

## DISSENTING OPINION OF JUDGE BADAWI

[*Translation*]

Without directing its consideration to questions concerning its jurisdiction, the Court bases its Judgment on the limitations that are imposed by its judicial function which requires that any legal action must have a definite purpose or object, in a word, that it must have some real substance, and this is lacking in the present proceedings as a result of the termination of the trusteeship and of the fact, which is admitted by the Applicant itself, that it is impossible to remedy the alleged irregularities in the administration of the trusteeship and in the conduct of the plebiscite. In these circumstances, and having regard to the Applicant's admission that it is impossible to reverse the termination of the trusteeship which was pronounced by the General Assembly, the Judgment of the Court would have no practical application.

The Applicant having emphasized that it is asking only for a declaratory judgment, that is to say a judgment not of an executory character, the Court, whilst admitting the notion of declaratory judgments, considers that, even for that category of judgments, every judgment must have continuing applicability either because it expounds a rule of customary law or because it interprets a treaty which remains in force. But when what is at issue is the interpretation or the application of a treaty which is no longer in force, as is the case with the Trusteeship Agreement, there can be no possibility of any such application. The Court cites the Judgments in the *Chorzów Factory* case and the *Haya de la Torre* case in order to show that there is no similarity between those cases and the present one.

The Court does not cite the *Corfu Channel* case. Possibly it has it in mind when it refers to a declaratory judgment that "expounds a rule of customary international law" but whilst "continuing applicability" can relate to the rule of customary international law concerning sovereignty, it cannot relate to the judgment itself which concerns past action and which is devoid of applicability as being a judgment concerned with particular facts that are over and done with.

In that case, the question submitted for the judgment of the Court was as follows:

"Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?"

In its Judgment in this case, the Court found that—

“by reason of the acts of the British Navy ... the United Kingdom violated the sovereignty of the People’s Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction”.

This was a declaratory judgment in the sense accepted in Europe and recognized in international law both in arbitral proceedings and in proceedings before an international tribunal and the case is almost identical with the present one.

But to declare that the present case is inadmissible as a result of the termination of the trusteeship, because it could not lead to any practical application, is to assume that the essential feature of any legal action is that it must have a practical application. This assumption is undeniable where a judgment is sought for the purposes of execution, but it is more than questionable in the case of declaratory judgments.

In point of fact, declaratory judgments have undergone a course of development in the Anglo-Saxon and American legal systems that is quite different from that which they have undergone in most European countries and in international law.

It was as the result of a procedural reform introduced in 1883 in the English legal system that the notion of declaratory judgments was adopted.

This reform was to the effect that—

“No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right *whether any consequential relief is, or could be claimed or not.*”

A similar reform was introduced in the United States by a Federal Statute of 1934 and was adopted by almost all State legislatures.

This system of declaratory judgments, which is preventive in character and has somewhat special technical features, has been applied in a large variety of legal situations and it is frequently resorted to in view of the advantages it possesses over the ordinary procedure. The effective applicability of declaratory judgments is an essential feature of this system, so that when that character is lacking the case is considered to be moot or inadmissible.

On the other hand, in continental and in international law, the application of declaratory judgments is somewhat infrequent and is wholly different from that in Anglo-Saxon and American law. In any case, effective applicability is by no means considered to be essential.

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The object of the present action is to obtain a simple declaration of facts and legal findings concerning irregularities in the administration of the Administering Authority throughout the period of trusteeship and irregularities in respect of the conduct of the plebiscite. It does not seek anything that could affect the plebiscite itself or the termination of the trusteeship which was definitively pronounced by the General Assembly in its resolution 1608 (XV). The essential thing for the Court, which is not called upon to consider the fundamental motives for the Application or the use to which the Applicant may put the judgment, is to satisfy itself that these facts and findings do present a legal interest for the Applicant.

More than once, and to show that the judgment requested of it would lack effective applicability, the Court mentions the fact that the Applicant does not ask for any reparation. If therefore the Applicant had requested reparation, even of a token nature, its action would have been admissible. In point of fact, the Applicant has a twofold interest in this case, the interest of a Member of the United Nations, which Article 19 of the Trusteeship Agreement recognizes for the purposes of protecting the interests of the people of the Trust Territory, and its own personal interest in reuniting the Cameroonian people under a single flag. Would not this twofold interest, without the legal device of a claim for reparation, suffice to justify its action, which seeks only the establishment of exact legal truth in regard to the administration of the trusteeship?

It is obvious that this twofold interest, or at all events the personal interest, would have supplied a basis for legal action under Article 19 of the Trusteeship Agreement, whether it embodied a request for reparation or not.

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In fact, the declaration of the ending of the trusteeship, which in 1961 was an inevitable consequence of the plebiscite—unless the trusteeship were to be re-instituted under new conditions guaranteeing better administration for a period difficult to determine which would have been unacceptable—does not in any way deprive the present case of its legal interest for the Applicant.

It should be observed in this connection that a judicial examination and appreciation constitute the only means of arriving at an objective determination of the irregularities committed in the administration of the trusteeship and in the conduct of the plebiscite which, as the conclusion of the trusteeship, which by its nature is temporary, forms part of its duration.

This objective determination, moreover, which is indispensable in order to give effect to the legal interest which provides the basis for the present case, finds its justification and its reason both in

the first plebiscite which produced a majority contrary to that of the second plebiscite, and also in the General Assembly's resolution 1473 (XIV) of 12 December 1959 by which the General Assembly recommended that the Administering Authority should initiate without delay the separation of the administration of the Northern Cameroons from that of Nigeria and that this process should be completed by 1 October 1960, the date of the independence of Nigeria and of the inevitable separation of the Northern Region of Nigeria from the Northern Cameroons, and nine months after the date of the resolution itself.

Furthermore, if this action had been instituted before the end of the trusteeship and prosecuted during the currency of the trusteeship, it would have made it possible to correct the irregularities and to terminate the trusteeship properly and in a way not open to criticism. Having been brought before the end of the trusteeship which was to terminate two days later, this action was validly instituted and the Court was properly seised. Since the legal interest has not ceased to exist, the Court cannot discontinue its examination of it.

In fact, the legal interest has not ceased through the declaration of the termination of the trusteeship for, by removing the uncertainty regarding the irregularities of which the Administering Authority is accused, the present action would enable the Applicant to clear itself of any charge of defamation which might properly be directed against it, quite apart from the fact that the General Assembly of the United Nations would be better enlightened in regard to a question which the nature of the discussions concerning the termination of the trusteeship did not allow it to investigate thoroughly.

The causal relationship between the irregularities imputed to the Administering Authority and the result of the plebiscite will, of course, always remain a matter for speculation and conjecture, but the establishment of the truth in regard to the irregularities could not fail to be of great legal interest both for the Applicant and for the General Assembly.

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For the reasons given above, I have reached the conclusion not only that the Court possesses jurisdiction by virtue of Article 19 of the Trusteeship Agreement, but also that the action is perfectly admissible.

(Signed) A. BADAWI.