submissions relating to the fundamental questions of procedure, the Court could have spelled out the scope of the jurisprudence relating to the prior decision in its relations with the multiple facets which have attracted the attention of the two Parties in dispute and precluded the possibilities for erroneous interpretation of the Judgment.

It was a difficult exercise but one to which a solution proved possible, inasmuch as the operative part itself did not pose any problems. But in dealing with these difficulties, the Court is laying down the framework for the development of international law and performing one of its principal functions, described by Sir Robert Jennings in the following terms:

“*Ad hoc* tribunals can settle particular disputes; but the function of the established ‘principal judicial organ of the United Nations’ must include not only the settlement of disputes but also the scientific development of general international law . . . There is therefore

nothing strange in the ICJ fulfilling a similar function for the international community.” (Judge Sir Robert Jennings, “The Role of the International Court of Justice in the Development of International Environmental Protection Law”, *Review of European Community and International Environmental Law*, Vol. 1, 1992, p. 242.)

(Signed) Raymond RANJEVA.

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