SEPARATE OPINION OF JUDGE SIR GERALD FITZMAURICE

I agree with the decision of the Court in this case, and I also consider that the main ground for it, as stated in the Judgment (namely that the claim is not of a character to engage the Court's judicial function), forms a correct and sufficient basis for the decision. I have however certain additional remarks to make, and also an additional ground for reaching the same conclusion. Finally, because of the particular considerations on which the Judgment is founded, the Court has not thought it necessary to consider whether it would have jurisdiction to entertain the claim if the grounds of objection mentioned in the Judgment did not exist. While I think the Court was right in this, I have reasons for wanting to deal with the main jurisdictional issues indicated in the submissions of the Parties.

In this opinion, Parts I and II (pp. 97-100, and 100-108) contain my additional observations on the basis of the Court's decision. Part III (pp. 108-111) gives my additional ground for reaching the same conclusion. In Part IV (pp. 111-127) I consider the jurisdictional issues arising on Article 19 of the Trusteeship Agreement for the former British Cameroons; and in Part V (pp. 127-130) I discuss the objection *ratione temporis* advanced by the Respondent State to the admissibility of a part of the claim.

I

"MOOT" [1] CHARACTER OF THE CASE. THE QUESTION OF REPARATION

It has been obvious from the start that this case had certain very unusual features, arising from the combined facts that the Applicant State's claim or request related to a situation which was not merely in the past, but wholly terminated and non-recurrent, and which for all practical purposes was so at the date of the Application; while at the same time the latter contained no claim for any compensation or other form of reparation in respect of the illegalities alleged to have been committed during the period when this

[1] The term "moot" is here used in the sense given to it in American legal terminology, as denoting a case or claim which is or has become pointless and without object.

situation was still actively in existence. Nor was any attempt made to introduce such a claim at any later stage of the proceedings [1].

This combination makes the case almost unique in the annals of international litigation. It concerns alleged breaches of an international agreement, the Trusteeship Agreement for the former British Cameroons. Now, it is in no way singular that an allegation that a breach of treaty has occurred, should not be accompanied by any claim for compensation or other reparation, where the treaty is still in force and operating; for in that case, any finding in favour of the plaintiff State functions as a prohibition on the continuance or repetition of the breach of treaty, and this may be all that is required, and in any event makes the judgment effective [2]. Moreover, the latter necessarily operates as a finding about the correct interpretation or application of the treaty, and therefore serves a useful and effective legal purpose during the life-time of the treaty.

Equally, it would be quite normal to allege in respect of a treaty that was no longer in force, that breaches of it which occurred during its currency had caused damage to the plaintiff State, for which the latter claimed compensation or other reparation. In the absence of such a claim however, the issue of whether there was a breach of the treaty while it was still in force, could only be an academic one: a judgment on that issue, even if favourable to the plaintiff State, could create no rights or obligations for either party to receive, enjoy, do or refrain from doing anything. Nor would the treaty any longer be in existence, so that the judgment could have no operative relevance by way of declaring the treaty's correct interpretation or application. Such a judgment could at most afford a moral satisfaction to the party in whose favour it was pronounced, and could at most have an academic interest, however high its authority as a pronouncement of law. But courts of law are not there to make legal pronouncements in *abstracto*, however

[1] It is not proposed to discuss here whether the framing of such a claim would in fact have been practicable at all, or if so, would have been permissible at a later stage than that of the initial Application. What was quite clear throughout, was that there had been no error or oversight. On the contrary, it was insisted in the most positive manner that the Applicant State was not asking for anything but a declaration that the Respondent State had administered the Trust irregularly.

[2] This also applies to what may occur in cases such as the *Corfu Channel* case, where the Court, though finding that a violation of territorial sovereignty had taken place, awarded no compensation or other reparation (none was requested), but declared (*I.C.J. Reports 1949*, at pp. 35 and 36) that its finding as to the violation constituted "in itself an appropriate satisfaction". This declaration, however, though it related to a past and irreversible *event*, was also relevant to a *still continuing situation* in which a repetition of the violation of sovereignty could occur, and it had operative legal effect as a prohibition or interdiction on any such repetition. This was quite a different case from the present one.

great their scientific value as such. They are there to protect existing and current legal rights, to secure compliance with existing and current legal obligations, to afford concrete reparation if a wrong has been committed, or to give rulings in relation to existing and continuing legal situations. Any legal pronouncements that emerge are necessarily in the course, and for the purpose, of doing one or more of these things. Otherwise they serve no purpose falling within or engaging the proper function of courts of law as a judicial institution.

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Since, in the present case, it is the combination of the two things—the process of alleging breaches of a treaty instrument due to come to an end two days after the Application was filed, coupled with the failure to claim any reparation for these alleged breaches, that gives the case its special character—it is worth considering certain other consequences of the latter circumstance, which would immediately have come to light had the Court proceeded to the merits, and which in my opinion have a direct relevance to the question of the admissibility (or perhaps more appropriately in the context—the examinability) of the Applicant State's request, considered as such.

By not claiming any compensation, the Applicant State placed itself in a position in which, had the Court proceeded to the merits, the Applicant could have obtained a judgment in its favour merely by establishing that breaches of the Trust Agreement had been committed, without having to establish, as it would otherwise have had to do (i.e. if reparation had been claimed) that these breaches were the actual and proximate cause of the damage alleged to have been suffered—that is the incorporation of the Northern Cameroons in the Federation of Nigeria rather than in the Republic of Cameroon; without, in short, having to establish the international *responsibility* of the United Kingdom for this outcome. Neither in the Application or Memorial of the Applicant State, nor in its oral pleadings, did it do more than seek to set up a general presumption that if the United Kingdom, as Administering Authority, had conducted matters differently, the result would have been different. No proof of this was offered, nor even any real *prima facie* evidence of it, and in the nature of the case it hardly could have been. There are, moreover, aspects which suggest that not even

a presumption to that effect could legitimately be drawn. In short, it could only remain entirely speculative what would have happened if this or that circumstance or action had been different [1].

The point is that, on the basis of the Application as framed, and without establishing any actual causal link between the irregularities alleged and the damage complained of, the Applicant State could have called for a judgment in its favour. The result is that, had the Court proceeded to the merits, and had it considered the allegations of irregularities in the administration of the Trust, and in the conduct of the plebiscite leading up to its termination, to be justified, it would have found itself in the position of being obliged to give judgment against the Respondent State, *irrespective* of whether these irregularities had been the cause of the damage complained of.

This is clearly not a position in which the Court ought to allow itself to be placed. It is not the task of an international tribunal to apportion blame *in vacuo*, or to find States guilty of illegalities except as a function of, and relative to a decision that these have been the cause of the consequences complained of, for which the State concerned is accordingly internationally responsible; or except in relation to a still continuing legal situation in which a pronouncement that illegalities have occurred may be legally material and relevant.

II

THE RIGHT OF THE COURT NOT TO GIVE ANY FINDING ON JURISDICTION. THE QUESTION OF JUDICIAL PROPRIETY

The Judgment of the Court in the present case is essentially founded on the view that, *irrespective of the Court's competence to go into the merits of the case* (and even if it is competent to do so),

[1] The majority in favour of joining the Federation of Nigeria was broadly 3-2. It would have needed a heavy swing for this to be converted into a majority the other way. Moreover, the very fact that as many as two out of every five voted to join the Republic of Cameroon, tends to show that the vote was free and uninfluenced by anterior policies. This was equally the view taken in the independent report of the universally respected United Nations Commissioner, Ambassador Abdoh, on which the General Assembly acted in framing its resolution No. 1608 (XV) of 21 April 1961. A further point is that the *Southern* Cameroons, no less than the Northern, had always been administered as an integral part of Nigeria. Yet this did not prevent its population from opting to join the Republic of Cameroon, not Nigeria. The presumption, if any, must be that the previous method of administration had little direct bearing on the result. Yet this previous method of administration constituted the Applicant State's chief ground of complaint.

the claim is of such a character that the Court ought not to entertain it; or alternatively, that any decision that might be given by the Court in favour of the Applicant State (and if none, then *cadit quaestio*), *could only* be of such a character that the Court ought not, in the prevailing circumstances, to give it, and ought not therefore to examine the claim at all. The Court has not, I think, pronounced the claim to be formally inadmissible, but it has in effect (to make use of the French term *recevabilité*) treated it as non-receivable or unexaminable because of the consequences (i.e. strictly, the lack of any) which would ensue if it was acceded to.

In my opinion, however, a claim which would and *could* only have the outcome described in the Judgment of the Court (assuming even, that there was a finding on the merits in favour of the claim), must itself be regarded as inadmissible.

Underlying the Judgment of the Court there are clearly considerations of *propriety*, and this raises a general issue of principle—that is to say, of how far and in what circumstances a court which has, or may have, jurisdiction to go into a case, can and should decline to exercise that jurisdiction (or even to consider the question of jurisdiction) on the ground that it would not be proper for it to do so in the circumstances. Although the Judgment refers to previous cases in which the Court, or its predecessor the Permanent Court, declined to pronounce on certain matters for reasons essentially of unsuitability, and these cases are clearly relevant, I regard them as not quite comparable to the present case, in which the position is that, irrespective of its jurisdiction (and even if it has it), the Court is declining altogether to exercise it, or even to consider whether it has any jurisdiction. This involves an issue familiar in connection with requests for advisory opinions [1], but less so in the field of international litigation, where it may be argued that if a court is competent in relation to a given case, it must exercise that competence, and must therefore consider the question of its competence. This is a serious issue which requires to be dealt with, since it is in a general way evident that courts exist in order to go into and decide the cases they are both duly seised of, and have jurisdiction to entertain, without picking and choosing which they will pronounce upon, and which not [2].

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[1] For a recent judicial affirmation of the right of the Court to decline to give an advisory opinion even where competent to do so, see the case of *Certain Expenses of the United Nations* (*I.C.J. Reports 1962*, at p. 155).

[2] The fact that jurisdiction is assumed, does not of course mean that the tribunal concerned necessarily proceeds to hear and determine the *merits*, for it may reject the claim *in limine* on some ground of inadmissibility (non-exhaustion of local remedies, undue delay, operation of a time-limit, etc.). Such a rejection however, on grounds of this kind, is itself an exercise of jurisdiction.

No doubt there is a duty in principle for an international tribunal to hear and determine the cases it is both seised of, and competent to go into; and therefore, equally to consider the question of its competence. But there must be limits to this duty. In order to see what these may be, it will be necessary to discuss the general relationship between jurisdiction or competence on the one hand, and, on the other, the considerations which may cause a tribunal to refuse to proceed to the merits.

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The line between questions of jurisdiction (which basically relate to the competence of the Court to act at all) and questions of admissibility, receivability or examinability (which relate to the nature of the claim, or to particular circumstances connected with it) [1] is apt in certain cases to get blurred. For this reason, international courts have tended to decline to draw too hard and fast a distinction, or to sub-categorise too rigidly the general category of "preliminary objections", or else they have declared the distinction to be of secondary importance [2]; and there have certainly been cases in which a claim has been pronounced to be inadmissible, even though the objections on the score of jurisdiction had not been fully disposed of, so that strictly the court might not be competent to act at all [3]. *Per contra*, there have been cases in which a court has found itself to be competent, yet has refused to proceed any further, on what were essentially grounds of propriety [4].

A given preliminary objection may on occasion be partly one of jurisdiction and partly of receivability, but the real distinction and test would seem to be whether or not the objection is based on,

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[1] See generally, *British Year Book of International Law* for 1958, pp. 8-25, and Rosenne, *The International Court of Justice*, pp. 249-259.

[2] See the Permanent Court in the *Mavrommatis* and *Polish Upper Silesia* cases (P.C.I.J., Series A, No. 2, p. 10 and No. 6, p. 19).

[3] See the *Interhandel* case (Jurisdiction), *I.C.J. Reports 1959*, p. 6, in which the present Court upheld a plea of inadmissibility, although an objection to its jurisdiction was still outstanding, and was never disposed of. The immediate result is the same, but not necessarily in the long run; for a successful objection to the jurisdiction necessarily terminates the affair once and for all, whereas some pleas of inadmissibility (e.g. that local remedies have not been exhausted) relate to defects that may be cured by the subsequent action of the party concerned.

[4] In the *Monetary Gold* case (*I.C.J. Reports 1954*, at pp. 31-33) the Court, while expressly finding that jurisdiction had been conferred upon it by the Parties, declined to exercise it because of the absence of another State which the Court regarded as a necessary party to the proceedings.

or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist. If so, the objection is basically one of jurisdiction. If it is founded on considerations lying outside the ambit of any jurisdictional clause, and not involving the interpretation or application of such a provision, then it will normally be an objection to the receivability of the claim (see further in Part V hereof).

I have however pointed out elsewhere [1] that the classification of preliminary questions into the two categories of jurisdictional questions and admissibility questions is oversimplified, and can be misleading when it comes to considering and determining at what stage and in what order given objections, of either kind, can properly be acted upon—for each category is capable of subdivision into *(a)* questions which, while remaining preliminary (in the sense of preliminary to the merits), are substantive in character, and *(b)* questions which are of a wholly antecedent or, as it were, "pre-preliminary" character. Considerations of propriety or suitability will certainly figure amongst the latter. Thus in the jurisdictional field, there is the substantive or basic jurisdiction of the Court (i.e. to hear and determine the ultimate [2] merits), and there is the possibility of (preliminary) objections to the exercise of that jurisdiction. But also, there is the Court's *preliminary* or "incidental" jurisdiction (e.g. to decree interim measures of protection, admit counterclaims or third-party interventions, etc.) which it can exercise even in advance of any determination of its basic jurisdiction as to the ultimate merits; even though the latter is challenged; and even though it may ultimately turn out that the Court lacks jurisdiction as to the ultimate merits [3]. Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or of any court of law—being able to function at all. Nevertheless, there may in particular cases be objections (which would accordingly be of a pre-preliminary character) to the Court being entitled to exercise this power in relation to some specific part of its incidental jurisdiction. For example, a request for interim measures may be met either with a denial that, *on their merits*, these should be granted, or with a challenge to the *right* of the Court to grant them,

[1] See for instance *British Year Book of International Law* for 1958, pp. 56-60.

[2] There may be *intermediate* issues of merits—e.g. where interim measures of protection are requested, but the necessity for them is contested on the merits.

[3] This occurred in the *Anglo-Iranian Oil Company* case, in which the Court granted a request for the indication of interim measures in advance of any decision as to its competence to go into the ultimate merits, on the basis that it *could have* such competence (*I.C.J. Reports 1951*, at pp. 92-93); but in the subsequent jurisdictional phase of the case the Court decided that it had not—which entailed automatically the cancellation of the interim measures (*I.C.J. Reports 1952*, at p. 114).

or the propriety of its doing so in the given case—in effect a jurisdictional issue [1].

It is thus clear that arising from its seisin—that is to say from the fact of being duly seised of a case by means of a formally valid application stating the grounds of the claim, and the grounds upon which it is contended that the Court is competent to entertain it [2], the Court, irrespective of its substantive jurisdiction in relation to the ultimate merits, becomes immediately possessed of a preliminary competence enabling it to do a variety of things in relation to the case.

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It is in pursuance of this preliminary competence, which, as I have said, is really inherent in the functioning of any court of law, that the Court must be considered to have acted in the present case in declining to examine the claim, irrespective of its competence to do so. But in considering how far the Court is entitled to act in this way, irrespective of, and without deciding, the question of its competence, it is necessary to bear in mind that there are also different categories of preliminary objections of a non-jurisdictional character, and that the category of questions of receivability is itself sub-divisible.

The essence of any preliminary objection (and this applies as well to receivability as to jurisdictional objections) is that, if good, it holds good and brings the proceedings to an end [3], irrespective of the plaintiff State's ability to prove its case on the merits. But in the field of admissibility or receivability, some objections clearly cannot, or ought not, to be gone into or decided until after the competence of the tribunal is fully established; whereas others can, and must, be taken in advance, and irrespective of any determination of competence. An example of the former category would be pleas of inadmissibility closely connected with the merits, such as the objection *ratione temporis* in the present case, whereby it was sought to exclude *in limine* any complaints about acts or events taking place prior to the Applicant State's admission to the United Nations (see Part V hereof). Another case would be a plea of inadmissibility relating to defects which are capable of being cured

[1] According to its settled jurisprudence, the Court will not insist on its jurisdiction in respect of the ultimate merits being affirmatively established before it grants a request for interim measures. On the other hand, it will not grant the request if it is clear, even at that stage, that there is not any possible basis on which it *could* be competent as to the ultimate merits—see *British Year Book of International Law* for 1958, pp. 109-114.

[2] Statute, Article 40; Rules of Court, Article 32.

[3] Except of course where the objection is joined to the merits or in the type of case mentioned in note 3 on p. 102.

by appropriate action, such as a plea of non-exhaustion of local remedies: if the plaintiff State is able to cure the defect, it would obviously be absurd for it to return to the Court, only to find that the latter then declared itself to be incompetent on jurisdictional grounds. Therefore, all jurisdictional issues should be disposed of first in such a case [1].

There are however other objections, not in the nature of objections to the competence of the Court, which can and strictly should be taken in *advance* of any question of competence. Thus a plea that the Application did not disclose the existence, properly speaking, of any legal dispute between the parties, must precede competence, for if there is no dispute, there is nothing in relation to which the Court can consider whether it is competent or not. It is for this reason that such a plea would be rather one of admissibility or receivability than of competence. In the present case, this particular ground of objection arose as one of competence, because the jurisdictional clause invoked, namely Article 19 of the Trust Agreement, itself required the existence of a dispute. But irrespective of the particular language of the jurisdictional clause, the requirement that there must be an actual dispute in the proper sense of the term, and not merely (for instance) a simple difference of opinion, is a general one, which must govern and limit the power of any tribunal to act. For reasons I shall give later, I consider that there was not, in this sense, a dispute in the present case.

Very similar considerations apply to the plea that the Application should not be entertained on the ground that, owing to events occurring since it was filed, it has manifestly lost all *raison d'être*—that it has become "moot"—so that a decision on the merits would be objectless. There would clearly be an element of absurdity in the Court going through all the motions of establishing its jurisdiction, if it considered it must then in any event decline to examine the claim on this ground, however competent it might be to do so. This ground is in fact one of those on which the Court has, and rightly, declined to act in the present case.

In the same way, if the Court considered (as it did in the *Monetary Gold* case—*supra*, p. 102, note 4) that because of the absence of a necessary party, it could not examine the claim, this is a conclusion which would make a decision on competence unnecessary [2], and

[1] That this was not done in the *Interhandel* case (see footnote 3, p. 102 above), was due to the special character, and allegedly "moot" status of the jurisdictional objection ostensibly left open.

[2] Except where a joinder of the party in question was possible and seemed probable: for it would be pointless to effect the joinder unless the Court was competent—see pp. 102 and 104 *supra*, and footnote 3 on p. 102.

even impossible if the presence of that party was required not only for a determination of the merits, but also of the question of competence—as the Court might well have held in the present case in relation to the Federation of Nigeria.

A similar sort of position must arise where the objection touches not so much the substance of the claim, as the character of what the Court is requested to do about it, having regard to the surrounding circumstances—as for instance if the Court is asked to do something which does not appear to lie within, or engage, its judicial function as a court of law. In cases of this kind, the question of competence or jurisdiction becomes irrelevant, for it would be inappropriate, and even misleading, for the Court to avoid the issue by simply finding itself to lack jurisdiction, even if it did lack it; or alternatively, to find itself to be competent when it was manifest that it could not in any event exercise that competence for *a priori* reasons touching the whole nature of its function as an international tribunal and judicial institution.

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It is in the manner above indicated that the dismissal of a claim on what are essentially grounds of propriety, and irrespective of competence, can be reconciled with the general rule that if the Court is in fact competent, it must exercise its competence and proceed to the merits unless the claim falls to be rejected for some reason of inadmissibility arising on its substance; for the issue of propriety is one which, if it arises, will exist irrespective of competence, and will make it unnecessary and undesirable for competence to be gone into, so that there will be no question of the Court deciding that it has jurisdiction but refusing to exercise it.

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There is another reason also for postulating a certain latitude for the Court, on grounds of policy or propriety, to decline *in limine* to entertain claims that it might be competent to go into, and which might not be open to objection on grounds of straight inadmissibility. In the general international legal field there is nothing corresponding to the procedures found under most national systems of law, for eliminating at a relatively early stage, before they reach the court which would otherwise hear and decide them, claims that are considered to be objectionable or not entertainable on some *a priori* ground. The absence of any corresponding "filter"

procedures in the Court's jurisdictional field [1] makes it necessary to regard a right to take similar action, on similar grounds, as being part of the inherent powers or jurisdiction of the Court as an international tribunal.

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It has however been contended that the Applicant State's claim in the present case *would* engage the Court's judicial function, because a judgment in favour of that State could have effects, in the sense that it could be put to *some* use; and that in any case the task of the Court is to declare the law *(dire le droit)* and not to concern itself with the effects of its decisions. This might be true if the decision *could* have some *legal* effect. It is quite another matter when it would manifestly be incapable of any effective legal application at all, for it then becomes a decision of a kind a court of law ought not in principle to render.

Evidently a judgment of the Court, even if not capable of effective *legal* application, could have other uses. It could afford a moral satisfaction. It could act as an assurance to the public opinion of one or other of the parties that something had been done or at least attempted. There might also be political uses to which it could be put. Are these objects of a kind which a judgment of the Court ought to serve? The answer must, I think, be in the negative, if they are the only objects which would be served—that is, if the judgment neither would nor could have any effective sphere of *legal* application.

It was also suggested on behalf of the Applicant State during the oral hearing, that a judgment of the Court in its favour would, or at any rate might, have a legal effect or possible legal application, inasmuch as it might be made the basis of further proceedings, before either the Court itself or some other international tribunal. Whether this would be the case can only be entirely speculative, and the Court could not in any event render a judgment on a hypothetical basis of this kind.

However, *prima facie*, and so far as can be seen at present, no such further proceedings would be possible without the consent of the Respondent State. Furthermore, it would seem that the Court could not, on any subsequent request for an interpretation of its judgment (if it had given one on the merits), declare by way of purported interpretation, that the judgment gave rise to obligations

[1] It may exist in special cases—for instance the European Convention on Human Rights provides for a screening procedure whereby claims can be declared irreceivable before ever they reach the European Commission or Court of Human Rights.

that had not been asserted in the original claim, and the merits of which (having regard to the considerations set out in the second half of Part I of the present Opinion) would never have been gone into. This would not be to interpret the judgment, but to give effect to a new claim, and without any investigation of it as such, or into the question whether the irregularities, on this hypothesis found to have occurred, had actually been the cause of the result complained of. In the *Right of Asylum* (Interpretation of Judgment) case, the Court was emphatic that it could not, by way of interpretation of its Judgment in the original *Right of Asylum* case, pronounce upon what was essentially a new claim. It said (*I.C.J. Reports 1950*, at p. 403) that the gaps which the Applicant State claimed to have discovered in its original Judgment were "in reality ... new questions which cannot be decided by means of interpretation. Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions." The Court went on to say that, in reality, the object of the questions then being put to it was " to obtain by the indirect means of interpretation, a decision on questions which the Court was not called upon by the Parties to answer". Similarly in the subsequent and related *Haya de la Torre* case (*I.C.J. Reports 1951*, at p. 79), the Court declared that questions "not submitted to the Court [by the original application] and consequently ... not decided by it" could not be made the basis of any deduction "as to the existence or non-existence of an obligation" resulting from the original decision. In the present case, the question of any obligation for the Respondent State to pay compensation or make reparation in any other form, even if the alleged irregularities in the administration of the trust territory were established, has not been submitted to the Court, and does not form part of the claim.

III

THE QUESTION OF THE EXISTENCE OF ANY LEGAL DISPUTE, PROPERLY SO CALLED

The Court could, in my opinion, on another ground have reached the conclusion that it could not examine the claim—namely that there was not, properly speaking and in the legal sense, any dispute between the Parties at the date of the Application to the Court. I cannot share the Court's view that there was a dispute, because it seems to me, as I shall hope to show, that logically the very same considerations which have led the Court to find that it would be incompatible with its judicial function to entertain the claim,

should also have led it to hold that there was not, in the proper sense, any legal dispute. The two things are really different aspects of the same basic juridical situation.

The question of the existence of a dispute would of course have arisen on Article 19 of the Trust Agreement, if the Court had gone into that provision. It is however, as I said earlier, a general question, which must arise in any event since, unless there is in the legal sense a dispute, there exists nothing which the Court, as a court of law, can deal with, even for the purpose of determining its competence. On this point, and in order to show that the question is one "which, strictly speaking, does not relate to the jurisdiction of the Court: a problem which, indeed, arises prior to any question of jurisdiction ...", I associate myself with the reasoning contained in Part I of my colleague Judge Morelli's Dissenting Opinion in the *South West Africa* case (Jurisdiction)—*I.C.J. Reports 1962*, at pp. 546-566.

It must be admitted however that it may not be easy in a given case to say whether a dispute exists or not—particularly where, superficially, there may now be all the appearance of one. The Judgment of the Court, in my opinion, proceeds on the basis that since the Parties take different views as to whether the United Kingdom did or did not correctly administer the Trust—one alleging and the other denying this—there must be a dispute between them. This seems to me to beg the question. That there should be difficulty about the matter is due to the lack of any clear definition of what is meant by a dispute for legal purposes. It is generally accepted that if there is a dispute, it must have existed before, and at the date of, the Application to the Court, and that the making of the Application does not suffice *per se* to create a dispute. It is also accepted that the mere assertion or denial of a dispute is not sufficient in itself either to establish or refute its existence; and further, that a dispute must involve something more than a mere difference of opinion. Beyond that, there are only subjective ideas, and there is little agreement on any objective test.

I share the view expressed in Part II of Judge Morelli's Opinion already referred to (*I.C.J. Reports 1962*, pp. 566-588), that there is a minimum required in order to establish the existence of a legal dispute, properly so called—that is (to come very close to the language of the present Judgment itself) a dispute capable of engaging the judicial function of the Court. This minimum is that the one party should be making, or should have made, a complaint, claim, or protest about an act, omission or course of conduct, present or past, of the other party, which the latter refutes, rejects, or denies the validity of, either expressly, or else implicitly by persisting in the acts, omissions or conduct complained of, or by failing to take the action, or make the reparation, demanded. If

these elements exist, then as Judge Morelli said, it does not matter whether the claim comes first, the rejection (in terms or by conduct) coming afterwards, or whether the conduct comes first, followed by a complaint, protest, or claim that is not acceded to.

However, while this definition embodies the minimum, and is also adequate to cover the great majority of cases, it does not bring out quite clearly what is, to me, the essential ingredient of the existence of a dispute, the one element necessary in order to establish objectively, and beyond possibility of argument, that there exists a legal dispute properly so-called; the element in the absence of which the so-called dispute can only be a mere divergence of view about matters of theoretical, scientific or academic interest [1]. For this purpose, I accept the definition of a legal dispute put forward by the Respondent State in this case—the United Kingdom—which, in my opinion, constitutes a useful contribution to the clarification of a difficult matter. According to this definition (which I shall slightly emend) there exists, properly speaking, a legal dispute (such as a court of law can take account of, and which will engage its judicial function), only if its outcome or *result, in the form of a decision of the Court,* is capable of affecting the *legal* interests or relations of the parties, in the sense of conferring or imposing upon (or confirming for) one or other of them, a legal right or obligation, or of operating as an injunction or a prohibition for the future, or as a ruling material to a still subsisting legal situation.

Applying this test in the present case—then, since no compensation or other form of reparation is claimed, a decision of the Court could not award any, and consequently could not impose any obligation to pay or afford such compensation or other reparation, or any right to receive it. Therefore, there can be no dispute between the Parties as to the existence of any such right or obligation. Similarly, the Trusteeship for the Northern Cameroons being terminated, a decision of the Court could not confer or impose any right or obligation on either Party as regards the conduct of the Trust, or as regards its interpretation or application. Again, the basis of termination being irrevocable, and beyond the power of either Party to reverse or alter, a decision of the Court could not deal with that matter. Thus, there can be no dispute between the Parties as to the future conduct of the Trust (since it no longer exists), or as to what should be done about the basis of the termination of the Trust,

[1] Having regard to my earlier references to Judge Morelli's Dissenting Opinion in the *South West Africa* case, it is right that I should say that from this point on, his views diverge from mine. He considers that there *is* a dispute in the present case.

since this is admitted to be irreversible, and no claim that it can or should be altered is put forward.

In short, a decision of the Court neither would, nor could, affect the legal rights, obligations, interests or relations of the Parties in any way; and this situation both derives from, and evidences, the non-existence of any dispute between the Parties to which a judgment of the Court could attach itself in any concrete, or even potentially realizable, form. The conclusion must be that there may be a disagreement, contention or controversy, but that there is not, properly speaking, and as a matter of law, any dispute.

To state the point in another way, the impossibility for a decision of the Court in favour of the Applicant State to have any effective legal application in the present case (and therefore the incompatibility with the judicial function of the Court that would be involved by the Court entertaining the case) is the reverse of a coin, the obverse of which is the absence of any genuine dispute.

Since, with reference to a judicial decision sought as the outcome of a dispute said to exist between the Parties, the dispute must essentially relate to what that decision ought to be, it follows that if the decision (whatever it might be) must plainly be without any possibility of effective legal application at all, the dispute becomes void of all content, and is reduced to an empty shell.

IV

ARTICLE 19 OF THE TRUST AGREEMENT. THE QUESTION OF JURISDICTION

Even if, for the reasons given above, and in the Judgment of the Court itself, I did not consider that the Court is entitled to hold, and right in holding, that it should not examine the claim of the Applicant State, and need not go into the question of its jurisdiction to do so, I should in any event hold that it did not possess such jurisdiction, for broadly the same reasons, *mutatis mutandis*, as those contained in Parts V, VI and VII of the Joint Dissenting Opinion which my colleague Judge Sir Percy Spender and I wrote in the *South West Africa* case (Jurisdiction) (*I.C.J. Reports 1962*, at pp. 518-526 and 547-563).

However, I share the view expressed by Judge Sir Percy Spender in his Separate Opinion in the present case, that this case has features of its own relative to the question of jurisdiction, that require to be dealt with. I am in general agreement with his Opinion and associate myself with it. I can therefore confine my own remarks to certain points I specially want to make. Moreover, having regard

to what is said in Judge Sir Percy Spender's Opinion, I need not deal with the additional reasons which exist in the present case for thinking that such clauses as Article 19 of the Trust Agreement must be interpreted and applied so as to avoid the unreasonable and impossible conflicts (of which the present case could have afforded, and indeed did potentially afford, a conspicuous example) liable to arise if the Court is regarded as having a concurrent jurisdiction with the appropriate political organ or organs, in order to supervise the conduct of the Trust.

For the purposes of what follows, I shall assume that, contrary to the views expressed in Part III above, there is a dispute within the meaning of Article 19, since otherwise *cadit quaestio*.

* * *

1. *The scope of Article 19.*

(a) *Analysis of the provisions of the Trust Agreement. What rights did it confer on what States or other entities?*

The jurisdictional clause of the Trust Agreement for the former British Cameroons, Article 19, was as follows:

> "If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice provided for in Chapter XIV of the United Nations Charter."

The central issue of jurisdiction arising on this clause (as on Article 7 of the Mandate for South West Africa [1]), is what are the provisions here intended to be referred to by the words "the provisions of this Agreement". In my opinion, these words must be read as if they were followed by the phrase "in respect of which that Member enjoys substantive rights under the Agreement". Before giving my main reason for this view, I must briefly state the nature of the Trust Agreement.

Like the former Mandates (and the one remaining one), and like most [2] of the other Trusteeships, the British Cameroons Trusteeship involved two classes of provisions—that is of substantive provisions, for Article 19, being a purely jurisdictional clause, stood by itself

[1] But in the *South West Africa* case there was a second central issue arising on the jurisdictional clause, which does not arise in the presentcase—see *I.C.J. Reports 1962*, at pp. 504 ff.

[2] Significantly, all those Trusteeships which *only* contained provisions about the administration of the Trust in the interests of the population of the Trust Territory (and did not confer commercial or other rights on Members of the United Nations), did not contain any jurisdictional or adjudication clause.

and apart from the substantive provisions. The two classes of the latter were *(a)* provisions as to the rights and obligations of the Administering Authority (the United Kingdom) for the administration of the Trust in the interests of the population of the Trust Territory—which it will be convenient hereinafter to call "conduct of the Trust" provisions or articles; and *(b)* provisions in which rights, mainly of an economic or establishment character (equality of treatment, non-discrimination, right to enter, travel or reside in the Territory, to own property there, etc.), were conferred on the Members of the United Nations as a class, for themselves individually as States, or for their nationals. It will be convenient hereinafter to call the provisions in this category "national rights" provisions or articles.

The complaint of the Applicant State in the present case (as with that of the two Applicant States in the *South West Africa* case) related exclusively to the former category of provisions (conduct of the Trust). The Applicant did not invoke or make any claim or complaint in respect of the national rights provisions of Articles 9, 10, 11 and 13.

Three further points require to be stressed:

First, the mention of Members of the United Nations occurred exclusively in the Articles conferring rights upon them in their individual capacity or upon their nationals—Articles 9, 10, 11 and 13. They were not mentioned in any of the conduct of the Trust provisions or even in those of the Preamble to the Agreement. All these provisions referred only to the Administering Authority, or to organs of the United Nations such as the General Assembly or the Trusteeship Council. Correspondingly, these organs were not mentioned in any of the national rights articles, although the Administering Authority naturally was. Thus it can be plainly seen that one of these two categories of provisions (conduct of the Trust) created a link exclusively between the Administering Authority and the United Nations as an entity, or certain of its organs; while it was only the other category (of national rights provisions) that created any link or contractual tie between the Administering Authority and the *Members* of the United Nations individually.

Secondly, to make the picture thus presented even clearer, the Trust Agreement was concluded by being embodied in a resolution of the United Nations Assembly, and it has been common ground throughout the present case that the sole entities formally parties to it were the Administering Authority on the one hand, and the United Nations represented by the General Assembly on the other, and that the Members of the United Nations, as such, were not

individually parties to the Agreement. The particular rights they individually possessed under certain clauses of it (and those only) were in effect "third-party" rights. It was admitted on behalf of the Applicant State that the Members of the United Nations were third parties in relation to the Trust Agreement, although it was sought to argue that they were a "somewhat special" kind of third party. But it was not seriously suggested that they could, in relation to the Agreement derive direct *individual* rights from their corporate Membership of the entity which alone was, and as such, a party to the Agreement.

Thirdly, although the point is a lesser one, it is worth noticing that, whereas the organs of the United Nations could be relied upon to supervise the execution of the conduct of the Trust provisions with which they were directly concerned, they might well feel no particular interest in the enforcement of the national rights provisions. It was in this latter respect that the role of the Court under Article 19 was a necessary one. It was not in any other respect necessary, given the functions to be carried out by the organs of the United Nations in supervising the administration of the Trust—functions involving a far closer control than any which the League of Nations had exercised in respect of the former Mandates.

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The situation just described can, in my opinion, lead to only one valid legal conclusion, which is that to be stated in the next sub-section.

(b) *Did the Applicant State have the capacity to invoke Article 19 in respect of matters relating to the conduct of the Trust?*

The real issue that arises on the scope of Article 19 is not what provisions of the Trust Agreement it relates to (its actual language is quite general) but under what provisions the individual Members of the United Nations had rights which they could assert by invoking Article 19. This must be so because it is axiomatic that a State can only invoke the jurisdictional clause of an international agreement in respect of, and in order to assert, rights which (whether as a party to the agreement, or on a "third-party" basis) that State possesses, under or in relation to one or more of the provisions of the agreement. If there are provisions of the agreement relative to which it is clear, *a priori*, that the State concerned has and can

have no substantive rights, then it must necessarily lack capacity to invoke the jurisdictional clause in respect of them [1].

The conclusion just stated results directly and inevitably from the universally accepted principle that, whatever the apparent generality of its language ("any dispute whatever" relating to "the provisions" of the Agreement), a purely jurisdictional clause, such as Article 19 of the Trust Agreement, cannot confer *substantive* rights. The substantive rights it refers to must be sought elsewhere, either in the same instrument or in another one. All a jurisdictional clause can do, is to enable any such rights, whatever they may be *(and if they independently exist)*, to be asserted by recourse to the tribunal provided for—this provision being the real purpose of a jurisdictional clause, and all it normally does.

Thus, in the present case, the *scope* of Article 19 is necessarily governed not only by what it says itself, but also, and even more importantly, by what rights were conferred by the *rest* of the Trust Agreement, *and on what parties or entities*. As has already been seen, the Trust Agreement only conferred separate substantive rights on Members of the United Nations individually, by Articles 9, 10, 11 and 13, which are not invoked in the present case. No rights for Member States, as such and individually, were conferred by any of the remaining provisions, which relate to the conduct of the Trust. Hence Article 19 can only be invoked by individual Member States in respect of the former class of provisions, for only under these did the separate Member States possess rights in their individual capacity. This is not merely a valid, but a necessary conclusion, and for the following reason also.

There are in general only two ways in which a State can, as such and individually, claim rights under a treaty: (i) the State may be an actual party to the treaty, in which case (subject of course to any specific exceptions or exclusions contained in the treaty itself) such State will have rights in relation to the treaty as a whole, and can invoke all its provisions, without needing to be expressly indicated as entitled to do so under one or more specific provisions; or (ii) though not a party, a State can enjoy rights if these are expressly conferred on it *eo nomine*, or as a member of a named or indicated class. But from this it follows that, in case (ii), a non-party State can claim only the actual rights conferred on non-parties,

[1] This is of course quite a different question from the question—which can only arise on the merits of any given case—whether, if a State "qualifies" as possessing rights under a particular provision of a treaty, those rights have in fact been violated. The question of qualification itself, is a preliminary one affecting the capacity of the State concerned to invoke the jurisdictional clause of the treaty, and hence affecting the competence of the Court.

and could not claim rights in respect of any other provision of the treaty. Therefore, in the present case, the Members of the United Nations, not being individually parties to the Trust Agreement, could claim rights only under the national rights provisions, and could not individually claim them in respect of the conduct of the Trust provisions. It follows that, since Article 19 could only be invoked by a Member State in respect of the substantive rights it possessed under the Trust Agreement, and since the individual Members of the United Nations did not, as such, possess rights under the conduct of the Trust provisions (being neither named in them nor separate parties to the Agreement as a whole), they could not invoke Article 19 in respect of those provisions.

Whatever the generality of its language, Article 19 must be read subject to the fundamental consideration that it is only a jurisdictional clause, not conferring any substantive rights. The difficulty is not that Article 19 is incapable on its language of applying to the conduct of the Trust provisions, *if the Member States had, in their individual capacities, any rights under these.* But they had not; and Article 19 (being a purely jurisdictional provision) could not by itself create them. It could operate only in respect of rights which the party invoking it already possessed. The Applicant State in the present case had, *as a non-party to the Trust,* no individual rights under the conduct of the Trust provisions which alone it cites, and therefore cannot invoke Article 19 in respect of them. In short the Applicant State lacks the capacity to invoke Article 19 in respect of the only provisions of the Trust which are the subject of its complaint; and if the Applicant State lacks this capacity, then the Court can have no jurisdiction to entertain a claim which, in effect, the Applicant State has no legal right to make.

*

The foregoing conclusion, stated in this particular way—i.e. on the basis not so much of the scope of Article 19, as of the incapacity of Members of the United Nations to invoke it in respect of provisions under which they had no direct rights—seems to me incontrovertible in the present case, and I have wanted to stress this way of looking at it for two reasons which are peculiar to the present case as compared with the *South West Africa* case.

First, whereas in that case it was arguable (though not in my opinion correctly so—see *I.C.J. Reports 1962,* pp. 499-502) that if the Mandate for South West Africa was a treaty, the Members of the former League of Nations were all individually parties to it, this is

not possible in the present case. It is admitted that they were not parties to the Trust Agreement, and that the United Nations in its corporate capacity was the sole party, apart from the Administering Authority.

Secondly, whereas in the days of the League of Nations it might not universally have been considered that a body such as the League of Nations was, as an entity, possessed of international personality over and above, and distinct from, the aggregation of its Member States, so that it might lack treaty-making capacity (see *I.C.J. Reports 1962*, p. 475, note 1), the Court in the case of *Injuries to United Nations Servants* recognized once and for all the separate and distinct international personality of the United Nations (*I.C.J. Reports 1949*, at p. 179). Its capacity to enter into or be a party to international agreements is admitted—and it has frequently been exercised [1].

The conclusion which inevitably follows from and is necessitated by these unquestionable legal facts, and by the position of the United Nations, in its corporate capacity, as the sole other party to the Trust Agreement, is and must be that the interest of the individual Member States in the conduct of the Trust was exercisable and realizable only through the corporate machinery and action of the United Nations. This is the answer—at least in the present case—to the contention that all Member States had an interest in the conduct of the Trust; they had it, but they could exercise it only through the United Nations, and not through the Court, except as regards provisions of the Trust conferring national rights on them as separate States. This conclusion is not affected by the fact that, in the present case, geographical propinquity gave the Republic of Cameroon a *greater* interest in the conduct of the Trust than was possessed by most other Member States. This could not suffice to entitle the Republic to exercise or realize that interest except through the machinery of the United Nations; for that interest, during the currency of the Trust, was bound up with that of the United Nations, and of the whole Trusteeship System, and could not be independently served or dealt with. And clearly the Applicant State cannot now have other or greater rights or capacities than it enjoyed while the Trust was still in force.

* * *

(c) *The contention that the termination of the Trust was not part of the conduct of the Trust.*

The Respondent State in the present case, while making the considerations just discussed one of its main contentions, also put

[1] See also Article 1 of the General Convention on the United Nations Privileges and Immunities of 13 February 1946.

forward an additional argument, to the effect that even if Article 19 were regarded as applying to *all* the provisions of the Trust Agreement, and the Applicant State as having rights under (and as being entitled to invoke) them all, the present case would still not be covered, since it related not to the conduct, but to the *termination* of the Trust, its incidents and outcome, and this was a matter on which the Trust Agreement was wholly silent. It was part of this contention that although the Applicant State did indeed invoke specific provisions of the Trust, and alleged violations of them, it did so only as part of, or in order to lead up to, the complaints relating to the termination of the Trust.

This contention does not seem to me to be well founded. The latter part of it only goes to the motives which the Applicant State may have had in alleging violations of specific provisions of the Trust: it does not alter the fact that they were alleged. Whether the Applicant State would in fact ever have made these allegations except in the context of the termination of the Trust may be doubted; but there can be no doubt that it *could* have invoked these provisions [1], in order to allege irregularities in the conduct of the Trust, quite independently of the Trust's prospective termination, and even if there had been no immediate question of that. In short, allegations of irregularities in the conduct of the Trust, whether justified or not, retain their status as such whatever the aim with which they are made.

Moreover, even if it is literally true that Article 19 speaks of disputes about "the provisions" of the Trust Agreement, and that there are no express provisions about termination, I think that eventual termination must be regarded as being inherent in the declared aim of the Trust, namely of "progressive development towards self-government and independence" (see Article 76 *(b)* of the United Nations Charter, and the reference in Article 3 of the Trust Agreement to the "basic objectives of the International Trusteeship System laid down in Article 76 of the... Charter"). Since the attainment of these ends "in accordance with the freely-expressed wishes of the peoples" (Article 76 *(b)*) is regarded as being, if not the whole object, at any rate the chief *raison d'être* of the Trusteeship System, it seems to me difficult not to regard steps taken for that purpose, or in the actual process of its realization (plebiscites, etc.), as being an implied part of the whole conduct of the Trust. I would therefore have to hold that the jurisdictional clause of the Trust Agreement must be regarded as covering disputes about the termination of the Trust, if I regarded that clause as relating to the conduct of the Trust at all. I have thought it right to go into this

[1] Assuming, that is, for purposes of the argument, that Article 19 of the Trust related to these provisions at all.

matter, since some emphasis was laid upon it in the arguments of the Respondent State.

* * *

2. *The question of settlement by negotiation or other means.*

Article 19 required, finally, that the dispute should be one that could not be settled "by negotiation or other means", and was not. The right to have recourse to the Court, and the competence of the Court to entertain the claim, therefore depended on, and could not arise unless and until, attempts to satisfy this condition had been made and had failed.

(a) *Was there any such settlement?*

It has been contended that the whole matter was in fact settled "by other means", namely when the United Nations Assembly adopted resolution 1608 (XV) of 21 April 1961. As will be indicated presently (p. 123), the phrase "settlement ... by other means" in Article 19, strictly denotes a settlement arrived at by the parties themselves, by or through other means than negotiation (e.g. conciliation, arbitration, etc.), which they have agreed to resort to—rather than a settlement arrived at independently by some third entity, with or without their concurrence. Nevertheless, this contention of the Respondent State is a material one requiring consideration. Moreover, there is a good deal in the Judgment of the Court indirectly to warrant, or lend colour to it, although the Judgment is not based on it, but rather on the different, if related, view that the resolution of the Assembly, if it did not formally settle the dispute as such, rendered it pointless, so that any decision of the Court in regard to it would be pointless too.

But it has to be observed that the pointless character of the dispute did not arise *solely* from the termination of the Trust under Assembly resolution 1608. An essential ingredient was also the absence of any claim for compensation or other reparation for the damage supposedly caused by the form this termination took, allegedly in consequence of the irregularities committed by the Respondent State in the conduct of the Trust. Therefore, the fact that resolution 1608 constituted one of the elements rendering the dispute pointless or without object would not, since the resolution was only part of what was necessary for that purpose, suffice to demonstrate that it constituted in itself a complete and final settlement of the dispute.

However, the Respondent State's contention that it did, is evidently well founded on the assumption (which was also part of the Respondent State's case, and accords with my own view) that the Applicant State had no separate rights in its individual,

statal, capacity under the conduct of the Trust provisions of the Trust Agreement, but had rights only under the national rights provisions. On that basis (which was the one contended for by the Respondent State—correctly in my view), it was the United Nations alone, as an entity, and as the sole party to the Trust Agreement (apart from the Administering Authority) which, with the consent of the latter, was entitled to deal with the general conduct of the Trust, including its termination, and to "settle" any disputes about such matters. On that basis, the matters here in question were indeed settled by Assembly resolution 1608.

But equally, on that basis, it would of course become irrelevant whether the dispute was so settled or not, since (on that basis) it would *not* be a dispute to which Article 19 applied at all. The contention that resolution 1608 settled the dispute for the purposes of Article 19 is relevant only on the assumption that, under the Trust Agreement, the separate Members of the United Nations, in their individual capacity as such, did have rights in relation to the general conduct of the Trust which they could assert through the medium of Article 19.

If that assumption had to be made, then I would find myself unable to accept the Respondent State's contention that resolution 1608 settled the dispute—for if the Applicant State did indeed possess separate individual rights in relation to the conduct of the Trust, distinct from those of the United Nations as an entity, the Assembly could not have been empowered to deal with or settle a dispute between the Applicant State and a third party (the Administering Authority) relating to those rights—at least without the consent of the Applicant State—which, by voting against resolution 1608, did not give its consent to any settlement such as might result from the resolution[1]. If, as the Respondent State contended, the Applicant State's dispute was with the Assembly, this was a separate and additional dispute; for the complaint of the Applicant State was not merely that the Assembly decided to incorporate the Northern Cameroons in the Federation of Nigeria, but also that it was the (allegedly) irregular course of conduct pursued by the Respondent State in the administration of the Trust, which had led the Assembly to do this. Otherwise, it was contended, the Assembly would have decided differently. If resolution 1608 settled any dispute, it settled the dispute between the Applicant State and the Assembly. The arrangements made under that resolution for terminating the Trust, with the consent of the

[1] Whether the Applicant was "bound" by the resolution, in the sense that it had to accept the *fact* of the termination of the Trust on the basis provided for in the resolution is one thing, but not the same thing as whether the resolution could debar it from pursuing any legal right of action it might have against a third party (the Administering Authority) whose alleged wrongful conduct was said to be responsible for this result.

Administering Authority, were necessarily *res inter alios acta* as respects any dispute between that Authority and the Applicant State, concerning any separate rights the latter might have in its individual capacity, relative to the conduct of the Trust provisions of the Trust Agreement.

The real truth is that the Applicant State did not individually have any such rights, but had rights only in relation to the national rights provisions of the Agreement, which were not, and never have been, in issue in this case. The United Nations alone, as an entity, had conduct of the Trust rights; *and for that reason* the Assembly resolution settled the whole issue of the termination of the Trust. The dispute between the Applicant State and the Respondent State proceeded on the basis of the Applicant State's contention that it enjoyed personally and individually certain rights under the Trust which, in my opinion, it did not in fact possess. But, had it done so, they would have been separate rights and a dispute about them would have been a separate dispute [1].

* * *

[1] Certain other considerations serve to bring out the separate character of the dispute. It would seem that in the period March-April, 1961, the United Kingdom as the Administering Authority, the United Nations Assembly as the supervisory organ, and the Republic of Cameroon as a State geographically interested, were all maintaining different, and in several respects divergent, attitudes about the whole question of the termination of the Trust. The United Kingdom was willing, but in no way specially anxious, that the Trust should be terminated at that time. Its main preoccupation was that if the Trust was to be terminated, this should be on a basis that was workable and, so far as possible, in accordance with, or at any rate not contrary to, the wishes of the peoples concerned. The chief aim of the Fourth Committee and Assembly of the United Nations was to terminate the Trust on any terms that would give the Trust Territory independence, or voluntary incorporation in an independent African State. The Assembly was far more concerned with terminating the Trust as soon as possible, on any reasonable basis, than with the precise form the termination took.

The Republic of Cameroon, on the other hand, was primarily concerned with the *basis* of termination. Rather than accept the form it did take, the Republic would have preferred the Trust to continue, in so far as the Northern Cameroons was concerned, and not to terminate.

It seems therefore that three quite distinct attitudes existed on the question of termination: on the part of the United Kingdom, neutrality, that is willingness either to terminate or to carry on, as the Assembly might direct: on the part of the Assembly, a very definite desire to terminate on any reasonable and defensible basis; but on the part of the Republic of Cameroon, a desire *not* to terminate except on the basis that the Northern Cameroons would go to the Republic.

Moreover, the essence of what the Republic of Cameroon has contended is that, but for certain irregularities allegedly committed by the United Kingdom in the

(b) *Would the Parties in any case have had any authority or capacity to settle the dispute by negotiation or other means?*

The requirement that the dispute should be one that "cannot be settled by negotiation or other means" is clearly meaningless as a condition of the right to have recourse to the Court, and of the competence of the Court to act if such a recourse is attempted, unless two presuppositions are made. These are (1) that the dispute should be one which, in its nature, is *capable* of being settled directly between the parties by negotiation or other means (for if not, it cannot be the kind of dispute contemplated by Article 19); (2) that there shall have been at least some actual attempt at settlement between the parties, by negotiation or other means, such as could afford a basis for a finding by the Court that the dispute could not be so settled, and that in consequence the Court was now competent to settle it by means of a judicial decision. It is, or should be, obvious that a proposal for a reference to the Court, such as was contained in the Applicant State's Note of 1 May 1961, addressed to the United Kingdom Government, could not itself constitute an attempt at settlement for the purposes of Article 19, since that Article made it a pre-condition of any obligation to have recourse to the Court that independent attempts at settlement should already have been made, and have failed. It will be convenient to consider this latter question first.

(i) *Properly speaking, was any attempt at a settlement ever made, other than proposal for a reference to the Court?*

Article 19 is an absolutely common-form jurisdictional clause such as appears, or has appeared, in scores, not to say hundreds, of treaties and other international agreements. Its meaning is perfectly well understood by international lawyers the world over. What it contemplates in the present connection is a settlement or attempted settlement directly *between the parties*—by negotiation or

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administration of the Trust, and in the conduct of the final plebiscite, the outcome would have been different, and the Assembly would have decided to incorporate the Northern Cameroons in the Republic of Cameroon. Whether this would have been the case or not can only be speculative; but its relevance to the jurisdictional question is that the Republic is not seeking to reverse or impugn the validity of the Assembly resolution terminating the Trust. What the Republic says in effect, is that this resolution never would have been adopted, but for the alleged United Kingdom maladministration of the Trust, and misconduct of the plebiscite.

It seems clear therefore that these allegations on the part of the Republic involve an issue distinct from the one that was before the Assembly, and not settled by it. The allegations made by the Applicant State involved an issue such as the Assembly was not entitled to settle, if the Applicant State was entitled to make these allegations. It was not in fact entitled to make them because it had no individual rights under the conduct of the Trust provisions of the Agreement. Had it had any, they would necessarily have been separate from those of the United Nations, since it is precisely in this, that their separate character would have consisted.

other means. By "other means" is meant such things as conciliation, arbitration, fact-finding enquiries, and so on. Under Article 19 of the Trust Agreement, an attempt at settlement by negotiation, or by one or other of these means, would have had to precede any proposal for a reference to the International Court, before any obligation to have recourse to the Court could arise. It is quite clear that no such attempt at settlement, at least by any normally envisaged "other means", was made in the present case; and here it may be useful to recall that in a common-form jurisdictional clause such as Article 19, settlement by "other means" denotes a settlement by means other than negotiation, but nevertheless by means such as the parties have jointly *agreed* to resort to or employ. It does not include means *imposed* by the one party on the other, or on both of them by an outside agency. The whole point of the ultimate reference to the Court (to which the parties *have* duly agreed under the jurisdictional clause) is that they have not been able to settle the dispute *themselves*, by negotiation or agreed other means. To meet that possibility, the parties have agreed in advance to *one*, but only one, form of *compulsory* settlement—the ultimate reference to the Court. They cannot (*via* the reference to "other means") be held to have agreed in advance to any other (necessarily unspecified) form of compulsory settlement.

*

Was there any attempt at settlement by "negotiation", and what does negotiation mean? It does not, in my opinion, mean a couple of States arguing with each other across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States. That is disputation, not negotiation; and in the Joint Opinion of Judge Sir Percy Spender and myself in the *South West Africa* case, we gave reasons for not regarding this kind of interchange as constituting a negotiation within the contemplation of such a provision as Article 19 of the Trust Agreement.

It was there equally pointed out that, even if it were possible to regard such interchanges as constituting negotiation according to the generally received concept of that term, it would still not be right to hold that a dispute "cannot" be settled by negotiation, when the most obvious means of attempting to do this, namely by direct discussions between the parties, had not even been tried—since it could not be assumed that these would necessarily fail because there had been no success in what was an entirely different, and certainly not more propitious, milieu. Now the only direct interchanges between the parties in the present case were the Notes of May 1961.

The purpose of these Notes, however, was not negotiation on the substance of the dispute, but to consider whether there should be an agreed reference to the Court. These Notes did not even contain any proposal for, or discussion of, a possible basis for settlement. If they involved any negotiations at all, it was about the method of adjudicating the dispute—i.e. the possibility of an agreed reference —to the Court by means of a *compromis*—not about the substance of the dispute itself.

There were also two significant admissions made on behalf of the Applicant State. In the first place, it was conceded, and indeed strenuously contended, that the proceedings in the United Nations Assembly in March-April 1961, were quite separate and distinct from the dispute between the Parties before the Court, and could in no way constitute a settlement of that dispute. But in that case, how could the statements and discussions in the Assembly, or made for the purpose of those proceedings, constitute a negotiation relative to the quite separate matter of the dispute subsequently referred to the Court? And if they consequently did not, and if the May interchange of Notes was not a negotiation, as clearly it was not, what negotiation ever at any time took place? Evidently none.

The second admission made on behalf of the Applicant State—it admission is here the correct term—is that the dispute did not crystallize—did not even receive birth until May 1961, that is until after the adoption of Assembly resolution 1608. If that is so, then since it is not possible to negotiate in relation to a non-existent dispute, nothing that took place *previous* to May 1961 *could* have constituted a negotiation concerning the actual dispute now before the Court; while the May interchange of Notes constituted not a negotiation but the reverse.

(ii) *Was the dispute one that was in its nature capable of settlement between the parties alone, by negotiation or other means?*

The really important matter, however, in relation to the question of a possible settlement, is that arising on the first of the pre-suppositions mentioned on p. 122 above; for there is clearly no purpose in asking whether any attempt at settlement by negotiation or other means ever took place, if the dispute was one which the Parties in any event never could have had the capacity or authority to settle by their own joint action. Clearly, the type of dispute contemplated by Article 19 must have been one which the Parties *could* have settled by negotiation or other means, if they could reach agreement on the terms of settlement; or if they could agree on the other means of settlement (such as arbitration, conciliation, fact-finding com-

mission, etc.), and if they agreed to abide by the result. It follows therefore, that if the dispute was of such a character that the Parties would not have been entitled to settle it as between themselves by any of these methods, and without reference to, and agreement by, some other entity, such as the United Nations, then it cannot be a dispute of the kind contemplated by Article 19, and falls outside the scope of that provision. In short, the dispute must relate to matters or interests which the Parties could freely deal with themselves, if so minded and able to reach agreement. The moment it appears that in no circumstances could the Parties ever have settled the matters in dispute between them by any joint exercise of their own free wills, it becomes apparent, and follows necessarily, that such a provision as Article 19 can have no application.

In the Joint Opinion in the *South West Africa* case, reasons were given (*I.C.J. Reports 1962*, pp. 551-552) for thinking that questions relating to the conduct of any Mandate would, precisely, constitute an order of question having implications going far beyond the scope of any particular dispute between the mandatory Power and another Member of the League, and therefore as being incapable of independent settlement between them. Exactly similar considerations apply in the case of disputes over the conduct (or termination) of any Trust. But there are certain differences between the two cases which call for consideration. These arise partly from the peculiar position of the Republic of Cameroon in the present case, as compared with that of the two Applicant States in the *South West Africa* case, and partly from a certain difference of wording in the texts of the two respective jurisdictional clauses.

Since in the *South West Africa* case, the two Applicant States possessed literally no interest whatever that was not possessed by any other Member of the United Nations (because only conduct of the Mandate provisions were involved), it seemed impossible to hold (as the Judgment of the Court in that case must imply) that these two States would have, or ever could have had, the capacity to settle with the then Respondent State (South Africa) the issues regarding the conduct of the Mandate raised by their Applications. In the present case, the Republic of Cameroon, racially and geographically had an interest of its own, not possessed by other Members of the United Nations, and it might be argued that it and the Administering Authority had the capacity to settle a dispute regarding this individual interest. As has already been noted however, at the time when attempts to settle the dispute might have been made, this interest was inextricably interwoven with the whole question of the conduct and termination of the Trust, and of the Trusteeship System in general—matters which the Parties to the present proceedings could not possibly have been entitled to deal

with or regulate *inter se*, whatever the strength of any personal interest they, or either of them, might have possessed.

The type of settlement contemplated by Article 19 was of course such a settlement as might have been arrived at, by or between the Parties (or resulting from their joint action) previous to the date on which the Application to the Court was made, but which was not so arrived at. It has to be asked therefore whether, at any material time previous to 30 May 1961, the Parties could possibly have had any right or capacity to settle the subject-matter of the Cameroon complaint between them. Even if the Administering Authority had been willing to agree that the territory in question should go to the Republic of Cameroon, what capacity or authority could it possibly have had to do a sort of private deal with the Republic to that effect, when the Assembly was actively exercising its corporate powers in regard to that very same matter—powers which it had both a right and a duty to exercise under the United Nations Charter, to which both the Republic of Cameroon and the United Kingdom were parties? The question has only to be asked, for it to be immediately apparent that it was not for these States to regulate such matters, which must therefore have been quite outside the scope of Article 19.

The other difference between the present case and the *South West Africa* case is that Article 7 of the Mandate for South West Africa spoke only of a dispute that could not be settled "by negotiation", whereas Article 19 speaks of one that cannot be settled by negotiation "or other means". It might be contended therefore that, even if it is the fact that this type of dispute (i.e. about the conduct or termination of the Trust) is inherently incapable of being settled by negotiation between the parties, still it cannot have been inherently incapable of settlement by any means at all—for instance, precisely, by action in, or by the action of, the United Nations. The answer to this contention has, in effect, already been given—see pp. 119 and 123 above. It would involve an erroneous interpretation of the notion of settlement by "other means" in a jurisdictional clause such as Article 19. The term "settlement", as has been seen, denotes settlement between, or by the action of, the parties; or by methods jointly resorted to by them. But it is clear that the Parties in the present case would no more, by themselves, have had the right to settle this class of dispute by these "other means", than to do so by private negotiation. The conclusions of a fact-finding or conciliation commission, or arbitral tribunal, could not in any way have dealt with the United Nations interests involved, which altogether transcended those of the Parties, and which might have been quite at variance with those conclusions. Nor could these conclusions in any way have bound the United Nations. In short, whether by negotiation, or by other means, there could not have been any real settlement through the action of the Parties alone. There was no question of

their referring the matter to the United Nations—it was already there. But had there been any such reference, this could only have implied a recognition of the fact that only the United Nations *could* deal with the matter, which consequently exceeded the scope of Article 19.

V

THE OBJECTION "RATIONE TEMPORIS"

Since, in my view, the Applicant State does not have the right to invoke Article 19 of the Trust Agreement at all in respect of the matters to which the Application relates, and the Court consequently lacks jurisdiction to go into the merits of any part of it, it becomes strictly unnecessary to consider any preliminary objection which might arise on the substance of the claim, such as the objection *ratione temporis* advanced by the Respondent State, to the effect that all that part of the Applicant State's complaint which relates to acts or events having taken place previous to the date when it became a Member of the United Nations ("pre-membership" acts or events) should be ruled out as inadmissible on that ground.

However, since the Parties devoted a considerable part of their argument to this question, and it involves an important issue of principle, I propose to say something about it.

This objection, to my mind, concerns the admissibility of the claim rather than the competence of the Court, and is quite independent of Article 19 of the Trust Agreement, in the sense that even if Article 19 applied in principle to the present type of complaint, and the Court had jurisdiction to entertain a complaint of that type, the objection *ratione temporis* in respect of pre-membership acts and events could still be advanced in order to rule out *in limine* that part of the complaint. The objection was however treated by both sides in the case as a jurisdictional one; and by the Applicant State as depending exclusively on Article 19, in the sense that if, as Article 19 required, the Applicant State was a Member of the United Nations at the moment when the dispute arose and on the date of the lodging of the Application, and if the latter was lodged before Article 19 ceased to be in force because of the termination of the Trust, then, seeing that Article 19 did not in terms *exclude* disputes about pre-membership acts or events, the Applicant State was automatically entitled to include complaints about these acts and events in its Application.

The view that the matter turns wholly on Article 19 is, in my opinion, certainly incorrect. In their nature, questions of admissibility relating to the substance of a claim cannot be disposed of simply by a finding that the jurisdictional clause is in principle applicable. Thus a plea of non-exhaustion of local remedies, or as to the "nationality" of a claim [1], could be advanced and could operate to rule out the claim as inadmissible, even though all the requirements of the jurisdictional clause were met (so that the Court could proceed to the ultimate merits but for these non-jurisdictional objections). Indeed, preliminary objections of this kind cannot, unless the case has some exceptional feature, be heard at all unless the Court has jurisdiction (see pp. 104-105 above).

Since the validity of admissibility objections normally depends on considerations lying outside the jurisdictional clause as such, it is obviously immaterial that the latter has not specifically made the absence of any such grounds of objection a condition of the Court being able to proceed to the ultimate merits. The silence of the jurisdictional clause simply leaves the matter open, to depend on general principles of law, or possibly on other provisions of the instrument concerned. Thus in the present case it is immaterial, and in no way conclusive, that Article 19 did not in terms exclude pre-membership acts and events from its scope. The truth is that Article 19 would have had expressly to *include* them, in order to rule out *a priori* any objection to them based on independent grounds. The case of reservations or conditions *ratione temporis* contained in Declarations made under the Optional Clause of the Court's Statute is quite a different one, and not in point, for reasons to be stated in a moment.

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Turning now to the substance of the particular objection *ratione temporis* advanced in the present case, it is clear that it could not apply to the *whole* complaint, since part of the latter concerns acts and events taking place subsequent to the Applicant State's admission to the United Nations ("post-membership" acts or events), e.g. in connection with the conduct of the plebiscite in the Northern Cameroons. The objection is however advanced in respect of the most important part of the Applicant State's complaint, which alleges irregularities in the conduct of the Trust (virtually

[1] i.e., that the claimant State is making a claim in respect of an injury to a person or company not of its nationality.

since its inception), but for which the result of the plebiscite would allegedly have been different.

In my opinion, the validity of the objection *ratione temporis* in respect of the pre-membership acts and events depends on whether the Applicant State is making a separate and independent claim in respect of these, or is only citing them in order to establish, or as part of the process of establishing, or as relevant to its complaints about, the *post*-membership acts and events. In so far as the Applicant State is not making use of the earlier matters for the last-named purpose only, but is making them the basis of independent complaints, the claim must, to that extent, be considered inadmissible. The reason is, briefly, that since the Applicant State did not exist as such at the date of these acts or events, these could not have constituted, in relation to it, an international wrong, nor have caused it an international injury. An act which did not, in relation to the party complaining of it, constitute a wrong at the time it took place, obviously cannot *ex post facto* become one. Similarly, such acts or events could not in themselves have constituted, or retroactively have become, violations of the Trust *in relation to the Applicant State*, since the Trust confers rights only on Members of the United Nations, and the Applicant State was not then one, nor even, over most of the relevant period, in existence as a State and separate international *persona*.

It was argued that when States make a Declaration under the Optional Clause of the Statute, accepting the Court's compulsory jurisdiction, they must in terms exclude from the scope of that acceptance disputes relating to past acts, events or situations, if they intend that there shall be such an exclusion, or else must expressly relate their acceptance to the future only. This however proves nothing. These States are already in existence, and admitting that if their Declaration does not exclude the past, this will be regarded as covered—nevertheless it would still be the case that this could be so *only* in respect of those particular past acts, events or situations (previous to the Declaration in question) which took place *after* the State making it had itself come into existence, and therefore *could* have rights or obligations relative to those past acts, events or situations. In relation to anything having occurred previous to its existence as a State, there would be no right or obligation that could be invoked under an Optional Clause Declaration. A State might indeed perhaps have worded its Declaration in such a way that it could, technically, be taken before the Court in such a case, but even if the Court was formally competent, so far as the actual language of the two relevant Declarations went, the claim itself would have to be ruled out as inadmissible so soon as it became clear that it related to a period in respect of which it was impossible *a priori* for the defendant State to be under any obligation.

Similarly, States cannot, by accepting the Optional Clause, create *rights* for themselves in respect of a period previous to their existence as States. If they *were* then in existence, they naturally could have rights in respect of acts and events then occurring, and could later on invoke an Optional Clause Declaration for the purpose of asserting those rights, in any case where there had been no express exclusion of the past under the Declaration of the other party to the dispute. But in relation to a period in respect of which there were no rights, none can ever arise, unless by express agreement, and no express *exclusion* is necessary. The whole issue is not one of the applicability as such of the jurisdictional clause or Optional Clause Declarations involved, but of whether, *a priori*, there exist, or could exist, any rights for the assertion of which (*via* the Court) these provisions exist. Much more could be said on this subject; but if the position were not as here stated, there would be no limit to the antiquity of the matters in respect of which claims could constantly be made, and perpetually be liable to be re-opened.

In the present case, it comes to the same thing in practice whether the conclusion is put in the form that the Applicant State is precluded from making any claim in respect of pre-membership acts or events, or in the form that complaints relative to these must be ruled out as inadmissible, except for their probative effect in connection with the admissible post-membership claims. Now, according to the way in which the Republic of Cameroon framed its submissions, both in the original Application and at the close of the oral hearing, it was undoubtedly making various pre-membership acts and events a separate and independent ground of complaint. These were indeed an essential element of the claim taken as a whole, and the Applicant State was asking the Court to pronounce upon them as such. Had the Court decided to examine the claim, I consider that these complaints would have had to be ruled out as inadmissible. On the other hand, had the Court proceeded to the merits on the remaining (post-membership) portion of the claim, then the earlier acts and events could, so far as relevant, have been cited by the Applicant State in support of, or to assist in establishing, that part of the claim which was admissible *ratione temporis*.

* * *

I conclude by saying that, while I have thought it desirable to deal with the matters considered in Parts IV and V of this Opinion, this does not affect my earlier expressed view that the Court itself was right not to do so, for the reasons given on pp. 104-106 above.

(Signed) G. G. FITZMAURICE.